Snell & Wilmer L.L.P.

THE CORPORATE
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contents

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The 2008 Annual Meeting Season

Dear Clients and Friends,

To help you prepare for the upcoming annual report and proxy season, this issue of Snell & Wilmer's Corporate Communicator highlights some of the issues your organization will need to consider in preparing its annual reports and proxy statements. To facilitate presentation of these important documents, we are delivering to our clients various materials, including a time and responsibility checklist, director and officer questionnaires and form board resolutions, all of which are updated, where necessary, to account for new developments. As always, we are eager to meet with you one-on-one to assist in helping you understand and comply with the topics summarized in this issue.

Although the upcoming proxy season does not have a development as significant as last year's new rules governing executive and director compensation, related party transactions, director independence and other corporate governance matters, companies should certainly not put the annual report and proxy preparation on auto pilot, particularly since there is plenty of new SEC guidance concerning the implementation of last year's executive compensation rule changes. The SEC strongly indicated this Fall that it believes many issuers still have a lot of work to do in order to meet the SEC's expectations concerning executive compensation disclosures. Indeed, the exclamatory question "Where's the analysis!" that John White (the SEC's Director of the Division of Corporation

Finance) posed in a recent address on executive compensation disclosure should become a mantra for all companies this proxy season. In addition to providing much needed guidance on executive compensation disclosures, the SEC's big event for the 2008 proxy season is the ability of issuers to utilize the new e-proxy rules which became effective in 2007 after the traditional proxy season had ended. We believe that the e-proxy rules, along with other recent SEC reforms implemented over the course of the last couple of years (such as electronic shareholder forums discussed below and the sweeping Securities Act Reform enacted at the end of 2005), signal a movement by the SEC to embrace the benefits that technological advancements can provide to public companies and their shareholders.

In this issue, we are including discussions concerning the SEC's 2006 executive compensation disclosure rules, the new e-proxy rules as well as other updates and reminders that will help you prepare for your 2008 annual meeting and keep you abreast of the latest developments from the SEC, New York Stock Exchange, Nasdaq, and Institutional Shareholder Services.

During 2008, members of our Business & Finance group will continue to publish the Corporate Communicator, host business roundtables, participate in seminars that address key issues of concern to our clients and sponsor conferences and other events targeted toward specific types of companies. We look forward to your participation in these future events.

We also include in this issue a tombstone page that highlights selected deals that Snell & Wilmer's Business Finance Group closed during a successful 2007. We are proud to report that for the sixth consecutive year, the *Corporate Board Member* designated Snell & Wilmer L.L.P. as the number one law firm to do business with in Arizona. As always, we appreciate your business, and look forward to helping you make 2008 a successful year for your organization.

Very truly yours,
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BUSINESS & FINANCE GROUP

Issues Affecting Your 2007 Annual Report and the Upcoming Proxy Season

Disclosure of Executive Compensation

On October 9, 2007, the staff of the Division of Corporate Finance of the Securities and Exchange Commission (the "SEC staff") provided guidance to public companies on the new executive compensation disclosure rules which became effective in November 2006. The guidance was born out of the SEC staff's previously announced targeted review of the executive compensation disclosure contained in the 2007 proxy statements of 350 public companies. The SEC staff's review was focused on large and mid-cap companies and intentionally sought to cover a broad range of industries. As mentioned above, in concert with the release of the SEC staff's report, John White, the Director of the Division of Corporation Finance, gave an address at the 2nd Annual Proxy Disclosure Conference in San Francisco and provided his own thoughts on the 2007 proxy season, which seemed to entail guarded optimism, seasoned with some continued criticism. While Mr. White was encouraged by the efforts of many registrants, he also made it clear that he was disappointed by the lack of "meaningful analysis" in the 2007 proxy disclosures.

