Schulte Roth&Zabel

Public Company **Hot** Topics

Tuesday, January 31, 2012

Contents

Schulte Roth&Zabel

Public Company Hot Topics

1. About the Speakers

Howard B. Epstein
Partner
Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
+1 212.756.2596 | howard.epstein@srz.com

Howard B. Epstein is a partner in the Litigation Group and is chair of the Environmental Group and Insurance Practice. Howard's environmental practice has transactional, compliance counseling and litigation aspects, including assisting with documentation and due diligence in M&A, financing and other transactions; advising on regulatory and compliance issues; counseling on litigation avoidance; and defending clients against criminal, civil and regulatory actions. In the insurance area, he counsels clients on the adequacy of their coverage, recommends coverage enhancements, and litigates coverage disputes across a range of insurance products. He also advises regarding land use issues, specialized financial insurance products, the use of insurance products to resolve legacy liability concerns in business transactions, and insurance issues specific to investment fund managers and corporate directors and officers. A court-certified mediator, Howard has successfully mediated many complex insurance and environmental matters.

Howard brings to all his representations an in-depth understanding of the business needs of lenders, fiduciaries, buyers and sellers and, particularly, how those needs relate to environmental liability. Also, his expertise at drafting and negotiating environmental insurance products benefit from insights gained as a legal counsel to a number of insurance companies whose environmental products he helped draft.

Howard is a co-author of the *New York Law Journal*'s corporate insurance law column. Recent columns have included "New York Courts May Be Wavering on 'Zeig'" and "Second Circuit Upholds Coverage for Investigation-Related Costs."

Prior to joining SRZ, Howard served as a Deputy Attorney General in the New Jersey Office of Law and Public Safety, first as counsel to the New Jersey Department of Transportation, and later as Deputy Attorney General and Counsel to the New Jersey Department of Environmental Protection. He received his J.D. from Loyola University School of Law and his B.S. from American University.

Michael R. Littenberg
Partner
Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
+1 212.756.2524 | michael.littenberg@srz.com

Michael R. Littenberg is a partner in Schulte Roth & Zabel's Business Transactions Group and heads the firm's public companies practice. His principal areas of focus are corporate finance — across a broad range of equity and debt products — and mergers & acquisitions. As a significant part of his practice, Michael also counsels both domestic public companies and foreign private issuers and their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank and Sarbanes-Oxley, and with exchange requirements, as well as on governance and executive compensation matters. His public company clients range from well-known large-cap companies to growing micro-cap companies and his experience spans every major industry.

Michael is a frequent speaker at conferences and seminars, has authored numerous articles and is frequently quoted as an expert in the business and specialty press on topics pertaining to his areas of expertise. Michael is listed in *Who's Who in Securities Law* and in *New York Super Lawyers* for securities and corporate finance.

Michael received his J.D., *magna cum laude*, from Tulane University Law School, where he was an editor of the *Tulane Law Review* and a member of the Order of the Coif, and his B.S. from Indiana University.

Schulte Roth&Zabel

Public Company Hot Topics

2. About the SRZ Capital Markets Practice

Schulte Roth&Zabel

Capital Markets Practice

SRZ offers a full-service capital markets practice that provides transactional and ongoing advice through all stages for companies of all sizes. With extensive depth of experience and senior-level attention, we represent U.S. and non-U.S. issuers, investment banks and investors in connection with U.S. and global capital markets transactions, including SEC registered, Regulation D, Rule 144A and Regulation S offerings. Our expertise spans an extensive range of equity and debt products, including initial public offerings, investment grade and non-investment grade debt, SPACs, BDCs and other permanent capital vehicles, trust preferred securities, preferred stock, equity-linked securities, PIPEs, CMPOs, ATMs and registered direct offerings.

In addition to our transactional capital markets practice, we counsel public companies, their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank and Sarbanes-Oxley, and with exchange requirements, as well as on governance and executive compensation matters. We closely monitor and advise our public company clients on rule-making initiatives and evolving best practices.

We have experience in every major industry, including apparel, automotive, aviation, biotechnology, broadcasting, business services, computer hardware, consumer services, defense, energy, entertainment, financial services, food and beverage, government services, information technology, insurance, manufacturing, media, natural resources, real estate, restaurant and hospitality, retailing, shipping and logistics, software, technology and telecommunications.

Our public company clients range from well-known large-cap companies to growing micro-cap companies. We are able to leverage our experience to efficiently advise companies of any size. In addition, we have been pre-cleared by the OTC Markets Group to act as an Attorney Designated Advisor for Disclosure/Principal American Liaison (DAD/PAL) for OTCQX companies.

We frequently publish Alerts and hold seminars on developments affecting public companies. To join our Public Companies mailing list, please visit our subscriptions page at **www.srz.com/news/subscription.aspx**.

Contact:
Michael R. Littenberg, Partner
+1 212.756.2524 | michael.littenberg@srz.com

Schulte Roth&Zabel

Public Company Hot Topics

3. Presentation

Topics

- Conducting Effective Board Evaluations
- Cutting Edge Capital Markets Structures
- Public Company Hot Topics Grab Bag!
- Trends in D&O Coverage

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

Notes:

When Are Board Evaluations Required?

NYSE

Listed companies are required to adopt and disclose corporate governance guidelines, which must address annual performance evaluations

The Board should conduct a self-evaluation at least annually to determine whether the Board and its committees are functioning effectively

NASDAQ/ OTC

No similar requirement, although many NASDAQ and OTC companies conduct annual evaluations as part of good governance

Other Drivers

Disclosure obligations; auditor inquiries

Public Company **Hot** Topics

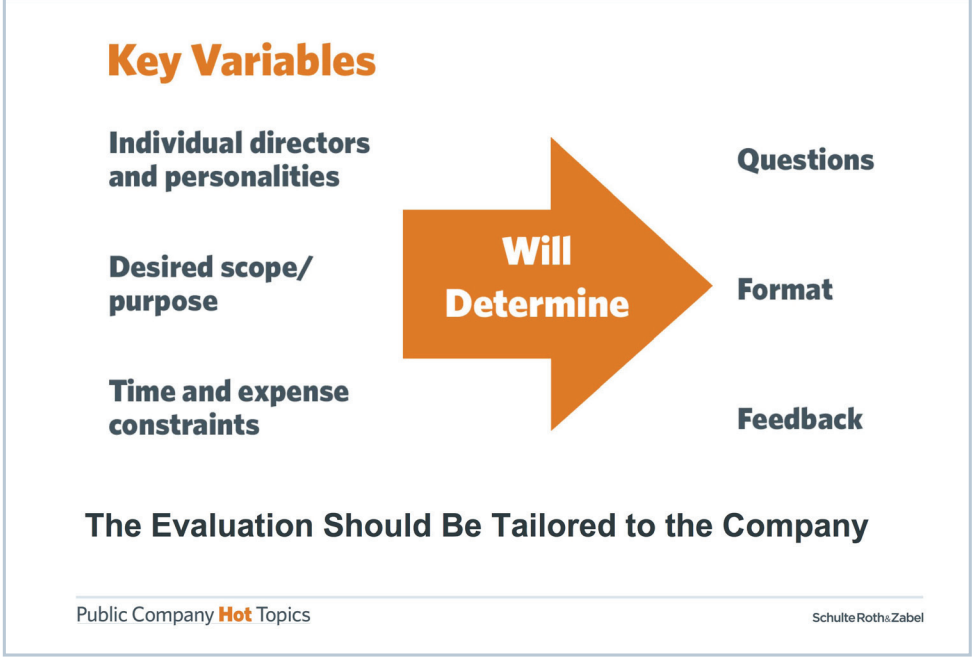
Schulte Roth&Zabel

Notes:

What Should the Evaluation Cover?

Notes:

How Should the Evaluation Be Conducted?



Notes:

Notes:

Using a Foreign Secondary Listing to Market Your Brand

Western companies have begun to use Hong Kong listings to increase investor interest and brand awareness and loyalty

The Coach Structure

- First U.S. issuer with a secondary HK listing
- Structured as a listing of HK depositary receipts by way of introduction
- Received waivers from various HK listing rules, including:
  - Local periodic reporting requirements
  - Related party transaction requirements
  - Shareholder approval of certain issuances, acquisitions and dispositions
- Received SEC no-action relief to be able to rely on Reg. S

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

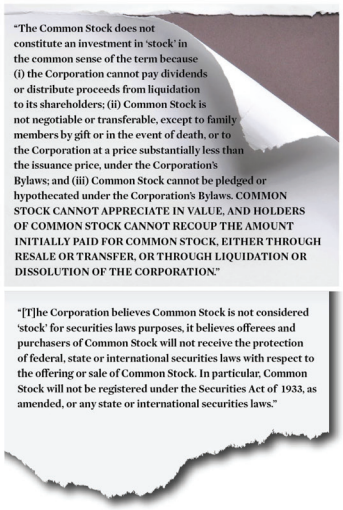
Offering Stock That Isn't a "Security"

280K shares at $250 per share

Deal Terms:

- **Use of proceeds: expansion of Lambeau Field**
- **Only individuals may purchase**
- **Can be purchased over the Internet by credit card**
- **Maximum purchase of 200 shares**
- **Transfers limited**
- **Voting, but no economic rights**

From the Disclosure



"The Common Stock does not constitute an investment in 'stock' in the common sense of the term because (i) the Corporation cannot pay dividends or distribute proceeds from liquidation to its shareholders; (ii) Common Stock is not negotiable or transferable, except to family members by gift or in the event of death, or to the Corporation at a price substantially less than the issuance price, under the Corporation's Bylaws; and (iii) Common Stock cannot be pledged or hypothecated under the Corporation's Bylaws. COMMON STOCK CANNOT APPRECIATE IN VALUE, AND HOLDERS OF COMMON STOCK CANNOT RECOUP THE AMOUNT INITIALLY PAID FOR COMMON STOCK, EITHER THROUGH RESALE OR TRANSFER, OR THROUGH LIQUIDATION OR DISSOLUTION OF THE CORPORATION."

