

Securities Law ADVISORY

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2010 SEC Regulatory Update

The first part of 2010 was already an extremely active year at the Securities and Exchange Commission (SEC, or the “Commission”), when, on July 21, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). This legislation forced the SEC to direct most of its rulemaking efforts towards implementing Dodd-Frank’s requirements. Given the frenetic activity at the SEC, it would be easy to lose track of the regulatory changes that have occurred over the last year. This article is intended to briefly highlight some of the most relevant changes impacting issuers.¹

Shareholder Rights and Proxy Disclosure

Shareholder Approval of Executive Compensation

Dodd-Frank requires an advisory shareholder vote on executive compensation for ALL public companies, expanding upon rules the SEC adopted in January applying to companies receiving TARP assistance. Thanks to Dodd-Frank, Section 14A of the Securities Exchange Act of 1934 (the “Exchange Act”) now includes a section called “Shareholder Approval of Executive Compensation.” The SEC proposed rules under this section on October 18, 2010, and is scheduled to adopt final rules in the first quarter of 2011 to meet the deadlines imposed by Dodd-Frank.

Beginning with the proxy statement for the first annual meeting occurring after January 21, 2011, reporting companies will be required to include in their annual meeting proxy statements a separate resolution that allows shareholders to cast an advisory, nonbinding vote on executive compensation. The proposed rules require companies to disclose information about the say-on-pay vote in their annual proxy statement. The proposed rules also would require the company to disclose in CD&A whether—and if so, how—companies have considered the results of previous say-on-pay votes.

In addition, at the first annual meeting occurring after January 21, 2011, and no less frequently than every six years thereafter, shareholders will be allowed to vote on whether the advisory say-on-pay vote should occur every year, every two years or every three years.

¹ This article is not meant to be all inclusive, but merely to highlight some of the more notable changes. Regulatory initiatives impacting the regulation of derivatives, investment companies and advisors and municipal securities are beyond the scope of this article. For greater detail about the items covered, please see the Securities Law advisories on Alston & Bird’s website, where we have covered most of the topics discussed.

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New Section 14A of the Exchange Act also provides for a shareholder vote on so-called “golden parachutes.” In any proxy statement for a meeting of shareholders occurring after the effective date of the yet to be adopted rules, requesting approval of any acquisition, merger, consolidation or proposed sale of assets of a reporting company, the person making the solicitation must disclose (i) any agreements or understandings that such person has with any named executive officer of the issuer; and (ii) the aggregate total of all such golden-parachute compensation payable to or on behalf of that executive officer, and the conditions under which such compensation is payable. The proxy statement must also provide a separate resolution by which shareholders may vote to approve the disclosed agreements or understandings and compensation, unless such agreements or understandings have previously been subject to a say-on-pay vote. The exception is somewhat peculiar for various practical reasons, and it is not clear how useful or relevant this exception will be, but it was required by the statute.

That being said, in mid-December, the Staff issued a no-action response to Navistar, allowing the company to exclude a shareholder proposal from the Teamsters General Fund. The shareholder had requested inclusion of a proposal for shareholder approval of future severance agreements with senior executives that provide benefits in an amount exceeding twice the sum of salary plus bonus. The Staff stated that it would not recommend enforcement action if Navistar excluded the proposal, relying on Rule 14a-8(i)(10) on the basis that the company will soon substantially implement the proposal because the company intends to include a say-on-golden-parachute vote as part of its say-on-pay vote for the upcoming proxy season.

Subsequently, on January 4, 2011, the Staff reconsidered the request and reversed its decision. The Staff noted in particular that the proposal did not request a shareholder vote on severance agreements already entered into and disclosed pursuant to Regulation S-K, and that Navistar does not appear to have a policy of having to obtain shareholder approval for future severance agreements.

Proxy Access

The big proxy news for 2010 prior to Dodd-Frank was supposed to be the much proposed but never before adopted proxy access rules. On May 20, 2009 (well prior to Dodd-Frank), the SEC voted to propose proxy access rules and seemed likely to act on the proposed rules sometime in 2010. In July 2010, Dodd-Frank amended Exchange Act Section 14(a) to permit (but not require) the SEC to prescribe rules permitting shareholders to use issuer proxy solicitation materials to nominate director candidates. At that point, adoption of some form of proxy access seemed certain.

