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PUBLIC COMPANIES AND CAPITAL FORMATION GROUP

JOBS ACT COVERAGE

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New SEC Guidance on Emerging Growth Companies

On September 28, 2012, the Securities and Exchange Commission (SEC) issued additional frequently asked questions (FAQs) as part of its guidance on Title I of the Jumpstart Our Business Startups Act (JOBS Act) related to emerging growth companies (EGCs).

Most of the FAQs cover issues related to M&A activities of, and financial information presented by EGCs. For example, the SEC clarified that an EGC may use test-the-waters communications with qualified institutional buyers and institutional accredited investors in connection with an exchange offer or merger. An EGC may also use the confidential submission process to submit a draft registration statement for an exchange offer or merger that constitutes its initial public offering of common equity securities.

The SEC provided guidance related to instances when an EGC may or may not present only two years of financial information. For instance, if a target company that does not qualify as a smaller reporting company is to be acquired by an EGC that is not a shell company and that will present only two years of its financial statements in its registration statement for the exchange offer or merger, the EGC may present only two years of financial statements for the target company in its registration statement. However, the SEC clarified that an EGC that is not a smaller reporting company is required to present three years of financial statements in its registration statement on Form 10 or Form 20-F under the

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***BLANK ROME** is pleased to announce the launch of it newest blog, Securities News Watch brought to you by our Public Companies and Capital Formation Group. This blog is positioned to respond quickly to news relevant to public and private companies.*

SecuritiesNewsWatch.com

News & Information on the JOBS Act, Corporate Governance, Executive Compensation, and Securities Matters

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New SEC Guidance on Emerging Growth Companies (continued)

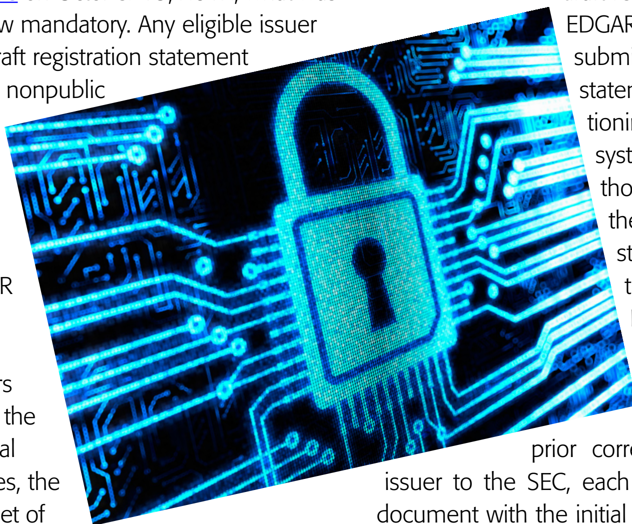
Securities Exchange Act of 1934. The JOBS Act accommodation, which permits two years of financial statements, applies only to the Securities Act registration statement for the initial public offering of common equity securities.

In addition, the FAQs specified that the SEC would not object if an issuer that lost its EGC status does not present, in subsequently filed registration statements and periodic reports, selected financial data or a ratio of earnings to fixed charges for periods prior to the earliest audited period presented in its initial registration statement.

The SEC also indicated that an issuer, which is not currently required to file Exchange Act reports but was once an Exchange Act reporting company and is now planning to conduct a public offering of its common equity securities, can take advantage of the benefits of EGC status, even though its initial public offering of common equity securities occurred on or before December 8, 2011. However, this position is not available to an issuer that has had the Exchange Act registration revoked pursuant to Section 12(j) of the Exchange Act. ■ Return to Table of Contents

Draft Registration Statements Must Be Submitted to the SEC Via EDGAR

On September 26, 2012, the SEC announced that starting October 1, 2012, certain emerging growth companies and foreign private issuers would be able to submit to the SEC draft registration statements for confidential nonpublic review via a modified EDGAR system instead of via the secure e-mail submission process in place at that time. As the EDGAR Filer Manual for EDGAR Release 12.2 became effective on October 15, 2012, what was voluntary is now mandatory. Any eligible issuer submitting a draft registration statement for confidential nonpublic review, or amendment or related correspondence, now must use the new EDGAR system.