"[T]he Corporation believes Common Stock is not considered 'stock' for securities laws purposes, it believes offerees and purchasers of Common Stock will not receive the protection of federal, state or international securities laws with respect to the offering or sale of Common Stock. In particular, Common Stock will not be registered under the Securities Act of 1933, as amended, or any state or international securities laws."

Public Company **Hot** Topics

Schulte Roth&Zabel

Notes:

Crowdfunding — An Idea Whose Time Has Come?

Crowdfunding Basics

Involves pooling small amounts of money from a large number of investors

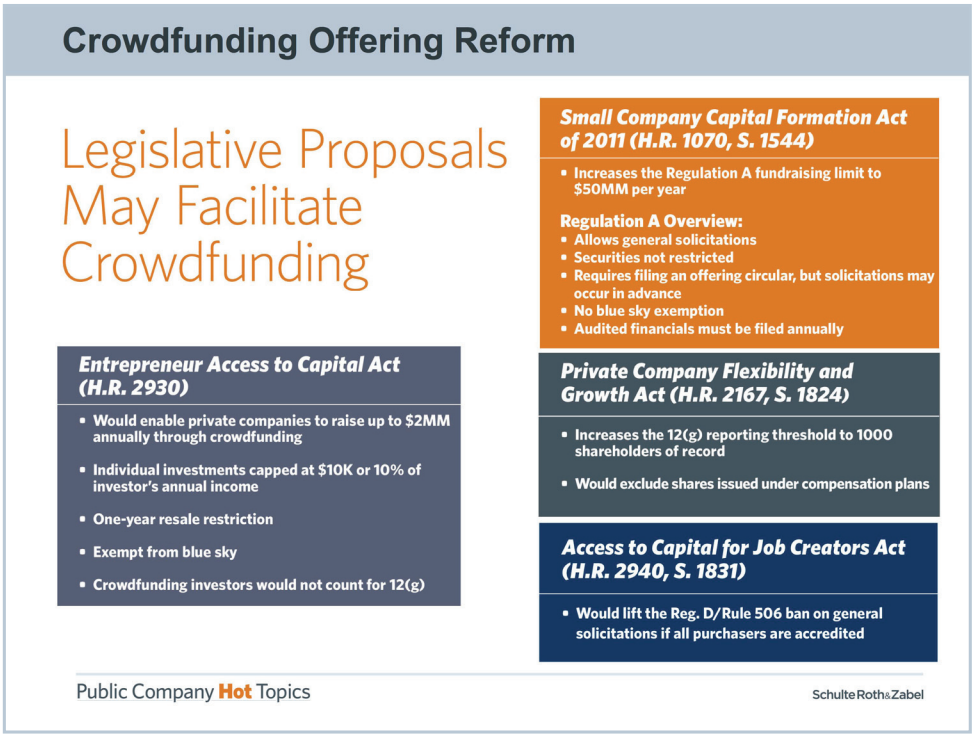
Typically occurs via the Internet

Currently no "crowdfunding exemption"

Public Company **Hot** Topics

Schulte Roth&Zabel

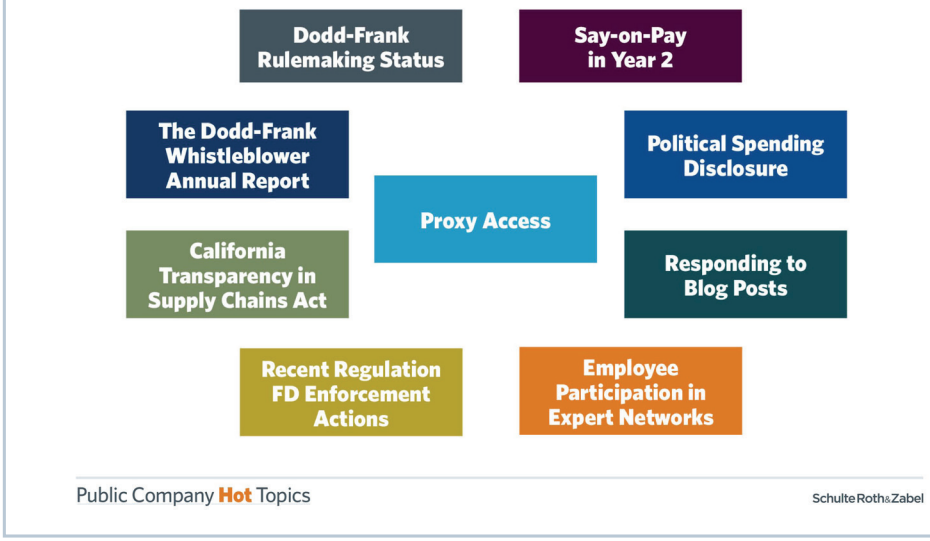
Notes:



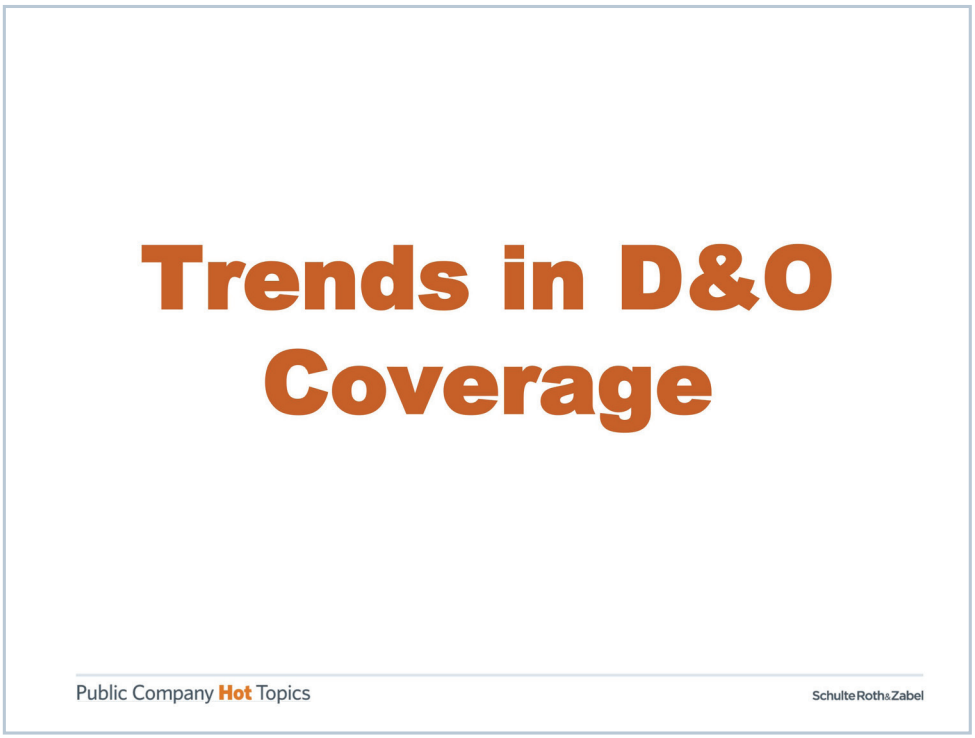
Notes:

Notes:

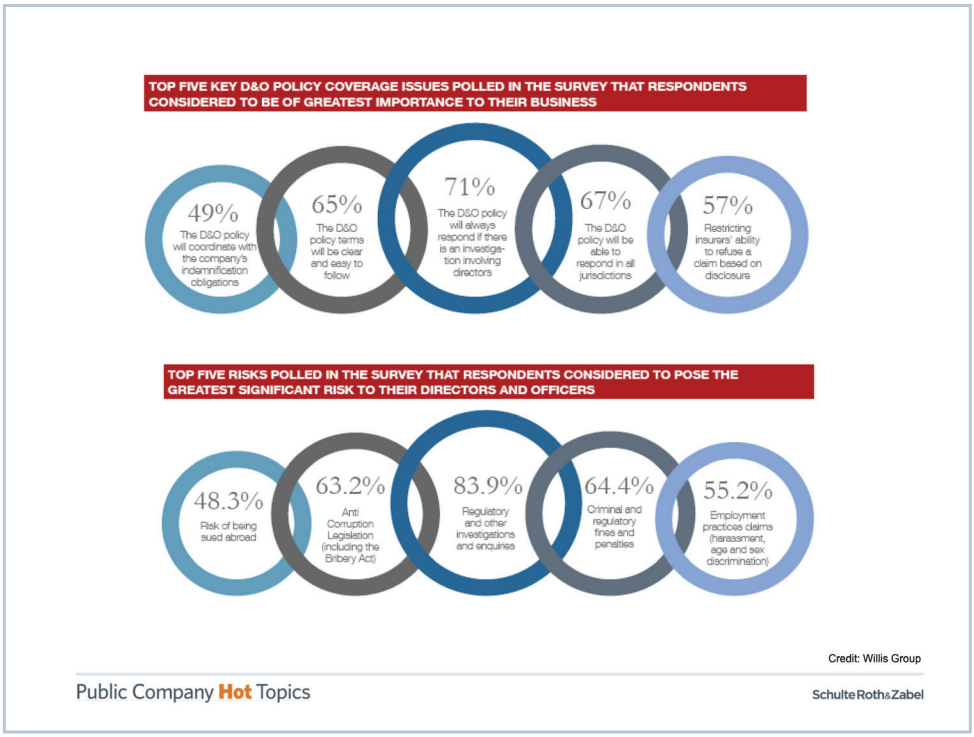
Other Topics That Should Be On Your Radar Screen



Notes:



Notes:



Notes:

D&O Insurance — What Does It Cover?

