Tuesday, October 26
4:30pm-6:00pm

805 - SEC Update

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Session 805

Faculty Biographies

Sophie Hager Hume

Sophie Hager Hume serves as vice president, assistant general counsel - corporate & securities, and assistant secretary at Starbucks Coffee Company, Seattle, Washington. She has primary responsibility for corporate securities, corporate finance, corporate governance, general corporate matters and domestic subsidiary maintenance.

Prior to joining Starbucks, Ms. Hume was first vice president and assistant secretary at Washington Mutual Bank, Seattle, Washington, and was responsible for securities and corporate law and corporate governance.

She is a member of the ABA Business Law Section, the Society of Corporate Secretaries and Governance Professionals and ACC. She is an active volunteer in the Seattle public schools.

Ms. Hume graduated from Brooklyn Law School, Brooklyn, NY, where she was a member and comments editor of the Brooklyn Law Review. She also holds a Masters degree from New York University's Institute of Fine Arts.

Robert Lindsey

Robert Lindsey is a Corporate Securities Counsel at Dell Inc. His responsibilities relate to SEC reporting, corporate finance, corporate governance, and mergers and acquisitions.

Prior to joining Dell, Mr. Lindsey was an associate at Gibson Dunn & Crutcher, LLP.

Mr. Lindsey graduated from the University of Virginia School of Law and Harvard University.

Janet Wright

Janet B. Wright is vice president-corporate, securities and finance counsel and assistant secretary at Dell Inc. She has primary responsibility for corporate securities, corporate finance, corporate governance, financial services, and general corporate matters.

Ms. Wright is a member of the American Bar Association Section of International Law and Practice and she is the former chair of the International Section's Women's Interest Network. She is also a member of the Society of Corporate Secretaries and Governance Professionals Securities Law Committee and the American Corporate Counsel Securities Law Committee.

Ms. Wright graduated from the Southern Methodist University School of Law.

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Walter Van Dorn, Jr.

Walter Van Dorn is a Partner in SNR Denton's Corporate and Securities Practice. He advises issuers, underwriters and financial institutions on securities and capital market transactions such as IPOs and other SEC-registered public offerings of both equity and debt securities, securities offerings under Rule 144A and Regulation S and mergers and acquisitions. In addition, Mr. Van Dorn advises clients on all aspects of compliance with the federal securities laws, including the Securities Act and the Exchange Act, as well as investment company and investment advisory matters and broker-dealer regulation. His clients include financial services, industrial and technology companies around the world.

Prior to entering private practice, Mr. Van Dorn spent seven years at the SEC in Washington, D.C. where he was special counsel in the Division of Corporation Finance. His areas of responsibility included offerings of equity and debt securities and mergers and acquisitions. He also participated in SEC rule-making initiatives such as those amending periodic reporting forms under the Exchange Act for public companies, amending Regulation S and exempting certain tender and exchange offers and rights offerings from Securities Act registration requirements and from Exchange Act tender offer rules.

Mr. Van Dorn is listed as one of the leading capital markets lawyers Legal Media Group's "Guide to the World's Leading Capital Markets Lawyers". He is a frequent lecturer and writer on the subject of U.S. securities laws and has spoken at conferences around the world.

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Dodd-Frank Act
Corporate Governance & Executive Compensation

- On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").
- Many of the details and much of the impact of Dodd-Frank may not be known for many months, as many of the required rulemakings leave significant discretion to the agencies as to how to implement the broad provisions of Dodd-Frank.
- A number of provisions important to public companies, however, will go into effect in the near-term, including those related to corporate governance and executive compensation.

Dodd-Frank Act
Compensation Committee Independence

- Requires the SEC to adopt rules that prohibit a company from being listed on a national securities exchange or association unless all compensation committee members are independent.
- Heightens the compensation committee independence standards currently required. Independence requirements are similar to the provisions added by SOX for audit committee member independence.
- "Independence" will be determined based on all relevant factors, including any consulting, advisory, or other compensatory fee paid by the company.
- Requires the SEC to adopt final rules no later than July 16, 2011.

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Dodd-Frank Act
Compensation Consultants

- Compensation committees may select a compensation consultant or other adviser only after considering independence factors to be determined by the SEC.
- The independence factors to be considered include:
  - The provision of other services to the company by the adviser.
  - The amount of fees the adviser receives as a percentage of the adviser's total revenue.
  - The policies and procedures of the adviser are designed to prevent conflicts of interest.
- For any annual meeting on or after July 21, 2011, each company must disclose whether the compensation committee obtained the advice of an adviser, whether the work of the adviser raised any conflict of interest, and, if so, the nature of the conflict and how it was resolved.
- Provisions are similar to SOX provisions with respect to audit committees.

Dodd-Frank Act
Say-on-Pay

- Requires non-binding shareholder votes on executive compensation.
- At least every three years, a company must provide for a separate non-binding shareholder vote to approve compensation of the company's named executive officers.
- At least every six years, shareholders must determine whether say-on-pay votes will occur every one, two, or three years.
- Say-on-pay provisions are effective for a company's first annual meeting occurring on or after January 22, 2011.