To assist issuers with the use of the new confidential filing procedures, the SEC posted a set of detailed instructions on how to prepare an electronic submission of a draft registration statement, or an amendment. In addition, issuers that submit their original draft registration statement via the new EDGAR system will no longer need to file copies of previously submitted draft registration statements as exhibits to their publicly-filed registration statements to comply with the JOBS Act's mandate that the drafts become publicly available at least 21 days prior to the start of the road show. The new EDGAR system will allow issuers to direct the EDGAR system to publicly file the drafts as individual documents on EDGAR.

To assist in the transition from the secure e-mail or paper system previously used for confidential submissions to EDGAR, in October 2012, the Division of Corporation Finance sent a letter to companies whose draft registration statements were under staff review to explain how they can transition to electronic filing via EDGAR. In contrast to issuers that submit their first draft registration statement via EDGAR, issuers that already submitted draft registration statements prior to transitioning to the new EDGAR system will have to submit those drafts as exhibits to the first draft registration statement submitted via the new EDGAR system. Issuers transitioning to the new EDGAR system will also have to submit copies of all prior correspondence from the issuer to the SEC, each as a separate "cover" document with the initial submission via EDGAR of a draft registration statement.

The new EDGAR system is part of the SEC's efforts to meet the requirements of Section 106(a) of the JOBS Act mandating that certain pre-IPO EGCs be provided an opportunity to submit draft registration statements to the SEC for nonpublic confidential review. In addition, the new EDGAR system will support the SEC's policies and procedures allowing certain foreign private issuers that are not EGCs to submit registration statements to the SEC for nonpublic review. ■

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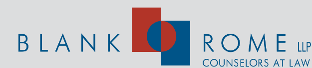

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NYSE Proposes New Rules Related to Compensation Committee and Committee Adviser Independence

The NYSE recently filed proposed rule changes with the SEC related to compensation committee independence and the hiring of compensation advisers. The NYSE proposed such rules to comply with Exchange Act Rule 10C-1 adopted in June 2012. Rule 10C-1 requires national securities exchanges to adopt listing standards which effectuate the compensation committee and committee adviser independence requirements of Section 952 of the Dodd-Frank Act. The NYSE's proposed rules do not expand upon or vary much from the SEC rules. Set forth below is a summary of the NYSE's proposed rules:

COMPENSATION COMMITTEE INDEPENDENCE

The NYSE proposed rules do not establish any new bright line standards specific to compensation committee independence. Instead, the NYSE proposed rules require that, in affirmatively determining the independence of any director who will serve on a compensation committee, a listed company's board "consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to, the two factors explicitly enumerated in Rule 10C-1(b)(ii)":

- the source of the director's compensation, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and
- whether the director has an affiliate relationship with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.

The proposing release specifically provides that the NYSE does not believe that board compensation should be considered as part of the independence determination. Further, commentary to the proposed NYSE rules provides that "the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service,…the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation."

COMPENSATION COMMITTEE ADVISER INDEPENDENCE

The NYSE proposed rules related to compensation committee advisers provide that prior to hiring a compensation adviser, the compensation committee must consider the six factors set forth in Rule 10C-1(b)(4). The NYSE proposed rules do not add any factors for a compensation committee to consider prior to hiring an adviser, as the "Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management."

Listed companies will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the *new director independence* standards with respect to compensation committees. The other proposed rules, including those related to compensation committee advisers, will become effective on July 1, 2013.

The NYSE's proposed new rules are subject to SEC review and comment. We believe it is unlikely that the SEC will have many objections to the proposed rules, as they essentially mirror the SEC's rules. In light of the NYSE proposed rules, NYSE listed companies should be reviewing their compensation committee charters, the composition of the compensation committee and their relationships with the compensation advisers in order to identify whether any modifications or changes may be in order to comply with the coming NYSE standards. ■ Return to Table of Contents

Nasdaq Compensation Committee Rules Will Become a Mini-Me of Its Audit Committee Rules

BACKGROUND INFORMATION AND EFFECTIVE DATES

On September 25, 2012, the NASDAQ Stock Market LLC (Nasdaq) proposed changes to its listing standards related to compensation committees. Nasdaq proposed new compensation committee rules in response to the SEC's Rule 10C-1, which became effective on July 27, 2012 and which, in its turn, was promulgated in response to Section 952 of the Dodd-Frank Act that required the SEC to direct the national securities exchanges to prohibit the listing of any equity security of an issuer, subject to certain exemptions, that does not comply with the Dodd-Frank Act's requirements relating to compensation committees and compensation advisers.