- **The typical D&O policy**
  - Indemnifies individual D&Os where the corporate entity does not, or cannot, honor the indemnity agreement
  - Reimbursement of the corporate entity where it has made indemnity payments on behalf of the D&Os
  - Indemnity coverage for the corporate entity for its liability (may be limited to securities claims)
  - Side A coverage for designated individual D&Os

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

D&O Insurance — How Does It Work?

- **Coverage applies to claims**
  - Made during the term of the policy regardless of the date of the wrongful act
  - Provided the reporting obligations are adhered to
  - Claims made after the expiration of the policy (where there is no renewal policy) by purchasing a "Tail Policy"

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

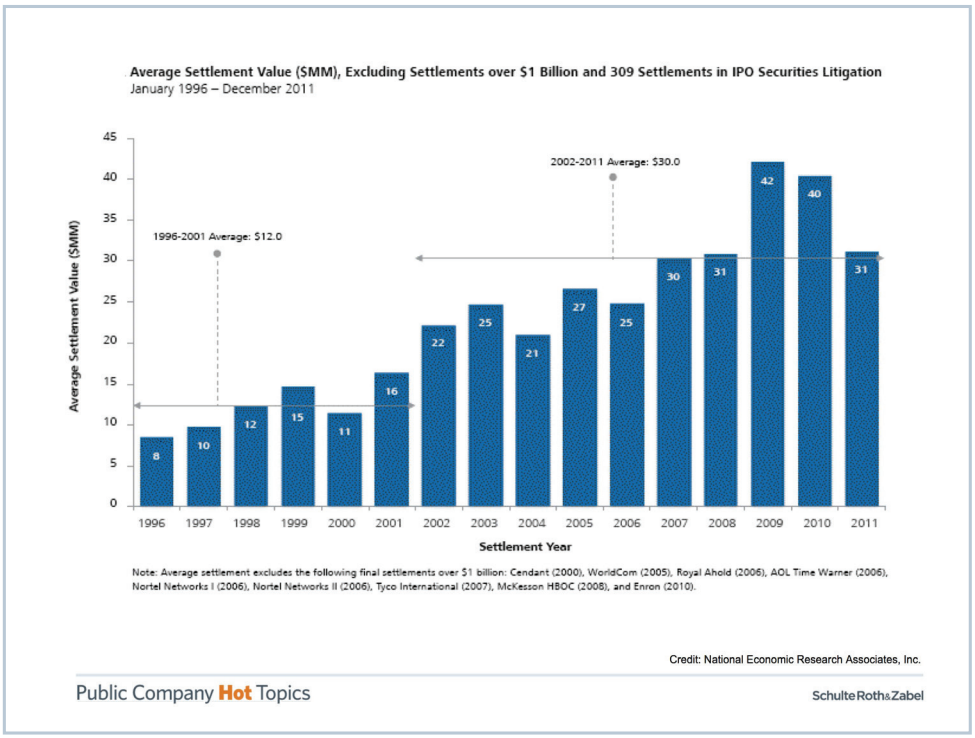
D&O Insurance — Should You Buy It?

- **Settlements, damages and legal fees will be paid from:**
  - D&O's personal assets
  - Corporate indemnity
  - D&O insurance

Public Company Hot Topics

Schulte Roth&Zabel

Notes:



Notes:

Current Issues and Trends

- **Are regulatory investigations covered claims?**
  - Standard definition typically covers only a complaint, notice of charges or indictment (note that some forms expand coverage for individual D&Os but not the entity)
  - Definition should be expanded to include, "…any formal or informal civil criminal, administrative or regulatory investigation by a federal, state, local or foreign government authority, agency…including the SEC or similar state agency"

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

Current Issues and Trends

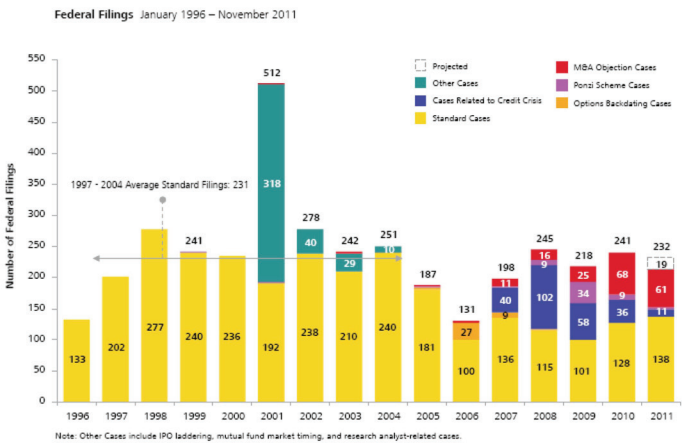
- **M&A litigation coverage issues**
  - In merger objection cases, the damages are usually lower because they amount to what the purchase price would have been if the defendants had done their jobs properly. The shareholders are seeking a bump-up in the price paid to them for their shares. For this reason, merger objection cases are often referred to as "bump-up" claims
  - Beware the "bump-up exclusion": "[t]he insurer shall not be liable for Loss on account of any Claim made against any Insured: . . . based upon, arising out of, or attributable to the actual or proposed payment by the Company of allegedly inadequate or excessive consideration in connection with the Company's purchase of securities issued by any company"
  - As a matter of public policy "loss" does not include "matters uninsurable under the law pursuant to which this coverage section is construed"
  - Defense costs are typically covered

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

Cases alleging breach of fiduciary duty in connection with a merger or an acquisition continue to be filed in large numbers. The number so far this year, 61, has declined only slightly from last year's total of 68 such suits. M&A objection lawsuits continue to be the single largest category of non-standard cases tracked by NERA.



Credit: National Economic Research Associates, Inc.

Public Company **Hot** Topics

SchulteRoth&Zabel

Notes:

Current Issues and Trends

- **Advancement of defense costs**
  - Reimbursement
  - Typically no duty to defend (tender exception)
  - Final adjudication clause
  - Order of payments clause
  - Beware of allocation

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

Current Issues and Trends

- **Maximizing coverage for individual D&Os**
  - Non-rescindable Side A difference in conditions
  - Stand-alone limits
  - No SIR
  - Exhaustion of underlying limits (limits shaving)
- **Protecting innocent insured**
  - Non-imputation/final adjudication clause
  - Severability clause

Public Company Hot Topics

Schulte Roth&Zabel

Notes:

Read Your Policy. The Details Matter!

"I think you misunderstood. The million dollar umbrella policy only covers you for claims involving an umbrella."

Credit: www.cartoonstock.com

Public Company **Hot** Topics

Schulte Roth&Zabel

Notes:

Schulte Roth&Zabel

Public Company Hot Topics

4. Schulte Roth & Zabel Articles

a) Conflict Minerals Due Diligence

b) Preparing for Conflict Minerals Compliance: Company Action Items Checklist

c) SRZ Conflict Minerals Resource Center Announcement

d) SRZ Annual Meeting Form of Public Company Director and Executive Officer Questionnaire

e) New York Courts May Be Wavering on 'Zeig'

f) Second Circuit Upholds Coverage For Investigation-Related Costs

a) Conflict Minerals Due Diligence

Conflict Minerals Due Diligence

Michael Littenberg, Farzad Damania and Joseph Valane, Schulte Roth & Zabel LLP

Published: January 10, 2012

This Practice Note is published by Practical Law Company on its PLC Corporate & Securities web service at http://us.practicallaw.com/0-510-6930.

This Note offers guidance on the due diligence required by the Securities and Exchange Commission's (SEC) proposed rules implementing Section 1502 of the Dodd-Frank Act, the conflict minerals provision. It lists and discusses resources that may assist companies with conflict minerals due diligence. The Note also describes significant uncertainties about the final rules.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1502) will require certain SEC reporting companies to make specialized disclosure and conduct related due diligence about certain minerals used in the companies' products or production processes. The minerals covered by the rules, which are included in many common products, include:

- Cassiterite.
- Columbite-tantalite (coltan).
- Wolframite.
- Derivatives of these minerals, including tin, tantalum and tungsten. These metals are often referred to as the "three Ts."
- Gold and its derivatives.
- Other minerals the US Secretary of State may designate in the future.

The sale of these minerals, which Section 1502 defines collectively as conflict minerals (regardless of their origin), is believed to be financing conflict in the Democratic Republic of the Congo (DRC). The intent of Section 1502 is to reduce a significant source of funding for armed groups that are committing human rights abuses and contributing to conflict in the DRC.

The SEC has proposed rules implementing Section 1502 (see *SEC Release No. 34-63547 (Dec. 15, 2010)*). Under the proposed rules, companies that use conflict minerals in their products or production processes must conduct due diligence on the source of the conflict minerals. In some cases, including if a company is unable to identify the source of the conflict minerals it uses, the company must publicly disclose that its products containing the minerals are "not DRC conflict free." When possible, companies are expected to preemptively make changes to their supply chains in response to the rules in order to avoid having to disclose that their products are not DRC conflict free.

