SCHIFF HARDIN LLP

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The Public Company *Adviser*

Our Valued Friends and Clients:

We are happy to present the latest edition of *The Schiff Hardin Public Company Adviser*, the quarterly newsletter of Schiff Hardin's Public Companies Group. Each quarter we issue a collection of articles to provide information and insights on the most pressing legal issues of the day for public companies, as well as to update you on recent developments and to highlight some of the key work Schiff Hardin is doing in the public companies arena.

Most issues of *The Schiff Hardin Public Company Adviser* will focus primarily on a central theme. In this Winter 2010-2011 Edition we focus primarily on preparations for the upcoming proxy season and the 2011 annual meeting.

- ***Key Issues and Practical Insights for the Upcoming Proxy Season*** — We first provide a round-up of the key issues and developments that will frame the upcoming proxy season and provide practical tips to assist you in preparing for the 2011 annual meeting and drafting your proxy statement. (See Page 2)

- ***The SEC's Proposed Rules Regarding Whistleblower Incentives*** — Next, we provide some critical insights into the ramifications of the SEC's proposed rules concerning whistleblower incentives and the interaction of these new rules with existing corporate compliance programs. (See Page 13)

- ***ISS 2010 Postseason Report and 2011 Policy Updates*** — The views of proxy advisory firms such as Institutional Shareholder Services ("ISS") on key issues and their vote recommendations remain a significant topic of interest for public companies and their directors and shareholders. In this article, we explore ISS's recently issued report on the 2010 proxy season, the ISS policy updates for 2011, and the impacts they may have on the upcoming proxy season. (See Page 16)

- In the ***Also of Interest*** section, we highlight a few additional developments in the public companies arena. (See Page 19)

- Finally, in the ***Spotlight on Schiff Hardin*** section, we provide a brief review of some of our most recent public companies work and highlight an upcoming program at Schiff Hardin. (See Page 21)

We hope you enjoy this edition of *The Schiff Hardin Public Company Adviser* and find its content both informative and useful.

Preparing for the Upcoming Proxy Season and 2011 Annual Meeting — Key Issues and Practical Insights

During the 2010 proxy season, public companies grappled with a host of new and updated disclosure rules promulgated by the Securities and Exchange Commission (the "SEC") on a variety of corporate governance issues, including director qualifications, director diversity, compensation risk, leadership structure and risk management. As we look toward the 2011 proxy and annual meeting season, public companies face a whole new set of challenges occasioned by provisions of The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and related SEC rules, the continuing influence of proxy advisory firms and activist shareholders, and other refinements and interpretive guidance concerning required proxy statement and annual report disclosures. In some cases, these issues are, or will be, the subject of specific new disclosure requirements for your proxy statement or year-end documents in 2011. In other cases, new rules may not be effective for 2011, but the issues loom on the horizon and may be the subject of inquiries and discussion among public company directors, executive officers and shareholders in the coming months.

This article seeks to assist you in responding to these new challenges, by presenting a "round-up" of the key issues and developments that will frame the upcoming proxy season, providing practical insights as to action steps that will help you successfully navigate those issues, and giving you guidance on particular disclosures that will be required in 2011.

1. Say on Pay and Say on Frequency

The Dodd-Frank Act added new Section 14A(a) to the Securities Exchange Act of 1934 (the "Exchange Act"). This new section requires public companies to put before shareholders at their annual meetings the following advisory votes beginning with the first meeting after January 21, 2011:

- a non-binding vote on executive compensation (a Say on Pay vote); and
- a non-binding vote on whether the Say on Pay vote should take place every one, two or three years (a Say on Frequency vote).

The SEC has released proposed rules concerning these advisory votes. We have previously provided a detailed review of the proposed rules, which can be viewed at http://www.schiffhardin.com/publications/pubcomp_102010/pubcomp_102010index.html. The comment period on these proposed rules ended on November 18, 2010. Final rules have not been issued yet, but are expected early in 2011. Regardless of when the SEC issues final rules, the requirement to hold the advisory vote will be effective as of January 21, as mandated by the Dodd-Frank Act.

In advance of holding these advisory votes, public company counsel and their boards of directors should consider taking the following preparatory steps:

Assess Compensation Policies and Practices and Related Proxy Disclosures: Over the past few years, the SEC has focused an increasingly bright light on compensation policies and practices of public companies, through the requirement of enhanced disclosures in proxy statements and periodic reports. This latest requirement

for an advisory vote on executive compensation is an occasion to undertake a fresh assessment of your company's policies and the effectiveness of your company's past disclosures concerning pay practices. Consider the following topics for discussion:

- What are the current linkages between your company's compensation policies and company performance?

- Are compensation policies and practices in line with best practices for your peer group and industry?

- Have the policies and practices been effective in achieving the results they are designed to produce?

- How do the policies and practices align with the latest public commentary on preferred practices, particularly the viewpoints of proxy advisory firms such as ISS? Consider in particular recent updates to ISS voting guidelines (discussed in detail below), your company's ISS GRId governance ratings and whether there are elements of your policies commonly characterized by such proxy advisory firms as problematic.

- What is your frank assessment of the likely results of the advisory vote? Should you reach out to particular shareholders that you believe may take a negative stance on the advisory vote and address their concerns?

- Given your company's particular shareholder base, are there any elements of the compensation policies and practices that are likely to be viewed negatively by your shareholders? Will those elements be targets for criticism in connection with the advisory vote and have you designed disclosures to provide sufficient explanation/justification for retaining those elements?

- Does your most recent CD&A effectively convey the link between pay and performance and otherwise provide an explanation and justification of current practices in a clear and convincing manner? Are there areas where the disclosures could be improved?

Focus on the CD&A:
Given the new requirement on all public companies to include a Say on Pay proposal in their 2011 proxy statements, companies should review their CD&As to ensure that the CD&A clearly and effectively explains the company's compensation programs and policies and the rationales behind each such program and policy. In 2011 and beyond, the CD&A likely will serve as one of the most important vehicles a public company has to garner support for its Say on Pay proposal and, therefore, should be a primary focus for companies in their preparation for Say on Pay. You should draft your company's CD&A not only to include all the required disclosures but also in a style and with the content that will best explain how, and for what results, each of the company's compensation programs is designed to incentivize and reward employees. Where possible, companies should clearly state and explain the relationship between executive performance and the resulting compensation.