Proposed Nasdaq Listing Rule 5605(d)(3), which requires compensation committees to have the specific responsibilities and authority necessary to comply with Rule 10C-1(b)(2), (3) and (4)(i)-(vi) under the Securities Exchange Act of 1934, will be effective immediately upon the SEC's approval of the Nasdaq's proposal as discussed below under *Compensation Committee Responsibilities.*

Nasdaq-listed companies must comply with the remaining amended listing rules by the earlier of: (1) their second annual meeting held after the date of approval of the proposed rules; or (2) December 31, 2014. A company must certify to Nasdaq, no later than 30 days after the implementation deadline applicable to it, that it complied with the amended listing rules on compensation committees (Nasdaq will provide a form for this certification). During the transition period, companies that are not yet required to comply with the amended listing rules on compensation committees must continue to comply with Nasdaq's existing listing rules, which have been redesignated as Listing Rule 5605A(d) and IM-5605A-6 in Nasdaq's proposal.

COMPENSATION COMMITTEE COMPOSITION AND CHARTER

Generally, Nasdaq's proposal has almost closed the bridge between its compensation committee and audit committee rules, and many requirements applicable to audit committees of Nasdaq-listed companies will be applicable to their compensation committees. (Please see a chart on page 4 comparing Nasdaq's current compensation committee rules, its proposed compensation committee rules and current audit committee rules.)

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Nasdaq Compensation Committee Rules Will Become a Mini-Me of Its Audit Committee Rules (continued from page 3)

Requirement	Current Compensation Committee Rules	Proposed Compensation Committee Rules	Current Audit Committee Rules
Requirement to Have a Compensation Committee	No standing compensation committee requirement (compensation of executive officers must be determined, or recommended to the board for determination, either by: (i) an independent compensation committee; or (ii) a majority of the board's independent directors).	Nasdaq's proposal requires companies to have a standing compensation committee responsible for determining, or recommending to the full board for determination, the compensation of executive officers of the company.	Nasdaq-listed companies must have a standing audit committee.
Compensation Committee Size	No compensation committee size requirements, and a company may have a compensation committee comprised of only one member.	Nasdaq proposes to require a compensation committee comprised of at least two members of the board of directors.	The audit committee must consist of at least three members of the board of directors.
Compensatory Fees	No specific prohibition for compensation committee members on accepting compensatory fees.	Subject to certain exemptions applicable to audit committee members, Nasdaq's proposal prohibits a compensation committee member from accepting, directly or indirectly, any consulting, advisory or other compensatory fee from the company or its subsidiary. Smaller reporting companies are exempt from this requirement.	Nasdaq proposes to adopt the same standard related to compensatory fees for compensation committee members that applies to audit committee members under Exchange Act Rule 10A-3.
Affiliation	No direct prohibition on affiliation for compensation committee members.	Under Nasdaq's proposal, the board of directors must consider whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company to determine the director's eligibility to serve on the compensation committee. However, the beneficial ownership of a significant amount of the company's stock will not preclude such owner from serving on the compensation committee. Smaller reporting companies are exempt from this requirement.	An audit committee member cannot be affiliated with the company or its subsidiary, except that the beneficial owner of 10% or less of any class of voting equity securities of the company is deemed not to be an affiliate.
Compensation Committee Charter	No formal written compensation committee charter is required.	Nasdaq proposes to require each company to certify that it has adopted a formal written compensation committee charter.	Companies must certify as to the adoption of a formal written audit committee charter.