This Note discusses:

- Which companies will be affected by Section 1502.
- The effective date of Section 1502's diligence and disclosure requirements (assuming final rules are adopted as proposed by June 30, 2012). On December 30, 2011, the SEC updated its Dodd-Frank implementation schedule to reflect that it expects to adopt final rules sometime between January to June 2012.
- The three main steps of conflict minerals due diligence that reporting companies may need to conduct depending on whether they use conflict minerals and, if so, the minerals' country of origin.
- Resources that may assist companies conducting conflict minerals due diligence.
- Major uncertainties about the final rules.

For a checklist that suggests action items for companies preparing to comply with the conflict minerals rules, see *Preparing for Conflict Minerals Compliance: Company Action Items Checklist (http://us.practicallaw.com/0-510-7468)*.

COVERED COMPANIES AND EFFECTIVE DATE

This section discusses the broad range of companies that will be affected by the conflict minerals rules and details when compliance obligations begin.

WHO MUST CONDUCT CONFLICT MINERALS DUE DILIGENCE?

Because every reporting company must determine whether it uses conflict minerals in a way that triggers the rules (see *Diligence Step 1: Ascertain the Company's Use of Conflict Minerals*), all reporting companies will need to do some diligence under the conflict minerals rules. Unlike some other requirements of the Dodd-Frank Act, the proposed conflict minerals rules do not provide a blanket exemption or a phase-in period for foreign private issuers (FPIs) or smaller reporting companies.

By the SEC's estimate, approximately 6,000 reporting companies will need to conduct a "reasonable country of origin inquiry" concerning the conflict minerals they use and make some conflict minerals disclosure in their annual report and on their website (see *Diligence Step 2: Determine Minerals' Country of Origin*). The SEC has further assumed that 20%, or approximately 1,200, of those companies will need to conduct more detailed supply chain due diligence and prepare a conflict minerals report to be furnished as an exhibit to their annual report, in addition to other annual report and website disclosure (see *Diligence Step 3: Detailed Due Diligence and Reporting on Supply Chain*).

Although the proposed rules technically apply only to reporting companies, they will have a significant impact on non-reporting companies worldwide that play a role in the supply chains of reporting companies. This is because reporting companies that must report under the rules will need to collect information from companies "upstream" (closer to the mines where the minerals originate) in their supply chains. Therefore, many non-reporting companies will also need to be familiar with the conflict minerals rules.

WHEN MUST COMPANIES CONDUCT DILIGENCE AND MAKE DISCLOSURE?

Under Section 1502 and the proposed rules, companies must conduct diligence and make conflict minerals disclosure for their first full fiscal year that begins after the SEC adopts final conflict minerals rules. While Section 1502 required the SEC to adopt final rules by April 15, 2011, the adoption date was delayed. The SEC has most recently indicated that it intends to adopt final rules sometime between January to June 2012. This section assumes the final rules:

- Will be adopted by June 30, 2012.
- Will not provide for a new effective date.
- Will not have their effectiveness stayed, for example, as a result of court challenge.

Disclosure Requirements

Under the proposed rules, calendar year companies will be required to make conflict minerals disclosure starting with their annual report for 2013 (due in 2014). Depending on their fiscal year end and when final rules are adopted, non-calendar year companies may be required to make disclosure substantially earlier than this. The rules require increasing levels of diligence and disclosure depending on a company's use of conflict minerals and country of origin of the minerals (see *Box, Due Diligence Flow Chart*).

The SEC is considering whether to require issuers to make conflict minerals disclosure separately from their annual reports, for example in a Form 8-K or on a newly-created form (see *Final Rules: Uncertainties and Open Items*).

Diligence Requirements

Under the proposed rules, as part of each year's annual report, covered companies will need to make disclosure about conflict minerals (including conflict minerals contained in products or components of products) that the company took possession of during the fiscal year covered by the report. Therefore, a calendar year company must conduct due diligence with respect to conflict minerals that it takes possession of on or after January 1, 2013.

Even though there is substantial uncertainty about the final rules, some companies have been actively developing an action plan to enable them to:

- Comply with the rules.
- Make changes to their supply chain to avoid having to disclose that their products are not DRC conflict free.

Companies may also be motivated to begin compliance efforts sooner rather than later in order to obtain a market advantage over competitors who cannot confirm that their products are "DRC conflict free." For a detailed list of actions companies should consider taking to prepare to comply with the conflict minerals rules, see *Preparing for Conflict Minerals Compliance: Company Action Items Checklist (http://us.practicallaw.com/0-510-7468)*.

In addition, in public speeches during 2011, members of the staff of the SEC's Division of Corporation Finance urged public companies to begin preparing to comply. In a July 15, 2011 statement (State Department guidance), the US Department of State reinforced this message, stating:

> [I]t is critical that companies begin now to perform meaningful due diligence with respect to conflict minerals. To this end, companies should begin immediately to structure their supply chain relationships in a responsible and productive manner to encourage legitimate, conflict free trade, including conflict free minerals sourced from the DRC and the Great Lakes region. Doing so will facilitate useful disclosures under Section 1502, as well as effective responses to any discovery of benefit to armed groups.

At the same time, many companies and industry groups are hopeful that the effectiveness of the rules will be even further delayed. Of the reporting companies participating in a pilot conflict minerals due diligence program organized by the Organisation for Economic Co-operation and Development (OECD), some indicated that they are moving aggressively to put diligence procedures into place. Others indicated that they do not intend to make significant investments in due diligence procedures until after the SEC adopts final conflict minerals rules. These companies expressed a desire to avoid investing in procedures that might ultimately not satisfy the final rules. For more information on this pilot program, see *Box, The OECD Diligence Guidance: Pilot Implementation Program*.

STEPS OF THE CONFLICT MINERALS DUE DILIGENCE PROCESS

This section discusses the steps of the conflict minerals due diligence process. Depending on what the company learns in each step, the rules may or may not require the company to continue to the next step.

For a flow chart depicting the three steps of conflict minerals due diligence, see *Box, Due Diligence Flow Chart*. For a checklist that can help determine a company's disclosure and diligence obligations under the proposed rules, see *Conflict Minerals Disclosure Requirements Checklist (http://us.practicallaw.com/3-504-6973)*.

DILIGENCE STEP 1: ASCERTAIN THE COMPANY'S USE OF CONFLICT MINERALS

The first question a reporting company needs to answer in conducting conflict minerals due diligence is whether any conflict minerals are necessary to the functionality or necessary to the production of a product the company manufactures or contracts to be manufactured. If they are not, the company has no obligations to make disclosure or conduct further due diligence under the rules.

This question can be broken down into three separate due diligence inquiries, discussed in this section.

Are Conflict Minerals Used?

A company must first determine if any conflict minerals are contained in its products or used in its production processes.

Mining companies should note that, under the rules as proposed, any reporting company that mines conflict minerals or contracts for conflict minerals to be mined is covered by the rules. Under the proposed rules, mining is considered a form of manufacturing (see *Does the Company Manufacture or Contract to Manufacture the Product?*).

For companies engaged in true manufacturing or in retailing, the question of whether a product the company makes or sells contains conflict minerals, or whether conflict minerals were used in a product's production process, may not be straight-forward. Many companies purchase component parts of their products from third parties, and others purchase finished products for retail sale.

A company may not have personnel on staff with the expertise to determine whether a component or product the company purchases contains conflict minerals. A company in that situation may need to:

- Hire consultants to assist it with supply chain due diligence.
- Survey its suppliers directly to inquire whether relevant products use conflict minerals.

Any survey of suppliers at this stage of the diligence process should, for the sake of efficiency, also include the additional inquiries that may be required under the later two steps of the conflict minerals due diligence process (see *Diligence Step 2: Determine Minerals' Country of Origin* and *Diligence Step 3: Detailed Due Diligence and Reporting on Supply Chain*).

Conflict minerals are used in a diverse range of products and in many industries. For a table listing common uses of conflict minerals, see *Box, Conflict Minerals: Industries and Applications*.

Many companies that assumed their products would not fall within the scope of the rules have discovered after a preliminary inquiry that they are covered by the rules. For example, the American Apparel and Footwear Association, a trade group whose members include many large designers, manufacturers and retailers in the apparel and footwear industry noted in its comment letter to the SEC that there may be incidental use of conflict minerals in certain children's shoes that light up and certain types of outerwear that contain heating elements. In addition, at the SEC's October 18th, 2011 public roundtable on the proposed rules, a manufacturer of food and beverage products noted that conflict minerals are used in some of its packaging (an archived webcast of the roudtable is available on the SEC's website).

Reporting companies should not assume that their products do not contain conflict minerals. Most public companies will need to conduct some supply chain due diligence.

Are Conflict Minerals Necessary?

Conflict minerals included in a product or production process will not trigger the rules unless the minerals are necessary to the functionality or necessary to the production of the product. Companies should determine whether their products or production processes that use conflict minerals meet this standard.

The conflict minerals rules do not contain a bright-line definition of when a conflict mineral is necessary to the functionality or production of a product. Guidance in the proposing release suggests that "necessary" should be understood very broadly. It indicates that the rules are intended to apply to products that intentionally include a conflict mineral, or that were produced in a process that intentionally included a conflict mineral (even if the mineral ultimately is not included in the final product).

The proposing release makes clear that, as proposed, the rules have no *de minimis* threshold for very small amounts of conflict minerals included in a product or production process. Under the

CONFLICT MINERALS: INDUSTRIES AND APPLICATIONS

While not exhaustive, this chart lists some common uses of conflict minerals.