Indeed, on August 25, 2010, the SEC adopted rules that would allow shareholders who own at least three percent of a company’s shares continuously for at least the prior three years to include their nominations for directors in the company’s proxy materials. Under those rules, the company would be required to include no more than one shareholder nominee or the number of nominees that represent 25 percent of the company’s board being elected, whichever is greater. If more than one qualifying shareholder desired to include their nominee in the proxy materials, the shareholder who owned a larger portion of the company would be permitted to include his or her nominee.

In September, the U.S. Chamber of Commerce and Business Roundtable filed a lawsuit seeking to overturn the SEC's proxy access rules. According to the lawsuit, filed in the U.S. Court of Appeals in Washington, the rules are "unlawful," "arbitrary and capricious," "exceed the commission's authority" and violate corporations' rights under the First and Fifth Amendments of the U.S. Constitution. The SEC has stayed implementation of the new rules until the lawsuit is resolved.

For more information, see Alston & Bird's [advisory](#) on the adopted rules.

Discretionary Broker Voting

Dodd-Frank Section 957 amended Exchange Act Section 6(b) to prohibit brokers from uninstructed (discretionary) voting with respect to the election of directors, executive compensation (including advisory say-on-pay and golden parachute votes) or any other significant matter, as determined by the SEC. The effective date of this new requirement was July 22, 2010, and the SEC approved the relevant NYSE rule on September 9, 2010. This new requirement was an expansion of NYSE rule 452, which had only recently been amended to deem director elections to be non-routine matters.

Revisions to E-Proxy Rules

Much earlier in the year, in February, the SEC announced amendments to Rule 14a-16, governing Internet-based posting of proxy materials. In response to significant declines in shareholder participation in elections following the adoption of E-Proxy by issuers during the 2009 proxy season, the SEC amended the Notice and Access rules to:

- provide additional flexibility regarding the format and content of the Notice;
- permit inclusion of explanatory materials regarding the process for reviewing proxy materials and voting; and
- revise the time frame for soliciting persons to deliver a Notice when utilizing the Notice-only option.

The amendments to Rule 14a-16 took effect on March 29, 2010.

Proxy Plumbing

On July 14, 2010, the SEC voted unanimously to publish a concept release seeking public comment on many issues relating to the mechanics of communications and voting under the SEC's proxy rules. The release is popularly referred to as the "proxy plumbing" release. Chairman Schapiro has noted that changes in "shareholder demographics, the structure of shareholdings, technology, and the potential economic significance of each proxy vote" drove a need to consider whether changes to the proxy voting system were merited. The concept release is intended to solicit public comment as to whether the SEC should consider revisions to its proxy rules to promote greater efficiency and transparency in the U.S. proxy system and enhance the integrity and accuracy of the shareholder vote. The comment period closed on October 20, 2010, but the SEC has yet to propose rules.

Other Dodd-Frank Initiatives

Accredited Investor Standard

Dodd-Frank revised the “natural person” prong of the accredited investor definition in Regulation D to exclude the value of a person’s primary residence from the \$1 million net worth test. This change was effective immediately upon enactment. The SEC expects to propose rule changes in the first quarter of 2011, but in the interim, the Staff has issued a Compliance and Disclosure Interpretation (C&DI) stating that the value of an individual’s primary residence must be excluded in the determination of net worth. In addition, pending future SEC rulemaking, the related amount of any mortgage or other indebtedness secured by an investor’s primary residence also may be excluded, up to the residence’s fair market value. Any indebtedness secured by the residence in excess of the home’s value should be considered a liability and deducted from the investor’s net worth. Dodd-Frank requires the SEC to conduct a review of the definition every four years to determine whether it should be modified.

