

# Securities Regulation and Compliance Alert

August 9, 2012

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or your regular Skadden contact.

**Brian V. Breheny**

202.371.7180

brian.breheny@skadden.com

**Marc S. Gerber**

202.371.7233

marc.gerber@skadden.com

**Andrew J. Brady**

202.371.7344

andrew.brady@skadden.com

**Hagen J. Ganem**

202.371.7503

hagen.ganem@skadden.com

**Samuel Scrimshaw**

202.371.7336

samuel.scrimshaw@skadden.com

## Current Developments in Corporate Governance and Disclosure Matters

Following is a summary of some recent developments relating to corporate governance and disclosure matters.

***SEC Meeting to Be Held on August 22, 2012.*** The SEC is scheduled to hold an open meeting on August 22, 2012. As set forth in the [notice](#) issued by the SEC on July 2, 2012, the items on the meeting agenda include two of the most controversial Dodd-Frank Act-required rulemaking matters and the first of many JOBS Act rulemaking matters. We expect the SEC to address a number of important compliance questions related to each of these rulemaking matters at the August 22 meeting and in the releases adopted by the SEC that day. We will track developments regarding these rules and provide additional gloss after the meeting.

Following is a brief summary of the matters on the meeting agenda.

- *Rules Implementing Conflict Mineral Disclosure Requirements of the Dodd-Frank Act.* The SEC will consider adopting rules to implement the requirements of Section 1502 of the Dodd-Frank Act. Section 1502 requires reporting companies that use certain minerals in their manufacturing processes that originate in the Democratic Republic of the Congo or any adjoining country to include certain disclosures in their annual reports and on their websites, and potentially to file a detailed report with the SEC describing, among other things, the sources and uses of the minerals. When adopted, the conflict minerals rules are expected to have a widespread impact on reporting companies. Because Section 1502 requires companies that are required to comply with the provisions to do so “beginning with the person’s first full fiscal year that begins after the date of promulgation of such regulations,” companies with a December 31 fiscal year-end will most likely be required to comply with the conflict minerals provisions in connection with their first annual reports filed after December 31, 2013. A copy of our alert concerning the SEC’s proposed conflict minerals rules can be found [here](#) and additional guidance for companies considering how to comply with the rules can be found [here](#).

- *Rules Implementing Resource Extraction Issuer Disclosure Requirements of the Dodd-Frank Act.* The SEC also will consider adopting rules to implement the requirements of Section 1504 of the Dodd-Frank Act. Section 1504 requires the SEC to adopt rules that will require resource extraction issuers to disclose in their annual reports certain payments made by the issuer or by a subsidiary or another entity controlled by the issuer to foreign governments or to the United States government for the purpose of the commercial development of oil, natural gas or minerals. This information must be provided in an interactive data format, and the SEC must make a compilation of this information available online. Issuers subject to Section 1504 will not be required to provide disclosures pursuant to the new rules until they file their first annual report relating to a fiscal year ending at least one year after the date on which the SEC issues final rules implementing Section 1504. Based on this language, the first annual report filed by a company with a December 31 fiscal year-end that will require the new disclosures most likely will be the annual report for the fiscal year ending December 31, 2013. A copy of our alert concerning the SEC's proposed resource extraction rules can be found [here](#).
- *Rules Implementing Section 201(a) of the JOBS Act.* Finally, the SEC intends to consider rules that will eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506 of Regulation D and Securities Act Rule 144A, as mandated by Section 201(a) of the Jumpstart Our Business Startups Act (JOBS Act). These rules will be the first JOBS Act-related matters considered by the SEC and, although the SEC has not proposed these new rules, it is possible that the SEC will approve the rules as final. A copy of our alert concerning the JOBS Act can be found [here](#).

***Congress Passes Law Requiring Reporting Companies to Disclose Certain Iran-Related Activities and Transactions.*** On August 1, 2012, both the U.S. Senate and the House of Representatives passed the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITR Act). Section 219 of the ITR Act requires SEC reporting companies to disclose certain information in their annual or quarterly reports, including whether they or any of their affiliates knowingly have engaged in certain activities prohibited by the Iran Sanctions Act of 1996 or the Comprehensive Iran Sanctions, Accountability and Divestment Act of 1996, or whether they have engaged in any transaction with the government of Iran or with persons designated by certain executive orders.

There is no further congressional action needed before the ITR Act is presented to the president for his signature. The provisions of Section 219 also do not require SEC rulemaking and, as a result, will take effect with respect to periodic reports that are required to be filed with the SEC 180 days after the date that the ITR Act is enacted. It is unclear when the ITR Act will be presented to the president for his signature, but it is possible that the act could become law in the next week. Companies should consider at this time whether it is possible that they will need to comply with the new disclosure requirements. We will monitor developments related to the ITR Act and provide additional information when available. The full text of the ITR Act is available [here](#).