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Nasdaq Compensation Committee Rules Will Become a Mini-Me of Its Audit Committee Rules (continued from page 4)

CONTENTS OF THE COMPENSATION COMMITTEE CHARTER

Under the Nasdaq's proposal, the compensation committee charter must specify the following:

- the scope of the compensation committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
- the compensation committee's responsibility for determining, or recommending to the board for determination, the compensation of the executive officers of the company;
- that the chief executive officer of the company may not be present during voting or deliberations by the compensation committee on his or her compensation; and
- the specific compensation committee responsibilities and authority set forth in proposed Nasdaq Listing Rule 5605(d)(3).

These matters represent a combination of (i) some of the requirements applicable to the audit committee charter and (ii) compensation committee responsibilities under current Nasdaq rules.

Smaller reporting companies may adopt either a formal written compensation committee charter or a board resolution that specifies the committee's responsibilities and authority, except for the matters set forth in proposed Nasdaq Listing Rule 5605(d)(3).

COMPENSATION COMMITTEE RESPONSIBILITIES

Proposed Nasdaq Listing Rule 5605(d)(3) states that a compensation committee must possess the specific responsibilities and authority necessary to comply with Rule 10C-1(b)(2), (3) and (4)(i)-(vi) under the Dodd-Frank Act relating to the: (i) authority to retain compensation consultants, independent legal counsel and other compensation advisers; (ii) authority to fund such advisers; and (iii) responsibility to consider certain independence factors before selecting such advisers (other than in-house legal counsel).

Because this rule will be effective upon the SEC approval of Nasdaq's proposal, Nasdaq-listed companies should consider now whether to grant these specific responsibilities and authority through an amendment to the charter, resolution or other board action. To the extent a company does not have a compensation committee, the provisions of this rule will apply to the independent directors who determine, or recommend to the board for determination, the compensation of the executive officers of the company. While Nasdaq proposes that companies must eventually have a written compensation committee charter that includes, among others, these responsibilities and authority, companies may implement such a charter on the schedule discussed above. Smaller reporting companies are exempt from this requirement.

WHAT SHOULD WE DO NOW?

Below is a list of suggested action items in connection with Nasdaq's proposals:

- If you do not have a compensation committee and a majority of independent directors is making, or recommending to the board, compensation decisions related to executive officers of the company, start evaluating potential candidates for compensation committee membership.
- If you have a compensation committee consisting of one director, start evaluating potential candidates to expand the compensation com-

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INVESTMENT ADVISER REGULATION

SEC Issues Letter to New Investment Advisers Regarding Presence Exams

On October 9, 2012, the Office of Compliance Inspections and Examinations (OCIE) of the SEC issued a letter directed to senior officers of newly registered investment advisers that manage private equity funds introducing them to the National Exam Program (NEP). The letter explains that the NEP is launching an initiative to conduct Presence Exams, which are focused, risk-based examinations of investment advisers to private funds. In the letter, the SEC explains that the Presence Exams initiative will take place over the next two years and will be comprised of three phases: engagement, examination and reporting.

Engagement Phase. The NEP is currently engaged in an outreach program to inform newly registered investment advisers about their obligations under the Advisers Act. As part of such outreach, the NEP has published various materials, including staff letters, risk alerts, special studies and speeches. The letter contains a list of some of these resources and their reference links.

Examination Phase. The letter states that the NEP staff will contact advisers separately if and when they are selected for an examination. If an adviser is selected for examination, the NEP staff will review one or more of the following higher risk areas: marketing, portfolio management, conflicts of interest, safety of client assets and valuation. Upon completion of an onsite examination, the NEP staff may send the investment adviser a letter (i) indicating that the exam has concluded without findings, or (ii) describing the deficiencies identified and asking the firm to take corrective action. Serious deficiencies may be referred to the Division of Enforcement of the SEC or other regulators.

Reporting Phase. Upon completion of the examination phase, the NEP will report its observations, such as common practices and industry trends, to the SEC and the public. ■ Return to Table of Contents

Nasdaq Compensation Committee Rules Will Become a Mini-Me of Its Audit Committee Rules (continued from page 5)

mittee to two members, as required by the proposed rule, or even to three members in order to avoid giving each director a veto power.