Begin the Drafting Process for the Proposals and Related Disclosures:
You should begin now to consider the wording of the Say on Pay and Say on Frequency

proposals to ensure sufficient time for review by executive officers, directors, compensation consultants and other advisors. The following are some practical points to consider as you approach the drafting process:

- The proposed rules issued by the SEC do not require any specific language to be included in the proxy statement proposals, although they make clear that the vote should be based upon all of the compensation disclosures contained in the proxy statement pursuant to Item 402 of Regulation S-K, including the CD&A and narrative and tabular disclosures.

- Consider reviewing the proxy statements of public company recipients of funds under the Troubled Asset Relief Program. These companies have previously been required to provide for non-binding votes on compensation similar to Say on Pay at their annual meetings under the Emergency Economic Stabilization Act of 2008.

- Note that with respect to both the Say on Pay and Say on Frequency votes, the SEC's proposed rules also call for disclosure as to why the votes are being conducted and the effect of such votes, including its non-binding effect. The SEC has also proposed an amendment to Item 402(b) of Regulation S-K that will require disclosure in CD&As regarding whether and how the company's compensation policies and decisions reflect the results of past Say on Pay votes.

- With respect to the Say on Frequency vote, the SEC's proposed rule requires companies to provide four choices on the proxy card with respect to how often the Say on Pay vote should be held — every year, every two years, every three years, or abstain from voting — rather than a choice to approve or disapprove a company recommendation regarding the frequency vote.

Determine the Board of Directors' Stance on Frequency of Advisory Votes: The board of directors is permitted to recommend to shareholders how they should vote on the Say on Frequency vote, as long as it is clear that shareholders are being asked to select one of the four voting choices provided on the proxy card: annual, every two years, every three years or abstain and that shareholders are not being asked to approve or reject the board of directors' recommendation. Thus, a task of first priority is determining whether your board of directors wishes to include a recommendation regarding the frequency of advisory votes and, if so, what that recommendation should be. In reaching this determination, directors should consider the following:

- How are shares in your company held? Are there a number of large institutional holders? Consider any publicly expressed viewpoints of proxy advisory firms and large institutional investors on the frequency vote. For instance, ISS has already issued a policy supporting annual advisory Say on Pay votes.

- Do you anticipate any shareholder approval difficulties in light of performance or problematic pay practices? If your board's recommendation on frequency does not align with a major shareholders' stance on the issue, will compensation committee members or other directors be at risk of an orchestrated no vote campaign?

- Consider any available intelligence on the recommended policy of your peers and other industry members, although at this point it may be too early to establish a true "best practice" among peers on this issue.

2. Other Executive Compensation Issues

In addition to the Say on Pay and Say on Frequency advisory votes discussed above, there are a few additional executive compensation issues arising from the Dodd-Frank Act that loom on the horizon. In some cases, the SEC may act on these issues in time for the 2011 proxy season. In other cases, the SEC is unlikely to act that quickly, but gaining a familiarity with the issues is advisable so that you can be conversant on the key issues and brief your directors and executive officers accordingly. Later in this issue, beginning on page 20, we provide a status report as to the anticipated timing of rulemaking by the SEC on a number of these issues.

- **Golden Parachute Advisory Vote:** The Dodd-Frank Act and related SEC rule proposals also include requirements concerning golden parachute pay that apply to any proxy statement relating to business combinations. The requirements will include (i) tabular disclosure regarding compensation triggered by or related to the combination and (ii) a non-binding, advisory shareholder vote on such arrangements unless previously voted upon at an annual meeting. Under the proposed rules, a company would be permitted to include these disclosures and the advisory vote as part of its Say On Pay vote at an annual meeting. If this is done, then the vote may not be necessary in the acquisition scenario. You should consider whether it is advisable for your company to include these disclosures and seek such an advisory vote at the upcoming 2011 annual meeting. We expect many companies will forego such action because any disclosures are likely to change in the context of a particular combination, making the prior advisory vote ineffective in avoiding a subsequent advisory vote on the changed elements. We have previously provided an in-depth client alert on these proposed rules at http://www.schiffhardin.com/publications/pubcomp_102010/pubcomp_102010index.html.

- **Clawback Policy:** Under the Dodd-Frank Act, the SEC is also required to promulgate rules concerning the implementation by public companies of clawback policies in the context of restatements of financial statements due to "material noncompliance" with reporting requirements. Such policies would call for recovery from any current or former executive officer of any "incentive-based compensation (including stock options)" received by the officer during the prior three-year period that is in excess of amounts that would have been paid under the restated financials. The Dodd-Frank Act does not set a deadline for issuance of rules on these policies, and it is uncertain when the SEC will promulgate its proposed rules. Certain aspects of the clawback policies referenced in the Dodd-Frank Act require clarification in the upcoming rules, but it is not too early for you to begin considering the following issues:

    - The proposed policies are broader than those required by the Sarbanes-Oxley Act. For instance, the look-back period is three years instead of one year, the requirement for recovery is placed on the company itself rather than empowering the SEC to recover amounts, the policy would cover all executive officers (not just the CEO and the CFO), and the standard triggering a clawback is a restatement for a "material non-compliance" instead of misconduct.

    - If you do not currently have a clawback policy, you should begin to consider the possible scope of a new policy. If you have an existing clawback policy, consider the potential for necessary amendments.

- You should consider what other existing agreements and policies may require amendment if a clawback policy is put into effect.

- **Broker Discretionary Voting:** Additionally, the Dodd-Frank Act requires the SEC to issue new rules that will prevent broker discretionary voting in connection with the election of directors, executive compensation or any other significant matters as determined by SEC rule. This requirement generally applies to public company proxy voting through application of NYSE Rule 452, which governs broker voting. In September 2010, the SEC approved a change to Rule 452 preventing brokers from exercising discretionary voting rights if the matter to be voted on relates to executive compensation. This includes the Say On Pay, Say on Frequency and Golden Parachute advisory votes and any other matter that relates to executive compensation. Consider the make-up of your shareholder base and whether this change in the application of Rule 452 will require actions on your part to ensure a necessary quorum or sufficient voting on these matters.

- **Compensation Committee Independence:** The Dodd-Frank Act also requires the SEC to issue rules directing the national security exchanges to mandate fully independent compensation committees. The independence requirements are expected to be much the same as the current Sarbanes-Oxley requirements for Audit Committee independence. Key factors will include whether the committee member receives consulting fees from the company or is an affiliate of the company. In advance of this rulemaking, it may be valuable to evaluate compensation committee members under current audit committee independence standards to see if any changes to membership will likely be necessary. Also give some advance consideration as to whether changes in the D&O questionnaire, committee charter or governance policies might be required.