Based on this recent SEC staff guidance, we believe that public companies can glean the following themes and points of emphasis for 2008 executive compensation disclosure:

- *Meaningful Analysis*: As Mr. White stated, companies need to focus on providing "meaningful analysis" on the "how" and "why" of specific executive compensation decisions. The Compensation Discussion and Analysis ("CD&A") should not include boilerplate disclosure, which many companies used year after year in connection with describing their compensation processes and philosophies in their compensation committee reports. In other words, among other things, companies should answer in the CD&A: "How they arrived at the particular levels and forms of compensation that they choose to award to their named executive officers?" and "Why they pay these particular forms and amounts of compensation?"

- *Presentation*: Companies should continue to search for ways to make their disclosure more (i) compliant with the SEC's plain English guidelines by using, among other things, overviews and layered disclosure and (ii) user-friendly by implementing tabular, graphic or other layout features which enhance an investor's ability to understand the disclosure.

- *Other Points of Emphasis*: The recent slew of SEC comment letters reflect other points of emphasis that companies should keep in mind as they prepare their 2008 executive compensation disclosure. In particular, the SEC staff indicated that they issued more comments regarding performance targets than any other disclosure topic and that they found it difficult to understand how performance targets were used in compensation decisions. The SEC staff report reiterated that once a company determines performance targets are a material element of its compensation policies and decisions, then the company is required to disclose these performance targets unless it is able to demonstrate that disclosure of these targets would result in competitive harm. The SEC staff report also indicates that there are a number of situations that would require companies to discuss prior year and current year targets, which will likely be a source of consternation for many public companies. In addition, the SEC asked many companies to (i) provide more detail on the use of comparative compensation information, or benchmarks, including the specifics of the peer group involved, (ii) provide more detail on change in control or termination arrangements, including how such compensation fits into the overall compensation elements and philosophy and affected other compensation decisions, and (iii) describe, more specifically, the role of their principal executive officers in making and setting compensation decisions.

We believe that this recent SEC staff report, coupled with Mr. White's speech, provide valuable guidance on executive compensation disclosures and we look forward to discussing the "how" and "why" of executive compensation disclosure with each of our clients. For a more comprehensive discussion of the SEC's recent guidance on this topic, please refer to our November 2007 Corporate Communicator.

E-Proxy Rules

Public companies can now satisfy their proxy delivery requirements by posting proxy materials, including annual reports, on their web site and mailing a notice to shareholders advising them that the materials are available and providing shareholders with instructions on how to access the proxy materials. Although this process is voluntary, on July 26, 2007, the Securities and Exchange Commission ("SEC") adopted amendments to the internet availability of proxy materials rules and regulations ("e-proxy rules") which will impact all public companies, even those that decide not to utilize the new e-proxy process. Generally speaking, these new "mandatory" regulations provide public companies two alternatives to comply with the e-proxy rules. A public company may adopt either:

- the "notice only" process, which mirrors the process associated with the voluntary e-proxy rules that went into effect on July 1, 2007; or

- the "full set delivery" alternative, which entails both posting proxy materials on the internet (with notification) and also sending a full set of proxy materials to shareholders.

If a public company wishes to continue the status quo and furnish a full set of proxy materials in paper to shareholders, the mandatory rules require that the company: (1) post those proxy materials on its internet web site, and (2) include a "Notice of Internet Availability of Proxy Materials" with the full set or incorporate such notice information into its proxy statement and proxy card.

In 2007, attorneys in our Business & Finance Group assisted one of our long-time clients with one of the first e-proxy filings ever made under this new regime and we published a full Corporate Communicator in September devoted to the implementation of this e-proxy regime. We want to highlight a few issues that have been raised by commentators with respect to California companies implementing the e-proxy model that were not included in our September Corporate Communicator. For instance, California Corporations Code Section 1501(a) requires that the boards of California corporations and foreign corporations that either have their principal executive offices in California or customarily hold meetings of the board in California send an annual report to shareholders no later than 120 days after the close of the fiscal year. There is a limited exception to this requirement for corporations with less than 100 shareholders of record that have expressly waived the requirement in the company's bylaws. This statute was amended in 2004 to permit distribution of the annual report by electronic transmission by the corporation, but this amendment requires that each shareholder must provide consent to receiving an electronic proxy and any communication to an individual must satisfy the requirements applicable to consumer consent under the federal E-SIGN Act. While the constitutionality of applying such a law to a foreign corporation with limited ties to California is in doubt, in light of recent case law, it is unlikely that most corporations would like to volunteer to be the test case for a lawsuit to prove the point. In addition, if a company has issued stock options in California prior to the time it was listed on an exchange, then it should have legal counsel review its option plan(s) if they intend to use the notice and access alternative and not physically deliver proxy materials to their shareholders. Under California's exemption for option plans (even for qualified plans), companies issuing stock options in California when they were not listed were required to provide for physical delivery of financial statements to security holders in their plan(s). It is our understanding that California is working on revising its laws to be more consistent with the SEC e-proxy rules but we do not anticipate that this will be effective for this proxy season.