Auditor’s Attestation of Management’s Assessment of Internal Controls

On September 15, 2010, the SEC adopted amendments to its rules and forms to conform them to Section 404(c) of the Sarbanes-Oxley Act of 2002, as added by Section 989G of Dodd-Frank. Section 404(c) provides that Section 404(b) of Sarbanes-Oxley shall not apply with respect to any audit report prepared for an issuer that is neither an accelerated filer nor a large accelerated filer. 404(b) is a provision that requires an issuer’s regular auditor to attest and report on management’s assessment of internal controls. Non-accelerated filers have enjoyed temporary deferrals under 404 and were not required to include management’s assessment under 404(a) until on or after December 15, 2007. Compliance with 404(b) had been deferred as well, and Dodd-Frank now provides a permanent exemption. Dodd-Frank also requires the SEC to conduct a study to address ways to reduce 404(b) compliance costs for issuers with public floats of between \$75 million and \$250 million.

Conflict Minerals & Mine Safety Disclosures

On December 15, 2010, the SEC proposed amendments to its rules under the Exchange Act to implement the provisions of Sections 1502, 1503 and 1504 of Dodd-Frank requiring specific disclosures by:

- persons that use certain minerals originating in the Democratic Republic of the Congo or its adjoining countries;
- operators of coal and other mines; and
- companies engaged in the commercial development of oil, natural gas and other minerals.

The conflict minerals disclosure requirements will likely implicate a large number of companies, as the minerals at issue are used in the manufacturing of metals, such as tin and tungsten, commonly used in products such as electronic components, light bulbs and jewelry. The SEC has estimated that 6,000 companies would be affected by the new rule.

For more information on these proposed rules, see Alston & Bird’s [advisory](#).

Rating Agencies

Prior to Dodd-Frank, the SEC had begun to make changes to the regulation of rating agencies as a result of the financial crisis. Since June 2010, Rule 17g-5 has required one of the issuer, sponsor or underwriter (each, an “Arranger”) of securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction where that Arranger paid an NRSRO to issue and/or maintain credit ratings on those securities or instruments to maintain a password-protected website containing information that NRSROs not hired to rate the securities or instruments can access. The websites are not accessible by the public. These requirements are intended to increase the number of non-hired NRSROs rating asset-backed securities.

Dodd-Frank imposes a number of additional new requirements upon rating agencies, including increased accountability, internal controls to avoid conflicts of interest and to better ensure the accuracy of ratings, elimination of reliance on ratings by federal agencies, and public disclosure of the information on which ratings are based. Importantly, Dodd-Frank rescinded the exemption from expert liability under Section 11 of the Securities Act of 1933 (the “Securities Act”) enjoyed by credit rating agencies under Rule 436(g). As a result, in many cases, the SEC would require issuers to file the consent of a rating agency named in a registration statement that includes credit rating information. Rating agencies responded by asserting that they would be unwilling to provide consents. Although rules proposed prior to Dodd-Frank would have mandated ratings disclosure, currently most issuers are allowed, but not required, to include information about ratings in their registration statements. The Staff responded by issuing a C&DI that provided its views regarding when disclosure would trigger the need for a consent, including stating that the disclosure of a rating in a free writing prospectus would not trigger the requirement to obtain a consent.

Asset-backed issuers, however, are required to include disclosure about ratings in registration statements and thus, absent SEC relief, are unable to forego disclosure in the registration statement in order to avoid the need for a rating agency consent. The Staff issued a no action letter to Ford Motor Credit Company LLC, stating that they would not recommend enforcement action to the SEC if registration statements did not include the identities of NRSROs and their ratings. Although the initial response was set to expire, a subsequent no action letter extended the relief indefinitely.

Structured Finance

In April 2010, the SEC proposed a dramatic overhaul of its regulatory regime for asset-backed securities and issuers. The proposals would make dramatic changes to the current offering, disclosure and reporting requirements for registered offerings of ABS and also would impose significant disclosure requirements on private offerings of structured finance products. Chairman Mary L. Shapiro, in her opening remarks at the April meeting, stated that the “release represents a fundamental revision to the way in which the ABS market would be regulated,” and that the changes were “both necessary and critical components of restoring investor confidence.” Subsequently, Dodd-Frank imposed some similar and additional requirements upon asset-backed issuers, and the SEC has begun efforts to implement the new requirements. The SEC has proposed rules to require issuer review of assets underlying asset-backed securities to enhance disclosure to investors in asset-backed securities as required by Section 945 of Dodd-Frank and proposed rules for enhanced ABS disclosure with information regarding use of representations and warranties in the asset-backed securities market as required