- **Compensation Committee Consultants:** Additionally, the Dodd-Frank Act requires that compensation committees have the authority and funding to retain independent compensation consultants, legal counsel and other advisors. Before selecting such advisors, a compensation committee is required to consider certain independence factors, including:

  - whether the entity employing the advisor provides other services to the company;

  - fees received by the entity employing the advisor as a percentage of the entity's total revenue;

  - the employing entity's conflict of interest policies;

  - whether the person providing the advisory service has a business or personal relationship with a compensation committee member; and

  - whether the person providing the advisory service is a shareholder of the company.

  Beginning with the first annual meeting proxy statement occurring on or after July 21, 2011, a company must include disclosures as to the compensation committee's use of such compensation consultants. Companies may benefit from beginning to examine these issues now in advance of impending disclosures, including a review of current relationships and policies and what

additional disclosures may potentially be required in its proxy statement concerning use of consultants by the compensation committee.

- **Disclosure of Relationship of Executive Compensation to Performance:** The Dodd-Frank Act also includes a requirement that the SEC promulgate rules requiring that public companies disclose in their proxy statements a clear description of compensation paid to name executive officers (NEOs), including information that shows the relationship between compensation actually paid to NEOs and the financial performance of the company, taking into account the change in share price (including dividends and distributions). The Dodd-Frank Act states that information can be in the form of a graph (for instance, a graph with a horizontal axis of a number of years and a vertical axis with two scales — one for executive compensation and one for the company's share price for each year). The SEC rules will need to address a number of issues, including: (i) what "actually paid" means; (ii) what compensation is to be taken into account (*e.g.*, all elements of the Summary Compensation Table?); (iii) the time period to be covered and (iv) whether the disclosures will be for named executive officers as a group or on an individual basis.

- **Pay Ratio Disclosure:** Additionally, the Dodd-Frank Act calls for the SEC to adopt rules requiring disclosure of: (i) median annual total compensation of all employees other than the CEO; (ii) the CEO's annual total compensation; and (iii) the ratio of (i) to (ii). For these purposes, compensation means total compensation as shown on the Summary Compensation Table, using the same rules as in effect the day before the Dodd-Frank Act's enactment. A number of issues will need clarification in the rules to be issued by the SEC, including whether "all employees" will be limited to a smaller group (such as only U.S.-based employees), and how mid-year hires, part-time/seasonal employees and employees of less-than-100% subsidiaries will be handled. Given the potentially burdensome nature of these disclosures, and that data for 2011 will likely be required, companies should begin formulating a strategy as to the most efficient means to track this data and which internal functions will need to coordinate reporting of the information.

3. Other Corporate Governance and Disclosure Issues

- **Interpretive Guidance on Climate Change Disclosures:** In 2010, the SEC issued interpretive guidance regarding the scope of climate change disclosures in periodic reports with the goal of promoting consistency in the disclosure of material risks. To the extent you currently make climate change disclosures in your public filings, you should review this guidance to determine if changes in disclosures are warranted. If you do not currently make such disclosures, we suggest a close review of the interpretive guidance to determine if disclosures are warranted. For a detailed review of the guidance, please see our previous client alert on the subject at http://www.schiffhardin.com/env_jan29_10index.html.

- **Short-Term Borrowings:** In September of 2010, the SEC issued proposed rules concerning disclosure of short-term borrowing arrangements in registration statements and periodic reports. For purposes of the rules, "short-term borrowings" include financing arrangements that mature in a year or less, and can include commercial paper, borrowing from banks or other financial institutions and any other short-term borrowing on the company's balance sheet. The stated intent of the proposed rules is to allow investors to better understand how short-

term borrowings affect the operations of the company. The proposed rules require public companies to provide quantitative information about their short-term borrowing arrangements in the MD&A section of their quarterly and annual reports. If finalized in their current form, the rules would require the MD&A to include the following pieces of information, among others:

- the average amount of short-term borrowing outstanding for the reporting period, calculated over a period no longer than one month, as well as the weighted average interest rate of the borrowing;
- the amount of short-term borrowings at the reporting period's end, as well as the weighted average interest rate on those borrowings; and
- the maximum amount of short-term borrowings outstanding at the end of any month in the reporting period.

  In addition to the quantitative disclosures, public companies would also be required to include a subsection within the MD&A with a qualitative narrative discussion of that company's borrowing arrangements. This description would include the following topics:

- a description of the short-term borrowing arrangements utilized by the company and the business purpose of those arrangements;
- the importance of the short-term borrowing arrangements as they relate to liquidity, capital resources, market-risk support, credit-risk support and other benefits;
- the reasons for the maximum amount of outstanding short-term borrowing during the period; and
- the reasons for any material difference between the average short-term borrowings for the reporting period and the period-end short-term borrowings.

  Although it is not clear if and when final rules on this topic will be issued, public companies should consider the ways in which their disclosures may need to change if the proposed rules are adopted in their current form during 2011.

- **Hedging Policy:** The Dodd-Frank Act requires the SEC to issue rules requiring disclosure in any proxy statement or consent solicitation material for an annual meeting of shareholders of whether a company's employees or directors (or their designees) are permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of equity securities granted by the issuer as compensation or otherwise held by the employee or director, directly or indirectly. It is important to note that the provisions do not require disclosure of actual hedging transactions, but instead only the issuer's policies in this regard. Furthermore, the rule does not require a public company to have a policy but instead just to state whether it permits directors and officers to hedge the risk of their equity securities. In advance of rule-making on this topic, it may be valuable for you to consider the following issues:

    - If you don't have a hedging policy, should you implement one?
    - If you do have a policy, you should examine any eventual rule-making closely to determine how your policy compares to standards promulgated by the SEC pursuant to the Dodd-Frank Act.
    - Do you or should you have different policies for directors and senior officers, on the one hand, and other employees, on the other hand?
    - If you have a policy, do you ban such hedging transactions or require pre-approval? What is the best practice for your company? Do you have insights as to the policies of your peers?

- **Disclosures regarding leadership structure:** Additionally, the Dodd-Frank Act requires that the SEC issue rules requiring companies to disclose in their annual proxy statements the reasons they have chosen to combine or separate the positions of chief executive officer and chairman of the board. This requirement appears to already be addressed by the disclosure rules adopted last December. Keep a watch for proposed rules issued under the Dodd-Frank Act to confirm whether they call for any new disclosures not currently required by the existing SEC rules.

