Top Disclosure and Governance Tips for 2014

Bonnie J Roe, Partner

The proxy and annual reporting season is upon us and, as with other things, it is best to be prepared. Here are some thoughts for publicly traded companies to carry through the season and help plan for the remainder of the year.

1. **Start your company's proxy statement and other disclosure documents with a clean slate, and use plenty of charts and graphs**. Consider what you want to highlight and how. Obviously, you must fulfill the legal requirements, and you may have said things well last year. But keep in mind that effective communication can change the way your company is perceived by shareholders, sometimes in critical ways. Make sure that you address the points that shareholders and proxy advisory firms care most about in a clear and concise manner. Review the proxy statements of other companies, particularly in your industry, and adopt strategies for disclosure that appear to do the best job of communicating. For example, you may wish to change the layout or organization of your proxy statement, use an executive summary at the beginning of both the proxy statement and the Compensation Discussion and Analysis, or develop a bullet-point list of "what we do and what we don't do," outlining your governance practices and policies.

2. **Make sure your compensation committee is independent**. The New York Stock Exchange and NASDAQ both adopted rule changes in 2013 relating to independence. Under the rules of both exchanges, the board must now take into consideration all factors relevant to determining whether a director has a relationship to your company which is material to that director's ability to be independent from management. In making the independence determination, the board must consider the source of any compensation paid to the director and whether the director is affiliated with your company or a subsidiary of the company, or an affiliate of a subsidiary of the company. In rule changes adopted in December 2013, NASDAQ dropped the absolute prohibition on the receipt of compensation from the company that it had originally proposed and adopted as part of these rule changes. Companies have until their first annual meeting after January 15, 2014 or October 31, 2014 (if earlier) to comply with the applicable standard. Smaller reporting companies are exempt, as are controlled companies and certain other entities. Foreign private issuers may follow their home country practices in lieu of complying with the new standards, so long as certain annual disclosures are made.

3. **Be careful to follow the rules on non-GAAP numbers**. The SEC's Financial Reporting and Audit Task Force is reportedly scrutinizing the use and presentation of non-GAAP financial measures, and SEC staff comments frequently focus on this area.

4. **Plan to engage with shareholders after proxy season**. Institutional shareholders tend not to have time to engage with companies during proxy season, which is when companies want to reach out. In order to get a better sense of what is important to your company's key shareholder constituencies, and open lines of communication, develop a plan to engage with significant holders after the end of the proxy season. In the meantime, of course, use what you already know about your shareholder base to help guide your disclosures and the planning of your annual meeting.

5. **Wait for regulations under the remaining Dodd-Frank executive compensation provisions**. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to adopt rules in four areas relating to executive compensation: pay ratio (the relationship of the CEO's compensation to the median employee compensation); disclosure of corporate policy on incentive compensation claw-backs; restrictions on hedging company stock; and pay for performance, based on total shareholder return. While the SEC has proposed rules relating to pay ratio, final rules are not expected to be effective for this requirement until 2015 at the earliest. Proposals for the other three requirements are expected this year, but again companies will not need to comply until 2015 or thereafter. Nonetheless, it is not too early to think through the issues that your company may face when these rules are finally effective.

6. **Consider the effect of litigation on other Dodd-Frank provisions, and file Form SD if required**. While Dodd-Frank continues to require the SEC to adopt regulations to require public companies engaged in the commercial development of oil, natural gas and minerals to disclose payments made by them to U.S. and foreign governments, the rules as adopted by the SEC were successfully challenged in *API and Chamber of Commerce et al. v. SEC,* No. 12-1668 (D. D.C. Jul. 2, 2013). Accordingly, these rules are not in effect, but the proposal of new rules to implement the statutory provision is back on the SEC's regulatory agenda. By contrast, the SEC regulations with respect to conflict minerals withstood scrutiny in *Nat'l Association of Manufacturers v*. SEC, No. 13-635 (D. D.C. Jul. 23, 2013), but that ruling was appealed. Assuming that the regulation is upheld, you will need to file Form SD by May 31, 2014 to report on matters with respect to calendar year 2013 (regardless of when the company's fiscal year ends), if conflict minerals are "necessary to the functionality or production" of a product manufactured (or contracted to be manufactured) by your company and the minerals were not outside the supply chain before January 31, 2013. In light of the potential complexity of the issues, including the possible need for an outside audit of the company's report, it is not advisable to wait for the outcome of the litigation before following the procedures required by the rule.

About the Author

Bonnie J Roe is a partner in the Corporate group of Cohen & Gresser LLP, where she represents publicly and privately held companies and investment funds. Ms. Roe has over thirty years of experience advising public and private companies on securities law, corporate governance and mergers and acquisitions. She has served as counsel for issuers, underwriters and placement agents in connection with public and private offerings, including PIPE transactions and cross-border offerings. Ms. Roe was named as one of New York's *Super Lawyers* for Securities & Corporate Finance in 2011, 2012 and 2013 and is mentioned in Who's Who in America and Who's Who in American Law.

About Cohen & Gresser

Founded in 2002, Cohen & Gresser LLP has been recognized in *Chambers USA*, *Legal 500*, and *Benchmark Litigation* and was named to *The National Law Journal*'s 2013 "Midsize Hot List." The firm has offices in New York and Seoul and has grown to over fifty-five lawyers in four practice groups: Litigation and Arbitration, Intellectual Property and Technology, White Collar Defense, and Corporate. The firm's attorneys are graduates of the nation's best law schools and have exceptional credentials, and its clients include Fortune 500 companies and major financial institutions throughout the world.

NEW YORK | SEOUL

www.cohengresser.com info@cohengresser.com PH: +1 212 957 7600