by Section 943 of Dodd-Frank. The SEC has yet to adopt any of these rules but is expected to do so in 2011. On January 6, 2011, the SEC proposed rules to address Section 942(a) of Dodd-Frank, which eliminated the automatic suspension of the duty to file under Section 15(d) of the Securities Exchange Act of 1934 for asset-backed securities issuers and granted the Commission the authority to issue rules providing for the suspension or termination of such duty. The SEC proposed rules that would permit suspension of the reporting obligations for asset-backed securities issuers when there are no longer asset-backed securities of the class sold in a registered transaction held by non-affiliates of the depositor. The comment period for the latest proposals ends on February 7, 2011. The Staff also issued a no action letter to the American Securitization Forum on January 6, 2011, stating the conditions under which it would not seek enforcement action if outstanding asset-backed issuers continue to determine their reporting requirements based on the standards set forth in Section 15(d) of the Exchange Act immediately prior to enactment of Dodd-Frank. Absent this relief, asset-backed issuers who had suspended their reporting obligations prior to Dodd-Frank might have to resume reporting.

KEY No Action Letters and Staff Legal Bulletins

Staff Legal Bulletin 18: Rule 12h-3

A large number of the no-action letters issued by the Office of Chief Counsel in the Division of Corporation Finance in recent years have related to ceasing reporting under Rule 12h-3. Despite the simple nature of these letters, the Staff has always taken the position that each issuer required its own no-action letter in order to cease reporting in situations where Rule 12h-3 by its terms did not apply. In March 2010, the Staff published Staff Legal Bulletin 18 (“SLB 18”). Pursuant to SLB 18, in two situations—an abandoned initial public offering or acquisition of an issuer—issuers can “go on their own” and do not need a no-action letter from the Staff before ceasing reporting if they meet the conditions of the SLB.

Debt Restructurings Using Section 3(a)(9)

In early 2010, the Staff issued an important interpretive letter related to debt restructurings. The letter permits reliance on Section 3(a)(9) of the Securities Act for the issuance of a new parent security in exchange for an outstanding parent security that has one or more “upstream” guarantees from the parent’s 100-percent-owned subsidiaries. The Staff had previously issued no-action letters regarding the availability of Section 3(a)(9) for exchanges of guaranteed securities that involved “downstream” guarantees (i.e., situations where the parent guaranteed a security issued by one or more of its subsidiaries), but had not previously approved use of Section 3(a)(9) for “upstream” guarantees.

Computershare No-Action Letter

In July 2010, the Staff issued a no-action letter allowing issuers and closed-end investment companies (“Appointing Issuers”) that appoint Computershare, a bank within the meaning of Section 3(a)(6) of the Exchange Act, to implement and operate issuer-sponsored dividend reinvestment plans (DRIPs) to allow affiliates of sponsoring issuers to sell securities through the plan without registering the sales under the Securities Act. The letter also granted an exemption from Rule 13e-4(f)(6) under the Exchange Act to permit purchases on behalf of affiliates of Appointing Issuers during the 10 business day period after a tender offer by an issuer for

its own securities. Rule 13e-4(f)(6) prohibits the issuer and its affiliates from purchasing issuer securities that are the subject of a tender offer for 10 business days following the termination of the tender offer.

Although this letter does not address Rules 144 and Section 16 directly, it is notable that the staff granted relief based on Computershare's representation that Computershare and each Appointing Issuer would establish specified controls and procedures to ensure each affiliate's compliance with both Rule 144 and the Section 16 reporting requirements. Thus, issuers that sponsor unregistered DRIPs in which insiders can participate must be sure to take affirmative steps to create Rule 144 and Section 16 compliance procedures.

Section 13(d) Interpretive Letter

In November 2010, the Staff issued an interpretive letter to Booz Allen Hamilton Holding Corp. in which it stated that it would have no objection if certain shareholders did not report membership as a group under Section 13(d). The letter involved various agreements to be entered into by certain stockholders in advance of Booz Allen's IPO. The Staff seldom provides guidance on when a group of stockholders creates a Section 13(d) group and the Staff's letter is limited to the specific facts in this request. Section 13(d) guidance is also important for Section 16, given that Section 13(d) is relevant to determining when a person is an insider for Section 16 purposes.