- **Liquidity and Capital Resources:** In September 2010, the SEC also issued an interpretive release clarifying current MD&A requirements regarding liquidity and funding disclosures. This guidance was effective upon issuance and should be considered by public companies when preparing their year-end documents. The guidance directs companies preparing their MD&As to:

    - consider difficulties that might arise in accessing the debt markets and the consequences of relying on commercial paper or other short-term pricing arrangements;
    - examine the possibility that there might be a mismatch between the maturity of borrowing sources and assets funded by those sources, as well as the likelihood of changes in terms requested by counterparties and changes in the collateral valuation risks presented by counterparties;
    - identify and describe internal and external sources of liquidity, as well as material unused sources of liquidity; and
    - disclose known trends, demands, commitments, events or uncertainties that would result, or are reasonably likely to result, in the company's liquidity increasing or decreasing.

4. Whistleblower Program

In November 2010, the SEC issued proposed rules with respect to the Dodd-Frank Act whistleblower program, which is designed to incentivize the reporting of securities law violations to the SEC through payment of monetary rewards. Given the profile and controversial nature of these proposed rules, we have included an in-depth article on the proposed program in this issue of the *Schiff Hardin Public Company Adviser*, beginning on page 13.

5. Review Prior Year Disclosures in Light of Peer Group Precedents and SEC Comments

During last year's proxy season, public companies grappled with a set of new and amended proxy statement disclosure requirements issued by the SEC in December 2009. For a refresher on those rules, look back to our discussion at http://www.schiffhardin.com/publications/pubcomp_dec09/pubcomp_dec09index.html. These amendments to the disclosure rules touched upon a variety of corporate governance topics, including compensation risk, director qualifications, diversity, leadership structure and risk management. Many companies were faced with the difficult task of complying with these new requirements without the benefit of precedent or substantial guidance from the SEC as to the best approach for handling the enhanced disclosure obligations.

Given that we now have a year's worth of experience in complying with these enhanced rules, it may be a valuable exercise for companies to revisit and consider the effectiveness of their disclosures in last year's proxy statement in light of further guidance, developing practice and the disclosures of the company's peers. Directors may inquire as to how their companies' disclosures compared with those of their peers, both in terms of the actual governance practices as well as the substance, tone and depth of the disclosures. If you have not done so already, we suggest that you take the time to review the disclosures of your key peer companies with respect to each of the enhanced disclosure topics from last year and consider whether you want to make any revisions to your company's practices or disclosures.

Additionally, companies can now benefit from a year's worth of SEC comments on the enhanced disclosures. A review of comments the SEC frequently made as to the proxy statement disclosures of other companies can be instructive and point out particular issues to evaluate critically in the upcoming proxy season. Specifically, we note the following common comments seen in SEC comment letters from this past year:

- **Board Leadership Structure:** On this point, the most frequent comment of the SEC staff was a request for further explanation of why the particular leadership structure the company has chosen (in particular, combined or separate chairman and CEO positions) is in the best interest of the company's shareholders, under the circumstances of the particular company.

- **Compensation Risk:** While the rule clearly provides that no disclosure is required if a company has determined that its compensation policies are not "reasonably likely to have a material adverse effect," a frequent comment of the SEC staff was to require additional explanation of the process undertaken to reach conclusions as to risks arising from compensation policies and practices, particularly where the company was silent on the issue.

- **Director Qualifications:** On this point, the most frequent comment of the SEC staff was that companies should avoid a narrative recitation of a director's resume highlights, but should instead focus on a specific enumeration of experience, qualifications, attributes or skills that led to the selection of that individual for board membership, taking into account the company's particular business and governance structure. The comments seem to be pressing for a more explicit linkage between director qualifications and the specific profile of the company. The comments also re-emphasize that the requirement that a company disclose

the "specific experience, qualifications, attributes or skills" that led the board to conclude that such director should serve on the board applies to all directors, not just those up for election in a given year.

- **Risk Management:** A common comment of the SEC staff concerning risk management was a request for more fulsome discussion of the connection between the board's role in managing risk and the chosen leadership structure for the board.

- **Diversity:** With respect to diversity disclosures, the SEC staff appears to be seeking more fulsome disclosure on the exact manner in which diversity is taken into account in the director nominee selection process. SEC staff comments also asked for further disclosure on the existence of a board or committee policy on diversity, how such a policy is implemented and how its effectiveness is evaluated.

6. Proxy Access

In late August 2010, the SEC adopted new "proxy access" rules requiring public companies to permit shareholders or groups of shareholders, under certain circumstances, to include their director nominees in the companies' annual meeting proxy statements and forms of proxy. Those new rules, which were originally scheduled to become effective on November 15, 2010, were detailed in our last issue of *The Schiff Hardin Public Company Adviser*, a copy of which can be found at http://www.schiffhardin.com/binary/public_companies_adviser-Sept2010.pdf. In light of, and pending the resolution of, the petition filed with the U.S. Court of Appeals for the D.C. Circuit by the U.S. Chamber of Commerce and the Business Roundtable, the SEC stayed the effectiveness of the new rules. The timing of resolution of the legal challenges to the proposed rules and whether and when the stay will be lifted is not clear, although it appears likely the proxy access rules will not be applicable to the Spring 2011 proxy season.

Nevertheless, we believe public companies and their boards can benefit greatly from actions undertaken in advance of the effectiveness of the proxy access rules. In particular, consider the following:

- **Be Ready:** Even if proxy access is not effective for 2011 and must be tailored to avoid legal challenges, proxy access in some fashion is likely to be adopted at some point in the future, as the concept has gained substantial support among activist shareholders, institutions and proxy advisory firms in recent years. Moreover, activist shareholders and others that had intended to make use of proxy access in 2011 may revert back to the normal shareholder proposal or proxy contest to advance their own slates of director nominees this year.

- **Evaluate Your Shareholder Base and Consider Active Engagement of Major Shareholders and Shareholder Groups:** If you have not done so already, you should evaluate and actively monitor your shareholder base to determine potential or likely shareholder groups that may seek to take advantage of the proxy access rules or otherwise seek to advance competing director nominees. Taking a proactive approach, seeking to anticipate particular shareholder concerns and addressing those concerns may help to head off potential disruptive and expensive proxy fights. Management should consider steps to educate key

shareholder groups as to the company's policies and practices as a means to help avoid such shareholder nominations.

- **Consider Director Qualifications and Evaluation:** The December 2009 proxy disclosure enhancements concerning director qualifications and evaluations may have highlighted certain weaknesses or sources for criticism of your current director slate. With the potential advancement of proxy access and the potential for increased shareholder nomination campaigns, it becomes even more important now to engage in a comprehensive and candid assessment of current director qualifications and board characteristics to ensure that individual directors or the board in general are not easy targets for a "vote against" campaign.