***Status of New Compensation Committee and Compensation Adviser Independence Rules.*** As we [previously reported](#), on June 20, 2012, the SEC implemented Section 952 of the Dodd-Frank Act by adopting new Exchange Act Rule 10C-1 and by amending Regulation S-K Item

407. Rule 10C-1 requires national securities exchanges to adopt listing standards regarding the independence of compensation committee members, the committee's authority to retain compensation advisers, the committee's consideration of the independence of compensation advisers, and the committee's responsibility for the appointment, compensation and oversight of compensation advisers. The SEC required that the exchanges propose the amendments to their listing standards no later than September 27, 2012, and that the revised listing standards be in effect by July 27, 2013.

As of the date of this alert, none of the exchanges have filed their proposed amendments with the SEC. We do not anticipate that the revised listing standards required by Rule 10C-1 will be in effect before the 2013 annual meeting season. The amendments to Regulation S-K Item 407, however, will apply to proxy statements for 2013 annual meetings. Those amendments require certain additional disclosures concerning any conflicts of interest raised by the compensation consultant's work and how any such conflicts of interest are being addressed. Additional information about the new required disclosures is available [here](#).

***Phase-Out of XBRL Limited Liability Provisions.*** When the SEC adopted the XBRL filing requirements in December 2008, it provided a two-year period during which liability under the XBRL rules was limited for each group of companies in the three-year phase-in period. The modified liability provisions include deeming interactive data files "furnished" and not "filed" or part of a registration statement or prospectus for purposes of the liability provisions in Securities Act Sections 11 and 12 and Exchange Act Section 18, and exempting interactive data files from the anti-fraud provisions of the securities laws if the company makes a good-faith effort to comply with the data-tagging rules and promptly amends any deficiency when it becomes aware of such deficiency. For the second group of companies that were required to comply with XBRL requirements — large accelerated filers with a market cap of under \$5 billion — these limited liability provisions end on August 9, 2012, the filing deadline for their Forms 10-Q for the period ended June 30, 2012. Given the expiration of the limited liability periods, companies should evaluate their disclosure controls and procedures for interactive data files.

***FASB Drops Proposed Revisions to ASC Topic 450 (Loss Contingencies).*** The accounting staff of the SEC's Division of Corporation Finance has been very focused in the last few years on disclosures regarding loss contingencies. The staff's focus on this topic coincided with the Financial Accounting Standards Board's (FASB) consideration of changes to the requirements of Accounting Standards Codification (ASC) Topic 450 concerning the disclosure requirements for loss contingencies. FASB's consideration of this topic was highly controversial and, as a result, on July 9, 2012, the FASB voted to remove the proposed revisions to the requirements of ASC Topic 450 from its agenda. Although FASB is no longer proposing to revise the disclosure requirements for loss contingencies, the SEC staff may remain focused on disclosures regarding loss contingencies, and reporting companies should continue to exercise care in reporting loss contingencies. Additional information concerning the SEC's focus on loss contingency disclosures is available [here](#).

***PCAOB Issues Release Providing Information for Audit Committees Regarding Its Audit Firm Inspection Process.*** On August 1, 2012, the Public Company Accounting Oversight Board (PCAOB) issued a release that is designed to assist audit committees in understanding the PCAOB's inspections of their audit firms and provides questions that audit committees may ask audit firms about their inspection results. The release provides information regarding the meaning and significance of audit deficiencies that are described in the public por-

tion of a PCAOB inspection report and outlines the PCAOB's perspective on certain types of assertions that are commonly made in audit firm responses to reports. The release also suggests specific approaches that an audit committee might use to initiate or improve inspection-related dialog with an audit firm and includes background details regarding the PCAOB inspection process. A copy of the PCAOB release is available [here](#).

***SEC Approves Change to NASDAQ Rules for Audit, Compensation and Nominations Committee Membership.*** On July 19, 2012, the SEC approved a change to NASDAQ's rules regarding membership on the audit, compensation or nominations committee of a listed company. NASDAQ rules generally require that such committees consist of independent directors. However, NASDAQ Rule 5605 provides an exception whereby a non-independent director may serve on such committees under exceptional and limited circumstances. Previously, this exception was unavailable to any director who has a family member who is an employee of the listed company. The amendment modifies the exception, allowing a director who is a family member of a non-executive employee of a listed company to serve on the audit, compensation or nominations committee of the listed company under exceptional and limited circumstances, as long as the listed company's board determines that "the director's membership on the relevant committee is required by the best interests of the company and its shareholders." In approving the proposed rule change, the SEC noted that in order to rely on the exception, a company's board would continue to be required to affirmatively determine that the director does not have any relationship which, in the opinion of the board, "would interfere with the exercise of independent judgment in carrying out the responsibilities of a director."

The SEC's release approving the proposed rule change is available [here](#).