Large accelerated filers must comply with the e-proxy rules for any proxy solicitations that take place on or after January 1, 2008. All other public companies (including registered investment companies) must comply with these rules for any proxy solicitations made on or after January 1, 2009. For a more comprehensive discussion of these e-proxy rules, including practical suggestions related to implementation, please refer to our September 2007 Corporate Communicator.

Direct Registration System Eligibility – Implementation Deadline Extended

If you are a public company, hopefully by now you have reviewed your charter documents to ensure they allow for uncertificated shares consistent with NYSE, Nasdaq and AMEX rules that require all listed companies to become Direct Registration System (DRS) eligible. On December 28, 2007, the SEC approved on an accelerated basis an extension of the implementation deadline from January 1, 2008 to March 31, 2008.

In order to become DRS eligible, issuers of public securities must ensure (prior to March 31, 2008) that (1) their transfer agent is DRS eligible, (2) their board of directors has adopted a resolution permitting the issuance of uncertificated securities, (3) their bylaws allow for securities to be issued in uncertificated form and (4) their transfer agent has instructed The Depository Trust Company ("DTC") to designate their listed securities as "direct registered eligible securities."

If you have not taken the necessary steps, you should begin the process immediately. Although most of the actions can be completed relatively quickly, if your bylaws do not provide for the issuance of uncertificated securities, the process could be delayed depending on what steps are needed to amend your bylaws (e.g., board and/or shareholder approval).

We remind all public companies that they need to ensure that they have taken that last step to make certain that DTC has added them to the list of eligible (but not necessarily participating) issuers. Once your transfer agent is comfortable that your company is DTC eligible, they will notify DTC to code your CUSIP as eligible, but not participating. In our experience, some transfer agents will not do this unless specifically directed by the company in writing to do so. Our experience is that DTC will send the transfer agent a confirmatory email that this has taken place if requested to do so which the transfer agent can forward to the company.

These actions are important because at least one exchange has indicated to us that they rely on the list that DTC periodically sends them to determine whether or not issuers are complying with these new rules. Accordingly, you could have technically taken all the necessary steps to become DRS eligible, but if DTC has not added your company to their list then this could result in an exchange sending you a letter that you are not satisfying a continued listing rule which could result in a negative 8-K disclosure event for something that is easily remedied.

Exchange and ISS Topics

NASDAQ and NYSE Reminders

E-proxy Amendments. Related to the e-proxy rules discussed above, in August 2007, the SEC approved changes to certain Nasdaq rules which included amendments to Nasdaq's Marketplace Rule 4350(b)(1)(A)(2) to permit Nasdaq issuers to electronically deliver their annual reports to shareholders. As a result of these amendments, Nasdaq no longer regulates the timing for delivery of the annual report and has eliminated the requirement that the annual report be filed with Nasdaq at the same time it is sent to shareholders. The SEC had already approved, in August 2006, amendments to Section 203.01 of the NYSE's Listed Company Manual to, among other things, allow a NYSE-listed company to satisfy NYSE's annual financial statement distribution requirement by making its annual report on Form 10-K available on its corporate web site (or related link). Both Nasdaq and the NYSE rules provide that issuers must physically deliver a hardcopy of the annual report upon shareholder request and must issue a simultaneous press release announcing, among other things, that its annual report has been filed with the SEC.