- **Consider Changes to Governance Policies and Committee Charters:** Companies should consider the need to revise provisions of the nominating and governance committee charters or other governance documents to take account of the potential need for heightened oversight responsibilities for the review of shareholder nominees. Companies may also wish to revisit certain corporate governance and director policies to ensure confidentiality and control of public dissemination of information for those cases where shareholder nominees have close ties to particular special interests or shareholder rights groups.

7. Recent ISS Guidance

Recent years have seen a rise in the influence of proxy advisory firms, particularly ISS, in establishing best practices on governance and compensation issues for many public companies. It appears that this trend will continue and that these firms' views and policies will continue to be a driving force for companies in the coming years. Thus, as you prepare for the upcoming proxy season, you should continue to remain familiar with recent guidance issued by proxy advisory firms and how that guidance relates to your particular compensation and governance policies and practices, particularly where these firms' recommendations are highly influential to significant shareholders. In particular, consider:

- ISS GRId ratings for your company,

- the ISS 2010 Postseason Report, and

- ISS' recently issued 2011 Voting Policy Updates.

We have provided a detailed discussion of the 2010 Postseason Report and the 2011 Voting Policy Updates in this issue of the Schiff Hardin Public Company Adviser, beginning on page 16 below. Additionally, see the last issue of *The Schiff Hardin Public Company Adviser* at http://www.schiffhardin.com/binary/public_companies_adviser-Sept2010.pdf for a detailed discussion of the GRId rating system.

Analysis of the SEC's Proposed Rules Regarding Whistleblower Incentives and Potential Impacts on Internal Corporate Compliance Programs

On November 3, 2010, the SEC proposed rules to implement Section 21F of the Exchange Act, "Securities Whistleblower Incentives and Protection," which was added by Section 922(a) of the Dodd-Frank Act. A copy of the proposing release is available at http://www.sec.gov/rules/proposed/2010/34-63237.pdf. Section 21F established a whistleblower program that requires the SEC to pay an award, under rules prescribed by the SEC and subject to limitations, to certain eligible whistleblowers — simply stated (subject to many conditions), to one who provides original information that leads to a recovery of sanctions by the SEC that exceed $1 million.[1] This article describes how the program would operate under the proposed rules and focuses on how the SEC's proposed rules regarding whistleblower incentives relate to, and potentially undermine, a company's internal corporate compliance program, such as a program established pursuant to Section 301 of the Sarbanes-Oxley Act of 2002 (now Exchange Act Section 10A(m)(4)).

In accordance with Section 21F, the SEC's proposed rules provide financial incentives to persons, including corporate employees, who "voluntarily" provide the SEC with "original information" that is "derived from [the whistleblower's] independent knowledge or independent analysis," "not already known to the [SEC] from any other source, unless [the whistleblower] is the original source of the information" and "not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit or investigation, or from the news media, unless [the whistleblower is] a source of the information." If the information eventually leads to a successful enforcement action in which sanctions exceed $1 million, the whistleblower(s) will receive between 10 and 30% of the collected sanctions. The exact amount awarded to the whistleblower within the prescribed range is decided by the SEC based on the significance of the information and the amount of assistance provided, among other factors. The SEC's proposed rules impose significant conditions, limitations and requirements pertaining to these incentives, including procedures and forms for applying for awards and SEC decision-making, so that the path to actually receiving an award is no cakewalk.

The potential significance of this award regime cannot be overstated, whatever the final form of the SEC's implementing rules. The statute is intended to provide a strong incentive for whistleblowing — a *minimum* award of 10% of the total amount recovered.[2]

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1 The comment period expired on December 17, 2010, and final rules are to be issued no later than April 21, 2011. However, any report made to the SEC on or after the effective date of the Dodd-Frank Act is eligible for an award under the program. Dodd-Frank § 924(b).

2 For instance, consider that if the law had been in effect and a whistleblower report triggered the SEC investigation of Goldman Sachs that evolved into the recent $550 million settlement, the award would have been at least $55 million.

The SEC has already disclosed an increase in tips.[3] While this program may result in many meritless reports, common sense suggests that there will be a number of reports of actual violations subject to SEC enforcement action. The rules have been written in a simplified form, to facilitate reports without the need for assistance from counsel.

A significant concern raised by the availability of the whistleblower awards under the Dodd-Frank Act is that whistleblowers have a potentially significant financial incentive to bypass internal corporate compliance programs that provide for, and in many cases require, internal reporting of violations of the law and instead to report securities violations directly to the SEC. The SEC has acknowledged in the proposed rules a need to accommodate these two reporting regimes.

The proposed rules seek to address this concern in several ways. First, whistleblowers who report information internally before going to the SEC will be deemed to have reported the information to the SEC as of the date the information was internally disclosed, as long as the whistleblower submits the same information to the SEC within 90 days of the internal disclosure. This way, a whistleblower is not disadvantaged vis-à-vis someone who goes directly to the SEC. (Recall only the person who provides information *not already known to the SEC* is eligible for an award.) Second, under its proposed standards for calculating the whistleblower's award, the SEC may award a higher percentage if the whistleblower reported a violation internally in accordance with internal corporate compliance programs prior to reporting to the SEC.[4] The SEC has also indicated that it expects, in certain circumstances, that the SEC will, "upon receiving a whistleblower complaint, contact [the] company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back."

The SEC has generally excluded from eligibility for an award persons who are responsible for implementing a corporate compliance program, so that, for example, they cannot use information they obtain in that capacity to make an eligible report to the SEC. Specifically, the proposed rules provide that a whistleblower award will not be granted for information obtained in any of the following ways: (1) through a communication subject to attorney-client privilege or as a result of a client legal representation, subject to disclosure that is permitted by attorney conduct rules; (2) through the performance of an engagement required under the securities laws by an independent public accountant; (3) where the whistleblower has legal, compliance, audit, supervisory or governance responsibilities for an entity and the information was

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[3] SEC Chairman Schapiro has testified, "Already, since the passage of the Act, we have seen a slight uptick in the number of tips and complaints received, and, more importantly, an uptick in the quality of complaints." Testimony on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 30, 2010)

[4] Proposing Release, p. 51. This factor is not, however, listed among the criteria set forth in the rule itself but rather is one of many factors the SEC says it would take into account under the broad discretion provided by Proposed Rule 21F-6. The SEC noted that internal reporting "is not a requirement for an award above the 10 percent statutory minimum and whistleblowers will not be penalized if they do not avail themselves of this opportunity for fear of retaliation or other legitimate reasons." Proposing Release, p. 51.

communicated to the whistleblower with the reasonable expectation that the whistleblower would take steps to cause the entity to respond appropriately to the violation, *unless the entity did not disclose the information to the SEC within a reasonable amount of time or proceeded in bad faith*; (4) otherwise from or through any entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information within a reasonable amount of time or proceeded in bad faith; or (5) by a means or in a manner that violates applicable federal or state criminal law.