Section 13(d)(1) of the Exchange Act and Rule 13d-1 require the filing of a Schedule 13D with the SEC by any person who directly or indirectly is the beneficial owner of more than five percent of a class of registered, voting equity securities of an issuer. Rule 13d-5(b)(1) provides that when two or more persons act together for the purposes of acquiring, holding, voting or disposing of securities of an issuer, such group formed thereby will be deemed to beneficially own all of the equity securities of that issuer beneficially owned by each member of the group. The agreements the pre-IPO stockholders proposed to enter into represented a restructuring of an existing stockholders agreement that had been in place since 2008, when an investment fund became the issuer's controlling stockholder. The shares not owned by the controlling stockholder were owned by current management and former management-level employees of Booz Allen. The purpose of the restructuring was to ensure that stockholders other than the controlling stockholder and the issuer's executive officers would not be parties to any arrangements that might create a group.

Poplogix No-Action Letter

The Staff does not often provide guidance regarding when something will not be deemed a security under Section 2(a)(1). In November, the Staff issued a no-action letter under Section 2(a)(1) to Poplogix LLC in which Poplogix proposed operating a peer-to-peer lending website without registration under the Securities Act. The relief is of limited value to most companies because, although Poplogix LLC will be able to charge minimal fees for participation, lenders will not be able to make a profit on their loans and will receive no interest, penalties or fees with respect to any loans. This letter is, however, noteworthy because it reflects a growing interest in finding ways to offer peer-to-peer lending platforms without the need for registration under the Securities Act or the Exchange Act. In recent years, two companies, Prosper.com and LendingClub Corporation, have registered under the Securities Act and the Exchange Act, and those offerings require the filing of daily supplements and involve partnering with a bank and a registered broker dealer. Dodd-Frank

requires that the Government Accountability Office (GAO) conduct a study of peer-to-peer lending by July 21, 2011, and offer recommendations on how federal regulation of the industry should be structured in the future.

Dear CFO Letters

Dear CFO Letter: Accounting and Disclosure

In early 2010 the Division of Corporation Finance's Office of Chief Accountant (CFOCA) published a "Dear CFO" letter providing disclosure guidance to issuers relating to repurchase agreements, securities lending transactions or other transactions involving the transfer of financial assets with an obligation to repurchase the transferred assets. The Staff of the Division of Corporation Finance had previously sent essentially the same letter tailored to the chief financial officers of nearly two dozen financial and insurance companies. These letters, and the generic Dear CFO letter, are probably the result of a bankruptcy examiner's assertions that Lehman may have used repurchase agreements to hide \$50 billion in debt.

In this letter, the Staff asks whether any of these types of transactions have been accounted for as sales as opposed to collateralized financings. The Staff is requesting historical data about these agreements, along with additional detail supporting the sale accounting determination. The Staff will also expect a justification regarding the level of disclosure provided in MD&A.

Dear CFO Letter: Mortgage and Foreclosure-Related Disclosures

In October 2010, CFOCA published another "Dear CFO" letter providing disclosure guidance to issuers relating to potential risks and costs associated with mortgage and foreclosure-related activities or exposures. In this letter, the Staff suggested issuers should consider the impact of various representations and warranties regarding mortgages made to purchasers of the mortgages (or to purchasers of mortgage-backed securities) including to the government-sponsored entities, private-label mortgage-backed security investors, financial guarantors and other whole loan purchasers. Representations and warranties under consideration should include ownership of the loan, validity of the lien securing the loan, the absence of delinquent taxes or liens against the property, the process used to select the loan for including in a transaction, the loan's compliance with any applicable loan criteria established by the buyer, delivery of all required documents to the trust and the loan's compliance with applicable federal, state and local laws.

Other Initiatives

Regulation G and Non-GAAP Measures

On January 11, 2010, the Division provided new guidance on non-GAAP financial measures. These interpretations are important because they reverse more limiting prior guidance. Following the adoption of Regulation G in 2003, the Staff issued a number of phone interpretations and issued comments in connection with reviews that went beyond what the new rules actually required. These new interpretations reverse those positions, particularly those relating to adjusted EBITDA and recurring items, giving issuers more flexibility to use non-GAAP measures in their press releases and SEC filings. That being said, issuers should be particularly careful that there

are no inconsistencies between what they say in their public filings and what they say outside of their filings. SEC examiners will listen to conference calls and review investor presentations posted on issuers' websites and issue comments when there are inconsistencies.