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Dodd-Frank Act
Golden Parachutes

- New Section 14A provides that any proxy statement for a shareholders meeting to approve an acquisition, merger, or sale of all substantially all of the company's assets must:
  - Disclose, in a clear and simple form, any agreements or understandings with any named executive officer or the acquiring entity concerning any type of compensation that is based on or relates to the transaction.
  - Include a separate non-binding shareholder vote to approve any such golden parachute arrangement and the amount of compensation to be received.
- Institutional investment managers subject to Section 13(f) of the Exchange Act must report at least annually how they voted on any say-on-pay and golden parachute resolutions.

Dodd-Frank Act
Pay for Performance

- Dodd-Frank directs the SEC to adopt rules requiring a company to disclose in an annual meeting of shareholders proxy, clear description of the compensation required to be disclosed under Regulation S-K, Item 402.
- The "Pay for Performance" disclosure must include information that shows the relationship between executive compensation actually paid and the financial performance of the company, taking into account any change in the value of the company's shares.
- Pay for Performance rules are to be adopted by the SEC. No deadline for implementation is specified.

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Dodd-Frank Act
Internal Pay Comparison

- Directs the SEC to amend Item 402 to require a company to disclose (a) the median total compensation of all company employees, excluding the company's CEO, (b) the annual total compensation of the company's CEO, and (c) the ratio of the median total compensation of all employees and the CEO's total compensation.
- This provision is subject to rulemaking by the SEC. No deadline for implementation is specified.

Dodd-Frank Act
Compensation Clawbacks

- Adds a new Section 10D to the Exchange Act, requiring the SEC to direct national securities exchanges and associations to prohibit the listing of any company that does not develop and implement a compensation "clawback policy" with respect to incentive based compensation.
- New Section 10D differs from the comparable provisions set forth in Section 304 of Sarbanes-Oxley in two major respects:
  - New provision applies to all current and former executive officers, not just the CEO and CFO.
  - New provision applies to any accounting restatement due to material noncompliance, not just to those that are the result of misconduct.

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Dodd-Frank Act
Certain Miscellaneous Provisions

- **Regulation FD** – SEC is required to remove, from the provisions of Regulation FD, the exemption for entities whose primary business is the issuance of credit ratings.
- **Rule 436(g)** – Rule 436(g) is declared to be of no force or effect. Any rating organization providing a credit rating disclosed in a prospectus or registration statement (including through incorporation by reference) will be regarded as an expert and, as a result, a company must include the rating organization's consent as an exhibit to any Securities Act registration statement that discloses a security rating.
- **Hedging** – SEC is required to adopt rules requiring companies to disclose in annual meeting proxy statements whether any employee or director may hedge ownership of the company's equity securities.
- **Internal Controls** – Dodd-Frank exempts smaller companies that are not "accelerated filers" or "large accelerated filers" from compliance with the requirement for an auditor attestation to internal controls under Sarbanes-Oxley Section 404.

Regulation D

- **Disqualification from Regulation D private placement safe harbor** – Dodd-Frank requires that the SEC promulgate new rules making certain companies ineligible to rely on Rule 506 of Regulation D, the private placement safe harbor. Such ineligible companies include any company (or promoter) which (or who) (1) is subject to certain final orders by a state securities, banking or insurance authority, a federal banking agency or the National Credit Administration or (2) has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of a false filing with the SEC.
- **Change to "Accredited Investor" definition under Regulation D** – Dodd-Frank states that the threshold to qualify as an "accredited investor" under Regulation D will be $1 million excluding the value of the investor's primary residence. Previously such value was not excluded.

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Beneficial Ownership

- **Acceleration of beneficial ownership report filings** – Dodd-Frank authorizes the SEC to require investors to file reports under Sections 13 and 16 of the Exchange Act in order to disclose an acquisition of more than 5% and 10%, respectively, of a registered class of equity securities within less than the current ten days after the acquisition.

Conflict Minerals

- **Expanded disclosure of "conflict minerals" and extractives payments -** Dodd-Frank requires the SEC to promulgate rules that will require additional annual disclosure, most likely in the annual reports, by public companies under the following circumstances:
  - companies whose products contain cassiterite (tin ore), coltan, wolframite and gold must disclose annually **whether** they are sourcing these minerals from the Democratic Republic of Congo (DRC) or adjoining countries (Angola, the Republic of Congo (Brazzaville), the Central African Republic, the Sudan, Uganda, Rwanda, Burundi, Tanzania, and Zambia). If such minerals are being sourced from these countries, companies must submit to the SEC a report that describes the measures that the company has taken to exercise due diligence on the source and chain of custody of the minerals. This report must include an independent private sector audit conducted in accordance with standards established by the U.S. Comptroller General.
  - companies which engage in the commercial development of oil, natural gas, or minerals must disclose information relating to any payment that the company, any subsidiary, or any entity under the control of the company has made to a foreign government or the U.S. government for the purpose of the commercial development of oil, natural gas or minerals. The information required to be disclosed in the annual report must be provided in "interactive data format".