Though the proposed rules supposedly are designed to eliminate any incentive to bypass internal corporate compliance programs in favor of direct SEC reporting, the SEC explicitly rejected requiring internal reporting as a prerequisite for making a report to the SEC, regardless of how vigorous the internal program is. The SEC stated that "while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections." Thus, even if the whistleblower violates the company's internal corporate compliance programs, such as where an employee is obligated under the program to report any wrongdoing internally, he could still be eligible for an award under the SEC's proposed rules. Ultimately, therefore, one may still bypass the internal corporate compliance program and go straight to the SEC without any adverse impact on eligibility for an award, in spite of the SEC's efforts not to discourage compliance with the program.

Corporate compliance programs that provide for internal reporting of violations also must now take into account that the Dodd-Frank Act has substantially enhanced the non-retaliation protections for whistleblowers that were added by Sarbanes-Oxley.[5] Many corporate compliance programs provide that it is a violation of the program to fail to report a violation, and that sanctions for a violation of the program can include dismissal. Corporations should, at the very least, be extremely cautious when enforcing the failure to report provision of a program.

There has been widespread criticism of the SEC's failure to more strongly encourage reporting through established compliance programs, thereby giving corporations the opportunity to address wrongdoing on a timely basis. If there is no internal report and the whistleblower goes directly to the SEC, the wrongdoing may continue undiscovered until the SEC Division of Enforcement starts asking questions — hardly a desirable outcome. Furthermore, the proposed rules do not provide that awards are completely foreclosed in the event of civil liability.[6] Indeed, under the proposed rules someone who is civilly (though not criminally) liable in connection with the reported wrongdoing would not be precluded from receiving an award if he timely blew the whistle on

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[5] Compare Dodd-Frank § 922(a), adding Section 21F(h) to the Exchange Act, with Sarbanes-Oxley § 806, adding 18 U.S.C. § 1514A. In particular, the Dodd-Frank Act adds a direct federal court cause of action for damages for retaliation for making a report, where the remedy is reinstatement and two times the amount of back pay, as well as attorney's fees.

[6] Proposed Rule 21F-15. In the request for comments, the SEC asks, "Should we instead exclude any wrongdoer from being eligible to receive an award categorically, or in particular circumstances?" (Proposing Release, p. 84)

himself. This framework poses at least some risk that a participant in the wrongdoing would not report himself to the company (though presumably he would suspend his participation) but instead would go to the SEC, hoping both to reap some reward as well as obtain lenient treatment in any SEC enforcement proceeding.[7]

The corporate community can only hope that these concerns will not be overlooked as the SEC addresses an overwhelming rulemaking agenda under the Dodd-Frank Act and proceeds to finalize the whistleblower rules by late April 2011.

ISS 2010 Postseason Report and 2011 Policy Updates — Lessons Learned and What to Expect in the Coming Proxy Season

Institutional Shareholder Services, or ISS, a well-known proxy advisory firm, published two documents that are valuable to public companies and their directors in preparing for the coming proxy season. On November 12, 2010, ISS published its 2010 Postseason Report on the prior proxy season, and on November 19, 2010, ISS published its annual update of the policies used when crafting voting recommendations to its institutional investor clients. ISS might have enhanced influence this proxy season because all public companies must hold shareholder advisory votes on executive compensation ("Say on Pay" votes) as well as a separate vote on how often Say on Pay votes should be held going forward ("Say on Frequency" votes). These documents from ISS, taken together, provide public companies valuable insight as to the shape of the coming proxy season.

2010 Postseason Report

Compensation

ISS reviewed 299 shareholder Say on Pay votes that took place in 2010 and found that, although these votes averaged nearly 90% in favor of the company's compensation practices, three companies (KeyCorp, Motorola, and Occidental Petroleum) did not gain majority shareholder support for their pay packages. The reasons ISS gave for the lack of shareholder support included a disconnect between pay and performance, a favorable bonus adjustment even when goals were not met, and a large disparity between one CEO's compensation and the compensation of the next-highest paid officer. While the high general support that Say on Pay votes received from shareholders should be an encouraging sign to companies, directors should consider whether any lessons are to be gleaned from those companies whose compensation practices did not receive majority support.

ISS also noted that many companies responded to pressures to reduce non-performance-related compensation in 2010, finding that at least 228 companies revised or eliminated these provisions from their compensation packages. In many cases, companies eliminated provisions for excise tax gross up payments to be made

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[7] See SEC Division of Enforcement, Enforcement Manual, pp. 123-26 (2010), http://www.sec.gov/divisions/enforce/enforcementmanual.pdf, which allows favorable treatment for an individual who provides certain cooperative efforts to the SEC in an investigation.

to executives pursuant to a change in control. These payments, intended to shield executives from government taxes on "golden parachutes" associated with a company buyout, have become unpopular from a shareholder standpoint, and ISS noticed a strong trend against these payments. These payments are "problematic pay practices" in the eyes of ISS that will likely lead ISS to recommend against the company's Say on Pay vote (discussed in greater detail below). Public companies and their directors are encouraged to carefully review their company's pay packages in advance of the coming proxy season.

Governance Issues

In 2010, both the number of governance proposals brought to a vote (392) and the number of proposals that received majority approval (30.6%) were down from 2009 (435 and 36.8%, respectively). However, the approval rate in 2010 remained higher than 2008 and 2007, so it remains to be seen if the 2010 decline is the beginning of a larger trend. In 2010, individual shareholders brought the majority of successful shareholder proposals, showing that a proposal does not need to be brought by a large shareholder or one with means to bring publicity to the proposal if the proposal itself is popular with shareholders. Seventy of the governance proposals were Say on Pay vote resolutions, which will no longer be brought in the future as shareholder proposals, as such votes have become mandatory. Other widely brought (and widely supported) resolutions were those seeking to rescind supermajority voting rules in favor of a simple majority standard for approving bylaw changes, transactions or other matters, and those seeking to remove provisions for staggered elections of boards of directors.