Proposed Revisions to Rule 10b-18

In January 2010, the SEC proposed amendments to Rule 10b-18's "safe harbor" for issuer repurchases. The proposed amendments are intended to clarify and modernize the safe harbor provisions.

The SEC proposes to modify the price condition and limit the general disqualification provision to provide issuers with greater flexibility to conduct repurchases in fast moving markets with reduced potential for abuse. The SEC proposes to modify the timing condition and the "merger exclusion" provision to maintain reasonable limits on the safe harbor, so as to minimize the market impact of the issuer's repurchases on the market. The SEC has not yet adopted final rules.

Review of Equity Market Structure

In January 2010, the SEC began a broad review of the equity market structure with its approval of a Concept Release. In the release, the SEC acknowledged that the secondary market for U.S.-listed equities has changed dramatically in recent years. As a result of this, the SEC explained, it is undertaking a comprehensive review of equity market structures in order to understand the effects that changes to the equity markets have had and whether regulatory initiatives are required.

Specifically, the concept release requests comments on:

- Equity market structure performance, including market quality metrics and fairness considerations with regard to the interests of long-term investors, and other measures of market performance;
- Strategies and tools related to high frequency trading, specifically including passive market making, arbitrage, structural, directional strategies, and co-location and private data feeds by high-frequency traders, as well as whether these strategies and tools pose systemic risks to the integrity of current market structure; and
- Un-displayed liquidity, including order execution quality, public price discovery, and fair access and other ATS regulation.

Circuit Breaker Rules

On May 6, 2010, the U.S. equity markets experienced a severe disruption. Among other things, the prices of a large number of individual securities suddenly fell by extreme amounts in an extremely short time period, although they subsequently rebounded. In response, on June 10, 2010, the SEC approved circuit breaker rules submitted by the self-regulatory organizations (SROs). The circuit breaker rules require the SROs to pause trading in certain individual stocks if the price moves 10 percent or more in a five-minute period. Initially, the new rules were to apply only to stocks in the S&P 500 Index during a pilot period, which was expected to run through December 10, 2010. However, on July 1, the SEC announced the expansion of the circuit breakers program to include all stocks in the Russell 1000 Index and certain exchange funds. SEC Chairman Schapiro

has expressed her desire that the circuit breakers be extended to “thousands” of publicly traded companies. Also as a result, in September 2010, the SEC released “Findings Regarding the Market Events of May 6, 2010.”

Short Selling

Short selling is always a matter of great interest. In late February, after a very contentious public comment process, the SEC finally adopted new rules related to short selling. The new rule imposes an “Alternative Uptick Circuit-Breaker” rule on short sales: if an equity security listed on a national market declines in price 10 percent or more in a day, a short sale may not be made at a price at or below the national best bid price for the rest of that trading day and the following trading day. On November 4, 2010, the SEC extended the compliance deadline to February 28, 2011, for the new rule.

SEC Proposes Rules Related to Short-Term Borrowings

On September 17, the SEC issued interpretive guidance regarding MD&A liquidity and capital resources disclosure and proposed rules that would require detailed MD&A disclosure on short-term borrowing arrangements. The interpretive guidance, which was effective immediately, reminded companies of longstanding MD&A principles as they apply to the disclosure of critical liquidity matters, including the identification of known trends and uncertainties. The guidance also encouraged companies to review previous interpretive guidance related to MD&A issued by the SEC, especially as it relates to discussion of cash requirements, cash management and sources of cash, as well as a company’s debt instruments and guarantees and related covenants.

The SEC also proposed to amend the current MD&A requirements to require both quantitative and qualitative disclosure about a company’s short-term borrowings during the reporting period. The disclosure would be required in a company’s quarterly and annual reports for the period covered by the report. Currently, the SEC requires this disclosure by bank holding companies on an annual basis under the SEC’s Industry Guide 3, Statistical Disclosure by Bank Holding Companies (“Guide 3”). But under this proposal, the disclosure would be required on a quarterly and annual basis for all companies that provide MD&A. The proposed rules would codify these standards in Item 303 of Regulation S-K. In addition to tabular data related to short-term borrowings, a company would also be required to include narrative discussion in order to provide context for the tabular disclosure.