CONFLICT MINERAL	DERIVATIVE METAL	INDUSTRIES	APPLICATIONS
Cassiterite	Tin	Electronics Automotive Industrial equipment Construction	Solders for joining pipes and circuits Automobile parts Tin plating of steel Alloys (bronze, brass, pewter)
Columbite-tantalite	Tantalum	Electronics Medical equipment Industrial tools Aerospace	Capacitors Hearing aids and pacemakers Carbide tools Jet engine components
Gold	Gold	Jewelry Electronics Aerospace	Jewelry Electric plating and interconnecting wiring Jet engine components
Wolframite	Tungsten	Electronics Lighting Industrial machinery	Metal wires, electrodes, electrical contacts Heating and welding

proposed rules, if conflict minerals are necessary to a product or process, they are covered no matter how small the amount. The SEC may be considering including a *de minimis* threshold in the final rules (see *Inclusion of a De Minimis Threshold*).

The proposing release indicates, however, that the rules will not be triggered solely by the fact a physical tool or machine used to produce a product itself contains conflict minerals. This should prevent the rules from being triggered solely by the fact that, for example, capital equipment used in the production of a product contains conflict minerals.

At the roundtable, the SEC asked whether the rules should specifically define:

- When a conflict mineral is necessary to the functionality or production of a product.
- Whether conflict minerals used in a product's ornamentation should fall outside of that standard.

In its comment letter to the SEC, the American Apparel and Footwear Association advocated that products should only be covered by the rules if conflict minerals are necessary to their primary functionality. For example, light up shoes should not fall under the rules, since, if the lights were to fail, the shoes would still perform their basic function.

Does the Company Manufacture or Contract to Manufacture the Product?

The conflict minerals rules only apply to companies that "manufacture or contract to manufacture" products. The proposing release does not define "manufacture." Instead, it notes that this term is generally understood. While it seems fairly clear that companies engaged in fabricating products are covered by the rules, it is less clear whether companies that sell products, but do not make them, are covered. These companies, including retailers, must determine whether they "contract to manufacture" products under the proposed rules and guidance in the proposing release.

According to the proposing release, the rules are intended to cover companies that "contract for the manufacturing of products over which they have any influence regarding the manufacturing of those products." The proposing release clarifies that a company that contracts with a third party to have a product manufactured specifically for the company is covered by the rules, even if it has no influence over the manufacturing specifications of the product, if the product is:

- A generic product that the company sells under its own brand name.
- A generic product that the company sells under a separate brand name that it has established.

In contrast, the proposing release states a retailer would not be covered by the rules if it:

- Sells only third-party products, if the retailer has no contract for, or other involvement in, the manufacturing of the products.
- Does not sell products under its own brand name or a separate brand established by it, and does not have products manufactured specifically for itself.

A retailer must analyze its involvement in the manufacturing of the products it sells to determine whether it is covered by the conflict

minerals rules. A retailer should closely look at, among other things, the way its buyers purchase goods in the ordinary course of business and its contracts with suppliers, if any. Special order instructions or specific packaging requirements may be enough to trigger the rules.

As discussed, under the proposed rules, companies that mine conflict minerals or contract for the mining of conflict minerals are considered to be manufacturing (or contracting to manufacture) the minerals. These companies are therefore covered by the rules. The SEC has requested comment on this point and may be reconsidering it (see *Exempting Mining*).

DILIGENCE STEP 2: DETERMINE MINERALS' COUNTRY OF ORIGIN

If a company determines in diligence Step 1 that conflict minerals are necessary to the functionality or necessary to the production of a product the company manufactures or contracts to be manufactured, it must move on to diligence Step 2. In Step 2, the company must conduct a "reasonable country of origin inquiry" to determine whether its conflict minerals originated in the DRC or an adjoining country. These countries (DRC countries) include:

- The DRC.
- Angola.
- Burundi.
- Central African Republic.
- Republic of Congo.
- Rwanda.
- South Sudan.
- Tanzania.
- Uganda.
- Zambia.

Reasonable Country of Origin Inquiry

The proposed rules do not spell out what steps would qualify as a reasonable country of origin inquiry. The proposing release explains that, in determining whether a particular inquiry is reliable, the SEC would look to whether the information used provides a reasonable basis for a company to be able to trace the origin of any particular conflict mineral it uses.

The proposing release provides flexibility to issuers to design their inquiry, noting that the details will depend on:

- The issuer's facts and circumstances.
- The available infrastructure at the time.

The proposing release specifically notes that, based on the SEC's understanding of current information systems in place, one way a company could conduct the inquiry would be for the company to both:

- **Processor representation.** Obtain a representation from the facility that processed the conflict minerals (the smelter or, in the case of gold, the refiner) about the source of the minerals. The company could obtain this directly from the processor or indirectly from suppliers further upstream in its supply chain.
- **Basis for reliance.** Determine that the processor's representation is reasonably reliable. A company could make this determination, for example, if the processor was identified as processing only DRC conflict free minerals under national or international standards, based on an independent third-party audit. That audit would need to have focused on the source and chain of custody of the processor's conflict minerals. The proposing release refers to these kinds of processors as "compliant smelters."

This strategy is consistent with the OECD's diligence guidance for downstream companies (see *OECD Guidance and Pilot Implementation Program*). Companies pursuing this strategy might be able to rely on the Electronic Industry Citizenship Coalition (EICC) and the Global e-Sustainability Initiative (GeSI) conflict free smelter program (see *EICC-GeSI Conflict Free Smelter Program*) in order to satisfy the second requirement.

The proposed rules may create an incentive for many companies to structure their supply chain so that they can affirmatively determine that their conflict minerals originated outside of the DRC countries (see *Next Steps*). A company could seek to do this by requiring that its suppliers of conflict minerals, or component parts or products containing conflict minerals, purchase them only from sources ultimately traceable to smelters who source only from non-DRC countries. However, a majority of the companies participating in OECD's downstream pilot program indicated a broad mineral sourcing approach, under which they will not source minerals from conflict areas in any region (as opposed to not sourcing conflict minerals from the DRC countries). For more information on the OECD downstream pilot program, see *Box, The OECD Diligence Guidance: Pilot Implementation Program*.

Under either approach, companies should consider requiring their direct suppliers to include "flow-down" clauses in their contracts with sub-suppliers. Flow-down clauses obligate the sub-suppliers to abide by the same requirements that the company is requiring of the direct supplier.

Next Steps

A company that affirmatively determines that its conflict minerals originated outside the DRC countries does not need to go on to Step 3 of the diligence process. Instead, it is required only to:

- Disclose the determination that its conflict minerals originated outside the DRC countries on the company website and in its annual report, along with a brief description of the reasonable country of origin inquiry supporting the determination.
- Maintain reviewable business records supporting the determination.

A company that determines any of its conflict minerals originated in a DRC country or came from recycled or scrap sources, or that is unable to determine the source of its conflict minerals, must:

- Disclose this determination in its annual report and on its website.
- Prepare a conflict minerals report. This will require the company to conduct the more detailed due diligence described in Step 3 (see *Diligence Step 3: Detailed Due Diligence and Reporting on Supply Chain*).

DILIGENCE STEP 3: DETAILED DUE DILIGENCE AND REPORTING ON SUPPLY CHAIN

Companies that determine any of their conflict minerals originated in a DRC country, or that are unable to determine the source of their minerals, must conduct the additional due diligence described in this section.

For a discussion of the modified diligence and disclosure requirements that apply if a company determines its conflict minerals came from recycled or scrap sources, see *Special Rules for Recycled and Scrap Materials*.

Conflict Minerals Report

When a company's conflict minerals originated in a DRC country, or their origin is unknown, the company must prepare and furnish a conflict minerals report describing:

- The measures the company took to exercise due diligence on the source and chain of custody of the company's conflict minerals.
- The company's products containing conflict minerals that it:
  - has determined directly or indirectly financed or benefited a DRC country "armed group" that has perpetrated serious human rights abuses, as identified in the State Department's *Annual Country Reports on Human Rights Practices*; or
  - is unable to determine the source of.

  The company must identify these products as not DRC conflict free. If applicable, the company may state that it is making this disclosure because the source of the minerals is unknown.
- To the extent known, the smelter or refinery used to process any conflict minerals identified as not DRC conflict free, the country of origin of the minerals and the efforts used to determine the mine or location of origin with the greatest possible specificity.

If a company affirmatively determines that its conflict minerals did not directly or indirectly finance or benefit a DRC country armed group, it can describe them as "DRC conflict free."

Step 3 Diligence

The proposed rules do not prescribe a particular due diligence framework, and the proposing release notes that what is reasonable may vary and evolve over time. However, the release notes that conforming to a nationally or internationally recognized set of standards or guidance for conflict mineral supply chain due diligence would evidence adequate due diligence. The proposing release specifically refers to the OECD guidance in this discussion (see *OECD Guidance and Pilot Implementation Program*).

In developing a due diligence process, companies should look for guidance to State Department statements, non-governmental organization (NGO) recommendations, industry group initiatives and the practices of other companies already conducting this type of due diligence. For more information on some of the leading resources currently available, see *Diligence Resources*.

Under the proposed rules, the process a company uses to collect the information for its conflict minerals report must be a reliable due diligence process. As the proposing release highlights, Section 1502 gives the SEC the ability to determine that a particular due diligence process is unreliable. If the SEC makes this determination, the company's conflict minerals report will not satisfy the requirements of the conflict minerals rules. This would subject the company to potential liability for violations of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (Exchange Act).