Support for proposals seeking an independent board chair declined in 2010, which was a surprise to commentators. This decline might be partially explained by the fact that a number of company boards expanded the role of their lead director before the 2010 proxy season. In addition, several high-profile companies (including Bank of America and Citigroup) appointed an independent board chair, thereby lowering the profile of this reform in the media as popular interest abated. Finally, 14 companies were able to omit such proposals from their proxy statements for various reasons based on no-action guidance from the SEC, and some of these companies had received high shareholder interest in this reform in the past.

Shareholder Dissent

While many anticipated that more directors would fail to receive majority support in uncontested board elections in 2010 than in 2009 due to the end of broker voting, the number of directors that did not receive a majority declined slightly. As of September 1, 88 directors failed to receive majority support, down from 93 in 2009. The issues that contributed to these withhold votes included serving on a board that failed to act on shareholder proposals that received majority support in prior years, serving at a company that engaged in objectionable executive compensation practices, failure to attend all meetings and serving on so many boards that there was doubt as to whether the directors could fulfill their duties to the company. The upcoming Say on Pay votes might reduce the number of votes withheld as they give shareholders an opportunity to directly weigh in on compensation practices. However, it is an open question whether any reduction in withhold votes will be merely deferred until 2012, when directors of companies that do not respond to compensation issues raised by a negative 2011 Say on Pay vote will have to face unhappy shareholders.

2011 Policy Updates

Say on Pay Votes

ISS evaluates public company executive compensation practices on a case-by-case basis making voting recommendations regarding Say on Pay votes. Executive compensation practices may also influence ISS to recommend against the re-election of compensation committee members (or even the whole board) if no Say on Pay votes are being held that year or "egregious situations" relating to pay practices require such a recommendation.

ISS has revised its list of "problematic pay practices," that might alone "warrant withhold or against votes in most circumstances." These practices are (i) repricing or exchanging underwater stock options without first seeking shareholder approval; (ii) paying out excessive perquisites or tax gross-ups; and (iii) entering into new agreements, or extending existing agreements, that pay out change-in-control payments in excess of three times salary and bonus and/or have excise tax gross-ups, or pay out even without "involuntary job loss or substantial diminution of duties."

In prior years a company could avoid an ISS recommendation to vote against the company's problematic practice or directors by committing to ISS that it would eliminate a problematic pay practice going forward. Effective immediately, ISS will no longer take such commitments into account when making its recommendation. Public company directors should keep this stance in mind as they prepare for the Say on Pay vote to be held this season.

Frequency of Say on Pay Votes

ISS has instituted a policy to recommend in favor of annual Say on Pay votes at all companies rather than every two or three years.

Director Elections

ISS has revised its policy of recommending against/withhold from directors who have attended less than 75% of the board and applicable committee meetings, unless the company could provide ISS with an excuse for the director's low attendance rate. Under the new terms, the only reasons ISS will consider for a director's absence are medical issues and family emergencies, and then only if disclosed in an SEC filing. In addition, ISS will not recommend against or withhold if the director missed only one meeting and that director has only been on the board for three or fewer meetings.

ISS has previously recommended withhold/against votes for the entire returning board if the board does not implement a shareholder proposal approved by a majority of the shares outstanding the prior year or approved by a majority of the votes cast for the prior two consecutive years. For 2011, however, ISS will recommend negative votes on the election of directors if (i) the board does not implement a shareholder proposal that was approved by a majority of the shares outstanding in the prior year or (ii) the board does not implement a shareholder proposal that was approved by a majority of votes cast in the prior year and one of the two previous years. ISS has stated that this change is to focus attention on the vote results for consecutive voting opportunities. Even if a shareholder proposal is absent from the ballot in one year (for instance, through an exclusion allowed by the SEC), the policy will still apply where there is a history of majority support of shareholders.

Shareholder Action by Written Consent
ISS is broadly in favor of shareholder proposals requesting that shareholders be permitted to act by written consent, and will generally vote in favor of such proposals. However, the update recognizes that action by written consent can be abused in certain circumstances, particularly in hostile situations when a hostile acquirer might use action by written consent to bypass a company's procedural protections. As a result, ISS will consider written consent proposals on a case-by-case basis when the company has the following attributes: (i) shareholders who own greater than 10% of the shares have the right to call a special meeting with few restrictions; (ii) directors are selected by a majority voting standard in uncontested elections; (iii) the company has no non-shareholder-approved poison pill; and (iv) the board is annually elected.

Conclusion
Both ISS documents lead to the conclusion that 2011 will be the year of Say on Pay. Shareholders in 2010 showed their interest in this issue by passing resolutions demanding a Say on Pay vote, taking a close look at Say on Pay votes that were put before them, and withholding votes from directors of a few companies that had executive compensation packages that shareholders found objectionable. All of that energy will be focused in 2011 on the mandated Say on Pay vote itself, and directors must be prepared to take a hard look at their executive compensation practices, paying particular attention to any "problematic pay practices." In addition, the continuing rise of, and increasing votes in favor of, shareholder proposals from individual shareholders should serve as a warning that these proposals will likely increase in coming years. Just as Say on Pay proposals went from being relatively uncommon five years ago to mandatory today, the pressing corporate governance topics of 2015 might appear first as a few unrelated proposals in this proxy season.

Also of Interest

The Delaware Supreme Court Upholds Net Operating Loss Pill.
The Delaware Supreme Court recently affirmed the Court of Chancery's decision upholding (i) the adoption of a shareholder rights plan with a 4.99% triggering threshold that was designed to protect the usability of the corporation's net operating losses ("NOL"), and (ii) the decision by a special committee to exercise an exchange mechanism in the plan to dilute the triggering stockholder. *See Versata Enterprises Inc. v. Selectica, Inc.,* 2010 WL 3839786 (Del. Oct. 4, 2010). After Versata Enterprises, Inc. intentionally triggered Selectica, Inc.'s shareholder rights plan, Selectica's board of directors chose to exercise an exchange option under the plan whereby each outstanding right (other than Versata's) was exchanged for one share of common stock, diluting Versata's ownership from 6.7% to 3.3%. In scrutinizing the decisions of the Selectica board of directors, the Delaware Supreme Court applied a two-part analysis from *Unocal Corp. v. Mesa Petroleum Co.* Under the *Unocal* framework, the court first considered whether Selectica had reasonable grounds to believe that there was a threat to its corporate enterprise. The court concluded that, based on the board's documented review with financial advisors of the value of Selectica's NOLs, the board's conclusion that the NOLs were worth preserving and that Versata's actions risked impairment of such NOLs was reasonable. Applying *Unocal's* second prong, the court concluded that Selectica's actions were not preclusive of potential takeovers because it did not make Versata's ability to run a successful proxy contest realistically unattainable. The *Selectica* decision demonstrates the case-by-case analysis the Delaware courts will apply with respect to the adoption of shareholder rights plans and

their implementation. In noting that the *Unocal* analysis to be applied is context-specific, the Delaware Supreme Court emphasized that its ruling should not be read as "generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation with or without NOLs."