For more information, see Alston & Bird’s [advisory](#) on the proposed rules.

Climate Change Interpretive Release

In January 2010, the SEC adopted an interpretive release on existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change. The release does not create new legal requirements nor modify existing ones, but is intended to provide clarity and enhance consistency for public companies and their investors. Specifically, the SEC’s interpretive guidance highlights the following areas as examples of where climate change may trigger disclosure requirements: the impact of legislation and regulation, the impact of international accords, the indirect consequences of regulation or business trends and physical impacts of climate change.

The SEC was very clear to emphasize that it was not taking a position with respect to the science of climate change. Whether or not “global warming” is real, the possibility of legislation and the impact of public perception are real and may require disclosure. The Staff was also very clear to point out that they did not believe the release changes any requirements. That is, these disclosures, when material, were already required. That being said, whether the release is a result of political pressure that will quickly be forgotten or is something that will spur Staff comments is yet to be seen.

Enforcement Trends

SEC Proposes New Whistleblower Protection Rules

On November 3, the SEC proposed rules for implementing the whistleblower provisions set out in Dodd-Frank. Under the proposed rules, a whistleblower is any individual who provides the Commission with original information related to a potential violation of federal securities law. Where all the conditions of the Proposed Rule are met, a whistleblower is entitled to between 10-30 percent of the total monetary sanctions collected in successful Commission or other actions. The size of the award is determined by the Commission after considering several statutory factors, including the significance of the information provided by the whistleblower to the success of the action and the degree of assistance provided by the whistleblower. While whistleblowers are entitled to remain anonymous, they must be represented by an attorney and disclose their identity before collecting any award. Compliance officers and those with a pre-existing legal or contractual duty to report securities law violations are ineligible to collect the award, unless the company does not provide the information to the Commission within a reasonable time or acts in bad faith. Finally, the proposed rules protect potential whistleblowers from employer retaliation, regardless of whether they ultimately qualify for an award under the rule.

Because Dodd-Frank created a new and broader program for making monetary awards to whistleblowers, it repealed Section 21A(e) of the Securities Exchange Act of 1934, which previously gave the SEC authority to make monetary awards to whistleblowers. Accordingly, on September 21, the SEC **rescinded** the former rules promulgated to administer that section.

For more information on the proposed rules, see Alston & Bird’s **advisory**.

Foreign Corrupt Practices

The Foreign Corrupt Practices Act (FCPA) was passed in 1977 and has since been amended twice. The DOJ and the SEC enforce the FCPA’s antibribery provisions and the SEC enforces its record-keeping and accounting provisions. In recent years, both the DOJ and the SEC have brought numerous FCPA cases resulting in very large penalties. The most recent announcement was a settlement with Alcatel-Lucent pursuant to which Alcatel-Lucent will pay over \$137 million.

Dodd-Frank could result in a flood of FCPA complaints to come into the SEC as a result of its new whistleblower provisions. As noted above, the SEC’s new bounty program, created by Dodd-Frank, entitles whistleblowers who report major fraud to as much as 30 percent of any monetary sanctions collected by the agency.

Regulation FD

The SEC filed another Regulation FD case in March. *SEC v. Presstek, Inc.*, Civil Action No. 10-1058 (E.D.N.Y. Filed March 9, 2010). In 2009, the SEC brought its first Regulation FD case in a long time, *In the Matter of Christopher A. Black*. In that case, the SEC did not bring an action against the company, only the individual who made the disclosures. Together, these two cases may mark renewed enforcement interest in Regulation FD.

In *Presstek*, the SEC's complaint alleges that, while acting on behalf of Presstek, its CEO selectively disclosed material non-public information regarding Presstek's financial performance during the third quarter of 2006 to a managing partner of a registered investment adviser who traded on the information. The complaint also alleges that Presstek did not simultaneously disclose to the public the information provided by its CEO to the partner.