Special Rules for Recycled and Scrap Materials

The proposing release recognizes that a company might determine that its conflict minerals came from recycled and scrap sources. The rules make special provision for this situation, in recognition of the difficulty or impossibility of tracing minerals further back than the recycling or scrap process.

If a company determines its conflict minerals came from recycled or scrap sources, it must:

- Disclose this determination in its annual report.
- Prepare a conflict minerals report describing the measures the company took to exercise due diligence in determining that its conflict minerals were recycled or scrap. The proposing release does not specify the due diligence required for this inquiry. Companies should consider using the same best practices recommended for conflict minerals due diligence generally, including supplier certifications and flow-down clauses in contracts.

Under the proposed rules, a company can consider its conflict minerals to be from recycled or scrap sources if they are reclaimed end-user or post-consumer products. It cannot consider partially processed or unprocessed minerals, or minerals that are a byproduct from another ore, to be recycled or scrap.

Conflict minerals that are obtained from recycled or scrap sources are considered DRC conflict free under the proposed rules.

DILIGENCE RESOURCES

This section discusses some of the leading resources for companies who must conduct Step 2 and Step 3 conflict minerals due diligence. As noted in this section, many of these resources are still in the development stage, and their maturity may also vary between the individual conflict minerals.

OECD GUIDANCE AND PILOT IMPLEMENTATION PROGRAM

The OECD has published its *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas*. The guidance provides a framework for conflict minerals due diligence. The SEC's proposing release states that an issuer that follows the OECD guidance (or another nationally or internationally recognized set of guidelines for conflict minerals due diligence) would have evidence that it performed adequate due diligence. The State Department guidance specifically

THE OECD DILIGENCE GUIDANCE

While not designed for compliance with Section 1502 and the conflict minerals rules, the OECD framework for conflict minerals due diligence has been endorsed by the State Department for that purpose, and is also mentioned in the SEC's proposing release as a recognized international standard for diligence of this type. The OECD guidance advocates a five-step diligence framework, which includes the following steps:

- Establish strong company management systems.
- Identify and assess risks in the supply chain.
- Design and implement a strategy to respond to identified risks.
- Carry out an independent third-party audit of supply chain due diligence at identified points in the supply chain.
- Report on the supply chain due diligence.

The guidance includes a supplement (three Ts supplement) which provides specific guidance on supply chain due diligence of tin, tantalum and tungsten. The three Ts supplement includes specific guidance for both upstream companies (companies that fall between the mine and the smelter in the supply chain) and downstream companies (companies that fall between the smelter and retailers of finished products).

The supplement recommends that upstream companies develop a chain-of-custody (or traceability) system for the minerals they mine or trade. By collecting this information and providing it to smelters, upstream companies enable audits of smelters which seek to determine whether a particular smelter sources minerals only from conflict free sources.

The supplement recommends that downstream companies review the due diligence smelters conduct in their sourcing operations to determine if smelters are sourcing responsibly. Downstream companies can do this on an individual basis, or as a part of industry-wide smelter assessment schemes.

This upstream/downstream strategy recognizes that, because smelters aggregate minerals from many sources, it is typically not feasible for a downstream company to trace the chain of custody of its minerals further upstream than the smelter. This makes the smelter a critical point in the supply chain for due diligence.

The OECD guidance also includes a model supply chain policy. Companies may want to incorporate this into their existing social responsibility, sustainability or equivalent policy.

PILOT IMPLEMENTATION PROGRAM

In November 2011, the OECD released two reports detailing the findings of the first phase of the pilot implementation of its diligence guidance for the three Ts. One report covers the upstream supply chain and the other covers the downstream supply chain.

The pilot implementation is a voluntary information-sharing program for companies currently implementing the OECD guidance for three Ts diligence. Participants in the program report the steps they are taking to implement the guidance, and their results and challenges, to the OECD. Several prominent reporting companies are participating in the downstream pilot program. Reporting companies and other companies affected by the conflict minerals rules may find the pilot program reports useful to benchmark their current conflict minerals diligence efforts against the efforts of the program participants.

As part of the pilot implementation, the OECD expects to release two further sets of reports that will detail the progress participants make in implementing the OECD guidance over time. The OECD expects to release the second set of reports in March 2012.

TYPES OF COMPANIES REPRESENTED

Participants in the downstream pilot implementation include companies at several points in that part of the supply chain, including:

- Metal traders and exchanges.
- Component manufacturers.
- Product manufacturers.
- Original equipment manufacturers (companies that buy components and include them in their own products).
- Retailers.

These downstream program participants come from several different industry sectors, including:

- Aerospace and defense.
- Automotive.
- Medical devices.
- Information and communications technology, including semiconductors.
- Consumer products.
- Extractives.
- Chemicals.
- Lighting.

THE OECD DILIGENCE GUIDANCE (CONT.)

Industries not represented include:

- Jewelry.
- Construction.
- Pharmaceuticals.
- Packaging.

Participants in the upstream pilot implementation, none of which were US-based, include companies at several points in that part of the supply chain, including:

- Mining.
- Trading (including local trading houses, or comptoirs).
- Smelting.

HIGHLIGHTS OF THE REPORTS

The downstream report contains a detailed discussion of how the participants are seeking to make the OECD guidance work in the context of their businesses. Among other things, the report covers:

- How participants have incorporated conflict minerals-related requirements into corporate policies and supplier contracts, and strategies companies have used to communicate and explain the conflict minerals rules to suppliers.
- The extent to which participants have taken part in industry-wide efforts, such as the EICC-GeSI resources, as part of their diligence process.
- Strategies participants have used when supplier-provided information seems unreliable, and to coax suppliers to reveal information the suppliers feel is commercially sensitive or intellectual property.
- Methods companies have used to assess smelter diligence.
- The amount of employee time participants have devoted to conflict minerals compliance, and how companies have structured their conflict minerals compliance function.

The upstream report details significant challenges faced by upstream companies in implementing the guidance. The report includes several examples, however, of upstream companies using the International Tin Supply Chain Initiative (iTSCi) traceability program as part of their efforts to identify the mine of origin of the minerals they mine, trade or process. The upstream report may be of interest to downstream companies that, either individually or through participation in industry groups, are seeking to aid their upstream suppliers in complying with the OECD guidance.

GUIDANCE ON GOLD

In light of key differences between the gold supply chain and that of the three Ts, the OECD released a draft gold supplement. The gold supplement gives reporting companies that must conduct supply chain due diligence concerning gold suggestions for a risk-based due diligence framework tailored specifically to gold.

endorses the OECD guidance, and encourages companies to draw on it as they establish their due diligence practices. The OECD has also published the first of three reports detailing the results of a pilot program for the implementation of its guidance.

For more information on the OECD guidance and the pilot implementation program, see *Box, The OECD Diligence Guidance*.

EICC-GESI CONFLICT FREE SMELTER PROGRAM

The proposing release notes one particular method a company could use to get comfortable that it can reasonably rely on a mineral processor's representation as to the source of the minerals it processes. Under this method, the company would need to confirm that the processor is identified, under national or international standards and after an independent third-party audit of its sourcing operations, as one that processes only DRC conflict free minerals.

The EICC-GeSI has developed a program to certify smelters as conflict free. This program allows smelters to apply to be audited on a voluntary basis. Smelters that apply are audited by an independent third party, with the goal of establishing that they purchase only conflict free minerals. The EICC-GeSI publishes lists of compliant smelters. The program is currently being phased in on a mineral-by-mineral basis. The program's success will depend on a sufficient number of smelters agreeing to participate.

For more information on the program, see the EICC-GeSI's website.

Since the program is being phased in, smelters have not yet been certified for each metal. Therefore, not all companies may be able to rely on the program immediately.

EICC-GESI REPORTING TEMPLATE

EICC-GeSI has also released a conflict minerals reporting template and dashboard tool that companies can use as a standard questionnaire for their suppliers. The template, which is available for free download, can automatically aggregate completed supplier templates. The EICC-GeSI website also includes instructions on how to use the tool, as well as sample form letters to suppliers.

Many reporting companies have indicated they are using or planning to use the template. Some companies have found the most-recent version of the template to be overly complex and generally not user-friendly. Users have stressed the template be designed with simplicity in mind.

STATE DEPARTMENT MAP AND OTHER STATE DEPARTMENT RESOURCES

Section 1502 requires the State Department to create a conflict minerals map that shows trade routes, mineral rich zones and areas under control of armed groups to aid companies in complying with Section 1502. The map, which became available in June 2011, provides details on deposits of conflict minerals in the eastern DRC and also provides known locations of armed groups in the same area. Companies that determine their conflict minerals originated in a DRC country may be able to use the map as part of their Step 3 due diligence. Companies should realize, however, that the map currently has several significant limitations, including that it:

- Only details conflict minerals mining in the eastern DRC and parts of northern Republic of Congo.
- Is current only as of 2009 in some areas and 2010 in others, even though control of some of the areas covered is constantly changing.
- Does not represent itself as a full or accurate depiction of the situation on the ground in the areas it details.
- Is not currently scheduled to be updated or supplemented by the State Department.

The State Department and United States Agency for International Development launched a technical aid initiative, the Public-Private Alliance for Responsible Minerals Trade, in October 2011. The alliance aims to promote the development of fully traced and validated supply chain routes for conflict minerals through coordination between the private sector and the US government.