SEC Explores Possible Regulation of Proxy Advisory Service Providers.
In the SEC's July Concept Release on the U.S. Proxy System, the SEC explored the possible regulation of proxy advisory services providers like Glass, Lewis & Co. and ISS. Many players in the market appear to have appreciated the opportunity to turn the table on such stalwart proponents of governance-related regulations. The U.S. Chamber of Commerce, for instance, proposed a framework for "standards" that each advisory firm would be required to adopt, which would govern such advisory firm's formulation of policies on an annual basis. Some larger, more management-centric law firms have advocated for the registration of proxy advisors under the Investment Advisers Act and for the application of certain proxy solicitation rules to such firms. The Business Roundtable, representing chief executives of the United States' largest companies, has advocated for the disclosure of proxy advisor's conflicts of interest, including relationships with proponents of shareholder proposals on which they are making recommendations, as well as for disclosure of the data, methodology and rationales for making such recommendations. No rules have yet been proposed, but we will continue to monitor any developments in this area.

SEC's Current Schedule for Implementation of Executive Compensation and Corporate Governance-Related Provisions of Dodd-Frank
On September 18, the SEC published its tentative schedule for adopting rules under the Dodd-Frank Act. The SEC periodically updates this schedule on its Web site (www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml). Based on the SEC's published schedule, as updated, and actions taken by the SEC to date, the Dodd-Frank Act executive compensation and corporate governance provisions that require SEC rulemaking likely will not be effective for the 2011 proxy season for calendar year companies. However, Dodd-Frank's Say on Pay and Say on Frequency provisions, which do not require SEC rulemaking in order to be mandated, will be in effect for the 2011 proxy season for calendar year companies. The current timeline for the executive compensation and corporate governance provisions is as follows:

- **Section 951** — requiring advisory votes of shareholders about executive compensation and golden parachutes as well as specific disclosure of golden parachutes in merger proxies. The SEC proposed rules to implement Section 951 of the Dodd-Frank Act on October 18, 2010 (Release Nos. 33-9153; 34-63124). For a summary of these proposed rules, please see our Public Company Client Alert at http://www.schiffhardin.com/publications/pubcomp_102010/pubcomp_102010index.html. Based on the SEC's current schedule, final rules should be enacted between January and March of 2011. As noted above, however, the provisions on Section 951 of the Dodd-Frank Act are effective and applicable to the 2011 proxy season regardless of final action by the SEC.

- **Section 952** — requiring disclosure about the role of, and potential conflicts involving, compensation consultants as well as the adoption of rules that require the exchanges to adopt listing standards that include certain enhanced independence requirements for members of issuers' compensation committees. Section 952 also directs the SEC to establish competitively neutral independence factors for all who

are retained to advise compensation committees. Based on the SEC's current schedule, proposed rules are expected to be released between January and March of 2011 and final rules should be enacted between April and July of 2011.

- **Section 953** — requiring additional disclosure about certain compensation matters, including pay-for-performance and the ratio between the CEO's total compensation and the median total compensation for all other company employees The SEC expects to release proposed rules between April and July of 2011.

- **Section 954** — requiring the SEC to direct the exchanges to prohibit the listing of securities of issuers that have not developed and implemented compensation clawback policies. The SEC expects to release proposed rules between April and July of 2011.

- **Section 955** — requiring additional disclosure about whether directors and employees are permitted to hedge any decrease in market value of the company's stock. The SEC expects to release proposed rules between April and July of 2011.

Spotlight on Schiff Hardin

Equity Forward Transaction for NiSource Inc.

In September 2010, Schiff Hardin represented NiSource Inc. in an equity forward transaction that provided over $336 million to fund NiSource's infrastructure investment growth opportunities and for general corporate purposes. The transaction involved a public offering of 21.1 million shares of NiSource common stock sold by Credit Suisse Securities (USA) LLC ("Credit Suisse") as forward seller in connection with a forward sale agreement between NiSource and an affiliate of Credit Suisse. At NiSource's request, Credit Suisse borrowed the shares sold in the public offering from third parties and sold them to the underwriters in the offering. NiSource received no proceeds from the offering and sale of the borrowed shares; however, NiSource will receive an amount equal to the net proceeds from the offering and sale of those shares, subject to certain adjustments, upon physical settlement of the forward sale agreement.

The forward sale agreement provides for settlement on one or more dates to be specified by NiSource within two years after the public offering. Subject to certain exceptions, NiSource has the right to elect the form of settlement for each settlement date. Assuming NiSource elects physical settlement, it will deliver up to an aggregate of 21.1 million shares of its common stock in exchange for cash proceeds at the forward sale price, which was initially the same as the public offering price less the underwriting discount. The initial forward sale price is subject to adjustment on a daily basis based on a floating interest rate factor equal to the federal funds rate less a spread and to certain other adjustments.

Newell Rubbermaid's Capital Structure Optimization Plan

Schiff Hardin assisted longtime client Newell Rubbermaid with the planning and successful execution of a capital structure optimization plan.

The plan included four carefully orchestrated transactions:

- An accelerated stock buyback plan with Goldman, Sachs & Co. for $500 million of Newell Rubbermaid common stock;

- The issuance of $550 million of senior notes due 2020;
- A cash tender offer for a series of high coupon notes; and
- An exchange of newly issued common stock and cash for in-the-money convertible senior notes and the unwind of a related call spread.

The plan was designed to simplify the client's capital structure and reduce its interest expense.

The series of complicated transactions showcased Schiff Hardin's deep experience in securities offerings, tender offers and exchange offers. Over the course of the representation, Schiff Hardin played a fundamental role in navigating the securities laws. The transactions drew upon the expertise of, and careful coordination among, lawyers from a wide variety of practice areas, including corporate and securities, financial derivatives, market regulation and tax.

Thursday, January 20, 2011

2:00 – 5:00 p.m.
Roundtable discussion

5:00 – 6:00 p.m.
Reception and hors d'oeuvres
at the Metropolitan Club

Schiff Hardin's Reception and Conference Center
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RSVP by January 11!
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