Independence Determinations. We remind Nasdaq and NYSE companies that when considering director independence in connection with the upcoming proxy season there are several independence determinations that need to be made other than the standard Nasdaq and NYSE independence definitions. Boards should consider all of the following standards, as appropriate, as well as circumstances unique to each director that would otherwise preclude an independence determination:

- For a majority of directors (and the nominating committee), Nasdaq Marketplace Rule 4200 or NYSE Rules 303A.01 and 303A.02;

- For audit committee members, SEC Rule 10A-3 (Nasdaq companies must also consider Marketplace Rule 4350(d))[1]; and

- For compensation committee members, Section 162(m) of the Internal Revenue Code; and Rule 16b-3 under the Securities Exchange Act of 1934, as amended.

ISS UPDATES

2008 Board Practices Study. RiskMetrics Group, the consulting parent of the corporate watchdog Institutional Shareholder Services, announced and released its 2008 Board Practices Study in early December. This study is one source that public companies can look to for an indication of market trends related to board and corporate governance practices. Risk Metrics reported its key findings from the study as follows:

- board independence stood at 74 percent in 2007, which was relatively consistent with the 72 percent in 2006;

- 45 percent of major U.S. companies had separated the posts of Chairman and CEO at the time of their most recent shareholder meeting—an increase of 20 percent since 2000, and up from 40 percent in 2006; and

- The number of companies with staggered boards continued to decline in 2007, to 52 percent overall, down from 55 percent in 2006.

One other interesting finding of the study is that companies continue to "move toward" allowing for annual elections of directors with just 40 percent of S&P 500 companies maintaining staggered boards as of their most recent proxy filings. Unlike previous years' editions, this 2008 study moved away from providing findings on trends in director pay and instead focused exclusively on board practices.

Annual Meeting Tips

Presented below is a bullet point list of items to consider as you prepare for the annual meeting:

- Prepare and rehearse the agenda and script;

- Ensure that all meeting logistics are coordinated and fine tuned (e.g., the location, audio visual equipment, food and beverage, security, etc.);

- It is important that ALL directors be strongly encouraged to attend the annual meeting;

- Plan for the worst and hope for the best;

1 Boards must also consider the financial sophistication and other requirements for audit committee service under the SEC and exchange rules.

- Pay attention to signs that shareholders with a specific agenda will attend, (e.g., are there signs of labor/management problems, consumer protection issues, environmental agendas or publicized matters involving directors, customers, or vendors?);

- Consider whether your security presence should be covert or overt;

- Fine tune your admission procedures and evaluate how strict you will be on the admission criteria (a diverse staff of friendly people are usually the best choice to host the admission desk);

- Hand out the agenda and rules of conduct to everyone who registers; and

- Prepare the directors and officers to conclude or adjourn the meeting and clear the room if a serious disturbance occurs.

Odds & Ends

Changes to Rule 144

On November 15, 2007, the SEC adopted several amendments to the Rule 144 safe harbor for resales of restricted securities. The amendments, which the SEC adopted substantially as proposed in June 2007, are designed to promote capital formation and make it more efficient for companies of all sizes to access private markets. The new rules will take effect in early 2008. Key changes are summarized below:

- *Shortened Holding Period Requirements.*

  o In general, the holding period requirement for restricted securities of reporting companies has been shortened to six months. Affiliates of reporting companies may resell their restricted securities after six months so long as they observe certain volume and manner of sale restrictions and file a Form 144. Non-affiliates of reporting companies may freely resell their restricted securities after six months, subject only to a requirement that the company continue to file Exchange Act reports until the holding period reaches one year (at which point resales are permitted regardless of whether the Rule 144(c) public information requirement is met).

  o The holding period requirement for restricted securities of non-reporting companies remains one year, but non-affiliates of non-reporting companies may now freely resell their restricted securities after one year. Affiliates of non-reporting companies may resell their restricted securities after one year, subject to the same requirements and limitations described above.