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Leadership Structure

- On December 16, 2009, the SEC adopted final rules, titled "Proxy Disclosure Enhancements", that require a company to discuss whether it has combined or separated the positions of Chairman of the Board and CEO and provide the reasons why it believes that this leadership structure is the most appropriate structure for the company.
- If the positions are combined, the company must also disclose whether it has designated a lead independent director and the role that director plays in the company's leadership structure.
- Dodd-Frank directs the SEC to issue rules that require a company to discuss in its annual meeting proxy statement the reasons for combining or separating the chairman/CEO positions.
- Because it appears that the SEC's rules on this topic already contain the information required by Dodd-Frank with respect to combining or separating the chairman/CEO positions, it is unclear whether the SEC will revisit its existing disclosure requirements.

Proxy Access

- On June 10, 2009, the SEC published a proxy access rule proposal for public comment. Proxy access refers to the ability of shareholders to include a director nominee in a company's proxy materials.
- The proposed SEC proxy access rule would:
  - create a new Rule 14a-11 that requires companies to include shareholder nominees for directors under prescribed circumstances; and
  - revise existing Rule 14a-8(i)(8) to allow shareholder proposals seeking to amend a company's governing documents regarding nominating procedures or disclosures related to shareholder nominations.
- Dodd-Frank amends Section 14(a) of the Exchange Act to explicitly authorize the SEC to adopt proxy access rules. Previously, there was some concern with whether the SEC had the authority to adopt this proposal.

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Proxy Access
Including Shareholder Director Nominations

- Proposed Rule 14a-11 would require companies to include in their proxy materials director nominees submitted by eligible shareholders if certain disclosure and procedural requirements are satisfied.
- Conditions that must be met include:
  - A minimum ownership threshold, which varies based on the size of the company. The minimum ownership thresholds are:
    - 1% for large accelerated filers;
    - 3% for accelerated filers; and
    - 5% for non-accelerated filers.
  - Nominating shareholders must have held the company's shares for at least one year.
  - A company is only required to include one shareholder nominee or, if greater, the number of shareholder nominees that represents 25% of the company's board of directors.

Proxy Access
Nominating Procedures

- Rule 14a-8(i)(8) currently permits companies to exclude shareholder proposals related to director elections. In 2007, the SEC amended this rule specifically to permit the exclusion of proxy access shareholder proposals.
- The SEC's proposed amendment to Rule 14a-8(i)(8) would require companies to include in their proxy materials proxy access proposals that would amend provisions of a company's governing documents relating to director nomination procedures or disclosures related to shareholder nominations.
- Shareholder proposals could only be excluded if the proposal conflicts with state law, proposed Rule 14a-11 regarding director nominations, or if the shareholder otherwise fails to satisfy SEC eligibility requirements for submitting proposals.

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Broker Non-Votes

- Currently, a broker's ability to vote shares is governed by the rules of the national securities exchange of which it is a member.
- For example, NYSE Rule 452 generally allows brokers to vote on "routine" proposals and sets forth those matters that are not routine.
- Rule 452 was last amended on July 1, 2009, to eliminate the ability of brokers to vote in their discretion when they have not received instructions from the beneficial owners of the securities with respect to the election of directors.
- Dodd-Frank reinforces the prohibition on discretionary broker voting for directors. Dodd-Frank requires each national securities exchange to adopt rules prohibiting discretionary voting by brokers (a) in the election of directors, (b) on executive compensation, and (c) on any other significant matters determined by the SEC.

Additional Hot Topics: Political Contributions

- On January 21, 2010, the U.S. Supreme Court, in *Citizens United v. Federal Election Commission*, ruled that restrictions on independent expenditures by corporations in federal elections violate the First Amendment.
- In response to this ruling, numerous investor activists have filed proposals asking companies to disclose their political contributions and their policies for making political contributions.
- In 2009, 29 proposals asking companies to provide more disclosure on their political contributions came to a vote, with an average "for" vote of 30%, up from an average "for" vote of 26% at 17 meetings in 2008.
- Various lawmakers have introduced state legislation related to this issue.
- On June 30, 2010, the SEC adopted new rules prohibiting registered investment advisers from making campaign contributions to elected officials to influence the awards of asset management contracts.

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Additional Hot Topics: New RiskMetrics “GRId” System

- In February 2010, RiskMetrics announced that it is replacing its Corporate Governance Quotient with a new tool that will help investors assess corporate governance related risks, including compensation-oriented risk.
- The new tool, called Governance Risk Indicators (GRId), will use approximately 70 variables to assess a company along the following four dimensions of corporate governance:
  - Board structure;
  - Compensation/remuneration;
  - Shareholder rights; and
  - Audit issues.
- Companies will receive an overall risk rating of “low”, “medium”, or “high” for each of the four primary categories.

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