- Consider whether existing members of the compensation committee or potential members of the compensation committee are getting any compensatory fees from the company or any of its subsidiaries or are affiliated with the company or a subsidiary of the company or an affiliate of a subsidiary of the company. Evaluate whether any changes to the current composition of the compensation committee are necessary.
- Implement new responsibilities and authority applicable to compensation committees, or independent directors involved in compensation decisions, relating to: (i) authority to retain compensation consultants, independent legal counsel and other compensation advisers; (ii) authority to fund such advisers; and (iii) responsibility to consider certain independence factors before selecting such advisers through a charter amendment or board resolution.
- Draft a new, or revise an existing, compensation committee charter. ■

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Political Spending Disclosure (Like Political Spending) Is on the Rise

The 2010 Supreme Court decision in *Citizens United* unleashed political spending by corporations and the 2012 elections are expected to be the most expensive ever.[1] The Center for Political Accountability (CPA) and The Zicklin Center for Business Ethics Research recently issued their second annual Index of Corporate Political Accountability and Disclosure. The Index analyzes the manner in which S&P 200 companies are navigating corporate political spending after *Citizens United* based on the practices and policies of these companies as publicly disclosed on their websites. The Index sponsors believe that disclosure of corporate spending gives investors the facts needed to evaluate whether such spending is in the best interests of shareholders, identifies possible sources of risk and helps ensure meaningful and effective board oversight.

Highlights of the 2012 Index include:

- Many companies have increased their level of disclosure; of the 88 companies studied both in 2011 and 2012, 85% improved their overall scores for political accountability and disclosure, with the most improved, Costco, going from a score of 3 (out of 100) in 2011 to 85 in 2012;
- Almost half (47%) of the companies studied reported their contributions to candidates, parties and "super-PACS," 11% reported that they make no such contributions and 42% made no disclosures;
- More than half (57%) provided a full political spending policy on their website, 32% gave brief policy statements and 11% made no such disclosures;
- More than half (56%) reported that the board of directors regularly oversees political spending, 48% reported that a board committee regularly reviews company policy on political spending and 46% said that a board committee reviews company political expenditures;
- Smaller companies were less likely to provide full disclosure of political spending and board oversight;
- The highest scoring companies (based on a scale of 0 to 100) were Merck (97), Microsoft (94), AFLAC (93), Gilead (92) and Exelon and Time Warner (each tied with 88); and
- 18 companies were tied for last with a score of 0.

After all the data is in, we can expect that the amount of corporate political spending in 2012 will surpass all previous records and that there will be continued calls for disclosure.[2] Accordingly, we expect that corporate governance "best practices" will soon require public companies to voluntarily disclose on their websites or through their SEC reports, information on their policies on political contributions and the amounts of such contributions. Companies not presently making such disclosures should consider "electing" to make them in the future. ■

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The SEC Digs Deep to Determine Whether Your Company Should be Reporting Financial Information by Segment

Generally, public companies are obligated to report financial information separately for each operating segment identified in accordance with the criteria set forth in FASB ASC 280-10-50-1. ASC 280-10-50-1 provides that an operating segment is a component of a public company that has all of the following characteristics:

- It engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same public entity).
- Its operating results are regularly reviewed by the public entity's chief operating decision maker to make decisions regarding resource allocation to the segment and assessing its performance.
- Its discrete financial information is available.

The SEC issues a number of comment letters inquiring into whether public companies should be reporting financial information by segment. These comment letters include a very detailed request for information, such as:

- Identify your Chief Operating Decision Maker (CODM) and submit a copy of the information package provided to the CODM covering all business activities.
- Submit a copy of all information provided to your board of directors covering business activities and operating results for the last fiscal year which was not provided to your CODM.
- Describe the frequency and types of communications between the CODM and his or her direct reports.
- Provide a copy of the minutes of your board of directors' meeting for each of the most recent four meetings.
- Describe the significant resource allocation decisions made during the last and current fiscal years by your CODM.