- *Affiliate Resales of Debt Securities.* Affiliates' resale of debt securities will no longer be subject to the manner of sale restrictions imposed by Rule 144(f) (e.g., the requirement that such resales be consummated in "brokers' transactions" involving limited solicitation). In addition, the volume limitations applicable to resales of debt securities have been relaxed to allow sales of up to 10% of a particular tranche of such securities within a three-month period.

- *Changes to Form 144 Filing Requirements*. Non-affiliates are no longer required to file a Form 144 upon their resale of restricted securities. The filing thresholds for affiliates have been increased from transactions involving 500 shares or $10,000 to transactions involving 5,000 shares or $50,000 (both within a three-month period).

- *Reduced Requirements for Non-Affiliates*. Non-affiliates are no longer subject to manner of sale or volume restrictions under the amended Rule 144, nor are they required to file a Form 144 in connection with any resale of restricted securities.

Notably, the Rule 144 amendments adopted by the SEC do not include the "tolling provision" that was initially proposed, which would have suspended the Rule 144 holding period for a restricted security when such security was hedged by a put equivalent position. In statements by its staff, the SEC indicated that it agreed with comments that such a provision would add complexity and compliance costs to Rule 144 despite a lack of evidence that hedging activities have resulted in abuses in the Rule 144 context.

Electronic Shareholder Forums

On November 28, 2007, the SEC adopted amendments to the proxy rules to facilitate the use of electronic shareholder forums, thus opening up new avenues for real-time communications among shareholders, and between shareholders and the companies they own. The SEC stated that its new rules are intended to tap the potential of technology and help shareholders communicate with each other and express their concerns and ideas to companies in an effective and efficient manner. Chairman Cox stated that he viewed the new rules as "the federal securities regulation equivalent of that landmark piece of Internet legislation" and that he hopes the amendments "will spark the growth of online forums for shareholders, and stimulate experimentation and innovation in communications between shareholders and their companies."

The SEC's new rules remove legal concerns that such communications might be viewed as a proxy solicitation by the shareholders participating in the forum. Specifically, the new rules clarify that participation in an electronic forum, which otherwise could constitute a proxy solicitation by the participating shareholder, will be exempt from most of the proxy rules if certain conditions are satisfied. The primary condition is that the electronic forum needs to occur more than 60 days prior to the date announced by the company for its annual meeting or a special meeting of the shareholders (as the case may be).[2] Also, the communicating shareholder may not solicit a proxy while relying on the exemption. After the date the electronic shareholder exemption is no

2 Where the company announces a meeting less than 60 days before the meeting date, the solicitation deadline is not more than two days following the announcement of the meeting.

longer available, the communicating shareholder is eligible to solicit proxies pursuant to the existing rules and disclosures.

Shareholder Access and Nomination/Election of Directors

On November 28, 2007, the SEC voted to adopt an amendment to codify the SEC's interpretation of Rule 14(a)(i)(8). This amendment was adopted in response to a 2006 decision of the U.S. Court of Appeals for the Second Circuit[3], which created uncertainty with respect to the SEC's longstanding interpretation of the rule (the Second Circuit did not defer to the SEC's interpretation). Leading commentators suggest that the SEC is exhausted with the ongoing controversy surrounding the question of shareholder access.[4] The amendment practically serves as a stop gap measure to preserve the status quo until the SEC can sort out how to move forward with its outstanding proposals.

In short, the amendment affirms the SEC's previously held position that shareholder proposals on shareholder access to company proxy statements for director nominations are categorically excludable under Exchange Act Rule 14a-8(i)(8). The prior rule provided that companies could exclude a stockholder proposal if it relates to an election for membership on the company's board of directors or analogous governing body. As amended, the rule provides that a stockholder proposal can be excluded if it "relates to a nomination of an election for membership on the company's board of directors or analogous governing body *or a procedure for such nomination or election*."

The issue of shareholder access continues to be hotly contested and the debate promises to continue in 2008 when two new Commission members are appointed and confirmed.
Despite the SEC's amendment, it looks like the controversy will continue during the 2008 annual meeting season. A number of leading institutional investors, watchdog groups, Senators, and Representatives promptly issued strong rebukes of the SEC's action. In fact, within minutes of the vote, new efforts to test the rule were launched as institutional investors asked two prominent financial service firms to allow all shareholders to vote on bylaw changes for electing directors. These investors indicated that they are prepared to litigate to defend the Second Circuit's decision. It appears likely the issue will shortly end up back in court.