ITRI TIN SUPPLY CHAIN PROJECT

ITRI, an organization of major tin producers and smelters, has introduced a three-phase plan that is intended to eventually enable certification of suppliers along the entire tin supply chain. The first phase involved the development of upstream due diligence methods, which focused on the "bagging and tagging" of minerals from the mines to the smelters. The plan is currently in its second phase, which involves the implementation of the methods developed in the first phase. The third phase will involve performance evaluations and ratings. Companies should note that this initiative is still in its earlier stages, and the ability of companies to rely on it as part of their conflict minerals due diligence may be limited in the short term.

According to the OECD's upstream pilot program report, the ITRI project's considerable requirements in terms of human resources, financial resources, equipment and training can stretch the capacities of governments in the region and deeply cut into the margins of companies. Furthermore, the costs of the project are fixed and are expected to rise.

For more information on the OECD upstream pilot program, see *Box, The OECD Diligence Guidance: Pilot Implementation Program.*

RJC SYSTEM

The Responsible Jewelry Council (RJC) has developed the RJC System, which is a certification system for the diamond and gold jewelry supply chain. Each RJC member organization must be audited by an accredited third party to verify its compliance with the RJC's ethical, human rights, social and environmental standards.

While the RJC system was developed before Section 1502 was adopted, the RJC has new chain-of-custody certification standards under development that will be tailored for compliance with the conflict minerals rules. The RJC intends to make these standards publicly available as an informational resource to non-members.

OTHER INDUSTRY GROUP RESOURCES

The State Department has indicated that it supports the use of industry-wide initiatives to overcome practical challenges and effectively discharge the due diligence recommendations contained in the OECD's guidance. In addition to those discussed above, other industry-specific initiatives are underway to streamline supply chain due diligence.

For example, the Automotive Industry Action Group (AIAG) has produced materials to serve as an informational resource for its member companies and the general public and has been reaching out to other industry groups to share ideas on conflict minerals compliance. The AIAG published a conflict minerals FAQ in July 2011. The AIAG is also working to put in place a common supply chain data collection system for conflict minerals origin determinations and smelter identifications.

The Association Connecting Electronics Industries (IPC) has provided form letters for companies to send to direct suppliers and response letters which can be sent by suppliers to their customers. In addition, the IPC is in the early stages of developing a data exchange standard. The Aerospace Industries Association has also recently launched a working group on conflict minerals.

Companies should familiarize themselves with relevant initiatives as they develop their due diligence strategy.

INDIVIDUAL CORPORATE INITIATIVES

Some leading companies have already taken steps to eliminate minerals that are not DRC conflict free from their supply chain. For example, the Enough Project, an initiative of the Center for American Progress aimed at ending genocide and crimes against humanity, has identified Acer, Apple, Hewlett Packard, Intel, Microsoft and Nokia as leaders in the electronics industry's effort to address conflict minerals.

Some companies have published information about these efforts. For example, Intel has published a report on its efforts to achieve a conflict free supply chain. Hewlett Packard's website discusses its efforts to attain a DRC conflict free supply chain. It also has made its audit findings and supplier list available online.

ANALOGOUS INITIATIVES

Companies designing conflict mineral due diligence practices might be able to piggyback on diligence strategies developed as part of initiatives to eliminate child and forced labor from corporate supply chains. The Portal for Responsible Supply Chain Management includes questionnaires relating to child and forced labor practices, recommendations for companies seeking to ensure their supply chains are free from these practices and links to related resources.

CONFLICT MINERALS AUDIT

Under the proposed rules, each company that is required to furnish a conflict minerals report must also obtain and furnish an independent audit of the report. The audit community has pointed out a number of uncertainties about the audit requirement, including that the proposed rules do not make clear whether the object of the audit is to determine:

- Whether the company acted in conformity with a recognized standard of due diligence.
- Whether the company performed the due diligence procedures it outlined in its conflict minerals report.
- The origin of the conflict minerals.

The Comptroller General of the United States, in consultation with the State Department, is responsible for establishing the standards for the independent audit. The Government Accountability Office (GAO) has made a preliminary determination that no new audit standards need to be promulgated and that existing Government Auditing Standards, such as the standards for attestation engagements and performance audits, will be applicable. It is not certain whether the final rules will specify whether the audit should be an attestation audit or a performance audit, or whether both are acceptable.

For a further discussion of uncertainties about the audit requirement, see the comment letters on the proposed rules submitted by the major accounting firms (KPMG, Deloitte, Ernst & Young) and the AICPA, available on the SEC's website.

FINAL RULES: UNCERTAINTIES AND OPEN ITEMS

There are a number of uncertainties about the final rules. This section highlights some of these, based on the SEC's request for public comment in the proposing release and statements at the roundtable.

EXEMPTING MINING

As discussed, mining is considered manufacturing under the proposed rules (see *Does the Company Manufacture or Contract to Manufacture the Product?*). Mining trade groups have indicated in comment letters that the rules should not treat mining as manufacturing. These groups have argued that mining falls outside the plain meaning of the statutory language, which uses the word manufacture.

Other groups strongly support applying the rules to mining companies. They have argued, among other things, that the Controlled Substances Act includes mining under the definition of manufacturing. Supporters of covering mining have also cited practical considerations, including that requiring the companies furthest upstream (mines) to report will make reporting by downstream companies easier.

INCLUSION OF A DE MINIMIS THRESHOLD

As discussed, the proposed rules do not contain a *de minimis* threshold. The proposing release asks for comment on whether the final rules should include one. Predictably, industry groups and companies strongly support this inclusion. While a comment letter from the House Financial Services Committee recommended including a *de minimis* threshold, a letter from Senator Richard Durbin and Congressman Jim McDermott, the authors of Section 1502, stated that this had been considered and rejected during the drafting process.

EXEMPTION OR TRANSITION FOR FPIS AND SMALLER REPORTING COMPANIES

As discussed, the proposed rules have no exemption for FPIs or smaller reporting companies. The proposing release requests comment on whether this kind of exemption is appropriate. It also asks whether the final rules should allow smaller reporting companies to provide more limited disclosure, or to have a phase-in period.

INDETERMINATE ORIGIN CLASSIFICATION

In its July 28, 2011 letter to the SEC, the House Financial Services Committee also recommended establishing a temporary "indeterminate origin" classification for conflict minerals during an initial transition period, which would reduce the diligence obligations associated with conflict minerals that come within the classification. In its November 17, 2011 letter to the SEC, the Senate Committee on Small Business and Entrepreneurship supported this, at least for small businesses required to make conflict minerals disclosure. Companies and industry groups, such as the Information Technology Industry Council, have been strong proponents of a temporary indeterminate origin classification.

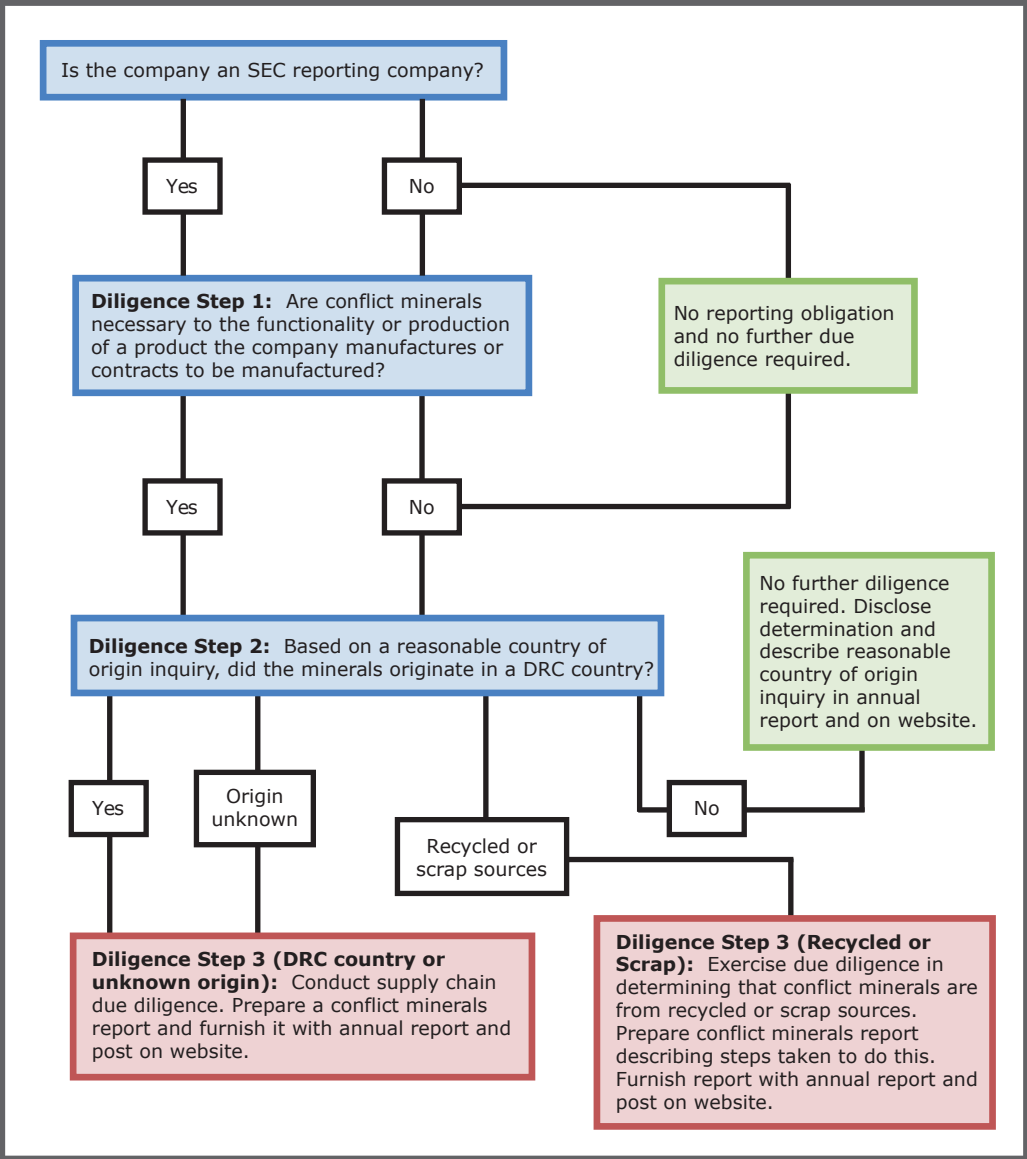
The creation of an indeterminate origin classification would prevent companies using minerals that cannot be traced with current diligence infrastructure from having to make the potentially damaging disclosure that certain of their products are not DRC conflict free. The classification would provide companies with time to implement their supply chain diligence plan and give diligence guidelines and infrastructure time to evolve and improve. Some commentators have also suggested that minerals falling into this classification should not trigger the conflict minerals report requirement.