The complaint alleges violations of Exchange Act Section 13(a) and Regulation FD. The company settled with the SEC, consenting to the entry of a permanent injunction prohibiting future violations of the sections cited in the complaint. As part of the settlement, the company agreed to pay a \$400,000 civil penalty. The SEC, in its complaint, acknowledged the cooperation of the company, citing its remedial measures. Those included revising its corporate communications policies and governance principles, replacing its management team, appointing new independent board members and creating a whistleblower's hotline.

Structural Revisions at the SEC

Following up on the structural changes announced last year in the Division of Enforcement, the Division of Corporation Finance announced the creation of three new specialized offices focusing on large financial institutions, asset-backed securities and other structured products and capital markets trends. In mid-December 2010, the Division of Corporation Finance announced that Suzanne Hayes would be the Assistant Director of the Financial Institutions Group, Katherine Hsu would be the Chief of the new Office of Structured Finance and that Amy Starr would be the Chief of the Office of Capital Market Trends.

Beyond involving new offices within the Division, these structural changes highlight the fact that the Division is beginning to engage in more continuous reviews of companies rather than merely reviewing pre-effective Securities Act filings and periodic and other current reports. In the upcoming year, registrants, particularly in the financial services sector, should not be surprised if they are contacted by the Staff with questions or comments relating to a Rule 424 prospectus or a press release.

Dodd-Frank also requires the Commission to create new offices of Credit Ratings, Whistleblower Protection, Investor Advocate, Municipal Securities and Women and Minority Inclusion. At the end of the year, the SEC announced that despite the mandate, it would delay creating these offices due to budget uncertainties.

Budget Concerns and Filing Fees

The budget delay also impacted filing fees. However, a later continuing resolution designed to fund the SEC for an additional two months stated that it would be deemed to be the SEC's regular appropriation for the fiscal year 2011. This resulted in changes to fee rates. As a result, effective December 27, the filing fee rate applicable to the registration of securities increased from \$71.30 to \$116.10 per million dollars, a 63 percent hike.

2011 Dodd-Frank Outlook

Dodd-Frank will continue to dictate most of the SEC's rulemaking agenda for 2011. Below are a few rulemakings to watch for in the area of executive compensation and disclosure.

Compensation Committees (Section 952)

New Exchange Act Section 10C includes a variety of provisions directed toward public company compensation committees. The SEC must issue rules by the end of July 2011. Dodd-Frank requires the SEC to adopt rules directing the national securities exchanges and national securities associations to impose heightened independence requirements on compensation committee members (similar to those applicable to audit committees). No rules have been proposed thus far, but the SEC expects to propose rules under this section between January and March of 2011.

Executive Compensation (Section 953)

New Exchange Act Section 14(i), "Disclosure of Pay Versus Performance," requires the SEC to promulgate rules requiring a company's annual meeting proxy statements to provide information that shows the relationship between executive compensation actually paid and the company's financial performance, and the ratio of CEO pay to the median pay of all other employees. No rulemaking deadline is specified for these sections, but the SEC plans to propose rules under this section between April and July of 2011.

Recovery of Erroneously Awarded Compensation (Section 954)

New Exchange Act Section 10D requires the SEC to promulgate rules requiring each issuer to develop, disclose and implement a clawback policy for incentive-based compensation that is based on publicly reported financial information. The SEC is instructed to provide rules directing the national securities exchanges to prohibit the listing of any security of an issuer that is not in compliance with these requests. Dodd-Frank did not implement a rulemaking deadline for clawback policy rules, but the SEC plans to propose rules between April and July of 2011.

Disclosure Regarding Directors' and Employees' Hedging (Section 955)

New Exchange Act Section 14(j) requires the SEC to adopt a rule requiring issuers to disclose in their annual proxy statements whether employees or directors (or their designees) are permitted to purchase financial instruments—such as prepaid variable forward contracts, equity swaps, collars and exchange funds—that are designed to hedge or offset any decrease in the market value of issuer stock they hold. Dodd-Frank did not implement a rulemaking deadline for hedging rules, but the SEC plans to propose rules between April and July of 2011.

For a more detailed outline of the SEC's planned Dodd-Frank implementation, see its rulemaking [calendar](#).

For more detailed information on Dodd-Frank, see Alston & Bird's [advisory](#) summarizing its provisions. For more information on provisions specifically affecting non-financial services companies, see Alston & Bird's [advisory](#) highlighting those sections.

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