While the SEC and financial reporting obligations tail should not wag the operations dog, reporting companies may wish to review their internal financial reports, especially those that are reviewed by senior management or the board of directors, to determine whether they needlessly provide information by product line, geography or any other criteria that could be the basis of segment reporting. For example, if a company

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SEC COMMENT LETTER TRENDS

The SEC Digs Deep to Determine Whether Your Company Should be Reporting Financial Information by Segment
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does not report financial information by segment, but internal reports provide financial information by product line, unless management utilizes the product line information, it may be best to eliminate such reports to avoid any appearance that the information is, in fact, considered by management, which could form the basis of an argument that segment reporting is appropriate. ■

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PRACTICE TIPS

Over $85 Million in FCPA Fines and Penalties Announced in the Past 90 Days—Is It Time to Add an FCPA Risk Factor?

Recent deferred prosecution agreements and settlements remind us of the need to carefully consider disclosure issues relating to the Foreign Corrupt Practices Act (FCPA). Since August 1, 2012, the Department of Justice and the SEC have announced the resolution of FCPA matters resulting in the payment of over $85 million in fines and penalties. In August, the DOJ announced that Pfizer H.C.P. Corporation, an indirect wholly-owned subsidiary of Pfizer Inc., and the DOJ entered into a Deferred Prosecution Agreement in connection with alleged FCPA violations. Under the Deferred Prosecution Agreement, Pfizer H.C.P. was required to pay a penalty of $15,000,000. In addition, the SEC announced that Pfizer Inc. and its Wyeth LLC subsidiary entered into settlement agreements with the SEC under which Pfizer agreed to pay more than $26.3 million in disgorgement of profits and pre-judgment interest and Wyeth agreed to pay more than $18.8 million in disgorgement of profits and prejudgment interest. In addition, on September 24, 2012, the SEC and the DOJ announced that Tyco International had agreed to pay more than $26 million dollars to settle SEC charges and resolve criminal matters brought by the DOJ relating to allegations that Tyco subsidiaries engaged in activities violating the anti-bribery provisions of the FCPA. These matters represent just a small fraction of the over 150 FCPA cases the DOJ had open in 2011 and the over 35 FCPA enforcement actions the SEC has announced since the start of 2010.

Generally, the FCPA covers, among others, any company with securities registered under the Securities Exchange Act of 1934 and any company that is required to file reports under the Exchange Act. The anti-bribery provisions of the FCPA prohibit corrupt payments to foreign officials for the purpose of procuring or maintaining business. The FCPA is notoriously broad in its scope and determining exactly what is prohibited by the FCPA can be very difficult. Because the FCPA makes illegal many payments that individuals working in countries other than the United States may consider ordinary or customary, it can be particularly difficult to put a stop to the sorts of payments that may be covered by the FCPA, even where a company has a robust training and compliance program.

The difficulty of ensuring compliance with the FCPA, even when there is a rigorous compliance program in place, combined with the significant fines and penalties that a company may have to pay for FCPA violations, present potentially significant risks to companies with international operations. Should your company include an FCPA risk factor in its annual report or registration statement? If your company has operations outside the United States, especially where those operations are in countries where unofficial payments or gifts are a regular part of the business culture, an FCPA risk factor is probably warranted. You and your legal advisors will have to determine whether an FCPA risk factor is warranted based upon your company's own unique circumstances. ■ Return to Table of Contents

ENDNOTES

1. *See, e.g.,* 2012 Election Will Be Costliest Yet, With Outside Spending a Wild Card, *Center for Responsive Politics,* August 1, 2012, available at http://www.opensecrets.org/news/2012/08/2012-election-will-be-costliest-yet.html. Return to Article
2. *See, e.g.*, Is Disclosure and Further Regulation of Public Company Political Contributions Coming? Up To Date: Current Developments in Securities Laws (No. 1) (Sept. 2011), available at www.blankrome.com/index.cfm?contentID=37&itemID=2590; Calpers Approves Policy on Corporate Political Contributions, *Businessweek* (Nov. 15, 2011, available at http://www.businessweek.com/news/2011-11-15/calpers-approves-policy-on-corporate-political-contributions.html. ■ Return to Article Return to Table of Contents

QUESTIONS: If you have a question regarding the issues raised in this newsletter, you may obtain additional guidance from the authors and other members of our Public Companies Group.

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