3 *AFSCME v. AIG.*

4 The SEC received over 34,000 comment letters to its duel proposals issued earlier this year.

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RECENT BUSINESS & FINANCE TRANSACTIONS

Debt Offerings and Credit Agreements

Meritage Homes
$150 million
Senior Subordinated Notes

Meritage Homes
$800 million
Amended Unsecured Credit Facility

DriveTime
$135 million
Senior Notes Exchange

DriveTime
$320 million
2007A Securitization

Radyne
$60 million
Credit Facility

Zila Advanced Technology for Health Protection
$12 million
Secured Notes Restructuring

Mergers and Acquisitions

Ventana
$40 million
Acquisition of Spring Bioscience Corporation

Cold Stone Creamery
Sale of Company to Kahala Corp.

Swift
$2.4 billion
Leveraged Buyout

Transwest Resort Properties
Acquisition of Westin La Paloma Resort and Westin Hilton Head Resort

Insight
$28.7 million
Sale of PC Wholesale Division

Zila Advanced Technology for Health Protection
$9.5 million
Sale of Peridex® Brand of Prescription Periodontal Rinse Products

Radyne
$18 million
Acquisition of AeroAstro, Inc.

LiveDeal Online Local Marketplace
$4.5 million
Acquisition of OnCall Subscriber Management, Inc.

YP.Com
$12 million
Acquisition of Live Deal, Inc.

Mini-Skool Early Learning Centers
Sale of Mini-Skool Early Learning Centers Inc. to Audax Group

eTelecare Solutions, Inc.
$7.5 million
Acquisition of AOL Member Services-Philippines, Inc.

Precision Science
Acquisition of E A Products, Inc.

EncoderTech
Sale of Assets of Encoder Technology LLC to Dynapar Corporation

Mark
Sale of Mark Window Products to Spring Window Fashions, L.L.C.

Cuben Fiber
Sale of Cuben Fiber Corporation to North Sails Group

Rightpath Limited Development Group
Acquisition of Glendale Jet Center, LLC

CellTrust
Acquisition of Prime Message, Inc.

Paramount Windows
Acquisition of Petty Windows & Cabinets, Inc.

Metro Care Services, Inc.
Sale of Company to Private Investors

Aero Design & Manufacturing
Sale of Aero Design & Manufacturing, Inc. to Platt River Ventures

Zencon Technologies, L.L.C.
Sale of Company to American Capital

Venture Capital and Equity Transactions

Peregrine Pharmaceuticals, Inc.
$22.5 million
Public Offering of Common Stock

emerald Technology Ventures
$3.5 million
Investment in Series A-2 Convertible Preferred Stock of SDC Materials, Inc.

Southwest Windpower Renewable Energy Made Simple
$6.2 million
Sale of Series B-1 Preferred Stock

Peninsula Equity Partners
$4.3 million
Investment in Response Analytics, Inc.

InternetSafety.com
Investment in Series A Preferred Stock in SafeBrowse.com, Inc.

CoolWell "Play all day"
Sale of Series A-1 Preferred Stock

Applied Photonics
Sale of Series A Preferred Stock

amnestix
Sale of Series A Preferred Stock

apthera
Sale of Series A and Series B Preferred Stock

InternetSafety.com
Sale of Series A Convertible Preferred Stock

Moszkito
Sale of Common Stock

bump
Sale of Series A Convertible Preferred Stock

Fund Formations

Translational Accelerator, LLC
Formation of Capital Fund Devoted to Life Sciences

Pinnacle Investment Partners, LLP
Formation of Real Estate Investment Fund

Sovereign Commercial Development Fund I
Formation of Real Estate Investment Fund

VICI
Formation of VICI SBI, LLC, Venture Capital Funds

CSP-Smith, LLLP
CSP-KDL, LLLP
Formation of Real Estate Investment Fund

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