OECD GUIDANCE SAFE HARBOR

The proposed rules do not prescribe a particular due diligence framework, although the SEC notes in its proposing release that conforming to a nationally or internationally recognized set of

DUE DILIGENCE FLOW CHART

This flow chart depicts the steps of due diligence required by the proposed conflict minerals rules.



standards of supply chain due diligence, such as the OECD guidance, would evidence adequate due diligence. At the roundtable, some participants requested that the final rules specifically adopt the OECD guidance, or that the final rules include a safe harbor which would provide that a company that follows the OECD guidance would be considered to have completed adequate due diligence.

PHASE-IN

Many companies and industry groups have called for a phase-in of the final rules in order to construct conflict minerals due diligence procedures and conduct diligence in a thought-out manner, indicating that fully mapping supply chains will take significant time. Proponents of a phase-in also have asserted that it is necessary, because the OECD guidance is not yet fully developed, and many of the diligence resources available to companies are in their pilot stages or otherwise not yet completed.

OTHER POTENTIAL CHANGES

At the roundtable, the SEC and the panelists discussed numerous other changes to the proposed rules. For example, it was suggested that the final rules limit conflict minerals to the three Ts and gold, rather than including all derivatives of cassiterite, columbite-tantalite and wolframite. The parties also discussed the possibility of creating a new SEC form for conflict minerals disclosure, or allowing for

disclosure on Form 8-K, rather than requiring disclosure in the annual report. Parties also discussed the possibility of requiring all companies to make conflict minerals disclosure at the same time of year, in order to facilitate reporting by upstream suppliers.

OTHER LEGISLATIVE AND JUDICIAL CONSIDERATIONS

Companies affected by the conflict minerals rules should also be aware of similar legislative initiatives at the federal and state levels. This section discusses these kinds of initiatives as well possible court challenges to final rules.

SUPPLY CHAIN LEGISLATION

The Business Transparency on Trafficking and Slavery Act, H.R. 2759, is currently pending in the US House of Representatives. This bill, which has received bipartisan support, would require reporting companies with over $100 million in worldwide receipts to disclose in their annual reports any steps they have taken to identify and address child and forced labor in their supply chains. This bill will require many companies to conduct supply chain due diligence similar to the requirements under Section 1502 if it is enacted.

The California Transparency in Supply Chains Act, which became effective on January 1, 2012, requires companies to disclose on their website (or on request, if they have no website) their efforts to ensure that their supply chains are free from slavery and human trafficking. This legislation applies to retail sellers and manufacturers, public or private, doing business in California that have annual gross worldwide receipts exceeding $100 million. Under this legislation, a company is "doing business" in California if it meets one of the requirements of Section 23101 of the California Revenue and Taxation Code.

In addition, California has enacted SB 861, which will bar companies that commit certain violations of Section 1502 from submitting to California state agencies bids to provide goods or services that are related to products or services that are the reason the company must comply with the rule. This law will become effective on the date the SEC adopts final conflict minerals rules.

POTENTIAL COURT CHALLENGES

The final conflict minerals rules may be subject to court challenge similar to the challenge brought against the SEC's mandatory proxy access rule, Rule 14a-11 under the Exchange Act, which was eventually struck down by the D.C. Circuit Court of Appeals in the *Business Roundtable* case. Some business groups have already indicated that they intend to challenge any final rules. Even if the rules are ultimately upheld, like Rule 14a-11, their application may be stayed pending the resolution of a challenge.

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London

b) Preparing for Conflict Minerals Compliance: Company Action Items Checklist

Preparing for Conflict Minerals Compliance: Company Action Items Checklist

Michael Littenberg, Farzad Damania and Joseph Valane, Schulte Roth & Zabel LLP

This Checklist is published by Practical Law Company on its PLC Corporate & Securities web service at http://us.practicallaw.com/0-510-7468.

This Checklist suggests action items for SEC reporting companies preparing to comply with the diligence and disclosure requirements of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the conflict minerals provision. This Checklist is a companion resource to *Practice Note, Conflict Minerals Due Diligence*, which includes a detailed discussion of the diligence and disclosure requirements of Section 1502, and a review of leading resources to assist companies in complying with those requirements.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1502) will require certain SEC reporting companies to make specialized disclosure and conduct related due diligence about certain minerals used in the companies' products or production processes.

Since Section 1502 and the SEC's proposed rules under Section 1502 are based on the use of minerals that are widely used in many industries, they will affect a wide range of companies. For more information on Section 1502's effective date and what companies will be covered, see *Practice Note, Conflict Minerals Due Diligence: Covered Companies and Effective Date (http://us.practicallaw.com/0-510-6930)*.

The due diligence required by the conflict minerals rules may be a lengthy and costly process. Based on anecdotal feedback, however, many reporting companies have not yet developed a strategy for compliance. This checklist suggests steps that companies should consider taking as they prepare to comply with the conflict minerals rules.

For a detailed discussion of the diligence and disclosure requirements of Section 1502 and a review of leading resources to assist companies in complying with those requirements, see *Practice Note, Conflict Minerals Due Diligence (http://us.practicallaw.com/0-510-6930)*. This Checklist should be read together with that Practice Note.

ASSESS THE COMPANY'S RISK

- Determine the products that may be implicated by the rules.
- Catalogue the company's current procurement policies and practices, due diligence practices, and internal reporting and data gathering practices and capabilities relating to conflict minerals.
- Assess the company's current supply chain relating to conflict minerals and risks presented by upstream suppliers. Upstream suppliers are suppliers closer in the supply chain to the mines in which the conflict minerals in the company's products or production processes originated.

CREATE A COMPLIANCE TEAM

- Create an internal conflict minerals compliance team. Consider including representatives from manufacturing, engineering, procurement, finance and legal.
- Consider whether the company needs to hire additional personnel to manage conflict minerals compliance.
- Become familiar with the proposed conflict minerals rules, the Organisation for Economic Co-operation and Development guidelines, other non-governmental organization recommendations and relevant industry initiatives (see *Practice Note, Conflict Minerals Due Diligence: Diligence Resources (http://us.practicallaw.com/0-510-6930)* for a discussion of these and other due diligence resources). Many companies will want to piggyback on industry-wide due diligence initiatives as a more efficient means of complying with the diligence requirements.
- Consider retaining outside legal counsel to assist in:
  - educating internal personnel on rule requirements;
  - constructing compliance policies;
  - crafting supplier communications and certifications;
  - assessing necessary modifications to standard form contracts; and
  - drafting annual report and website disclosure.
- Consider hiring other outside consultants to assist in:
  - analyzing the company's supply chain and supply chain risk;
  - developing and assessing the effectiveness of diligence procedures;
  - advising on enhancements to internal reporting systems and procedures; and
  - implementing these enhancements.
- Construct a work plan, timeline and budget for establishing a compliance program.
- Consider participating in the development of industry supply chain reporting initiatives (see *Practice Note, Conflict Minerals Due Diligence: Diligence Resources (http://us.practicallaw.com/0-510-6930)* for a discussion of examples of this kind of initiative).
- Consider launching a pilot compliance initiative for selected products. This will help the company assess the strengths and weaknesses of its supply chain and its systems and procedures relevant to compliance with the rules. It will also help the company develop best practices and identify potential cost savings before it launches its full conflict minerals compliance program.

DRAFT POLICIES, QUESTIONNAIRES AND SUPPLIER CONTRACT PROVISIONS

- Adopt a supply chain policy setting forth the principles the company will use to assess itself and its suppliers. Some companies have separate supply chain policies, while others include the principles in their general corporate social responsibility policy.
- Develop questionnaires and certifications for suppliers and determine any additional supplier documentation, due diligence and compliance requirements. This item will need to be tailored to the particular company and its industry. For example, the supplier certification process should take into account industry recommendations and diligence initiatives to map common supply chains. The questionnaire also should be designed to capture information necessary to conduct due diligence through Diligence Step 3 (see *Practice Note, Conflict Minerals Due Diligence: Steps of the Conflict Minerals Due Diligence Process (http://us.practicallaw.com/0-510-6930)*). Companies should consider whether to build child and forced labor elements into these materials.
- Incorporate the company's supply chain policy, due diligence process, inspection rights and supplier disclosure requirements into contracts with suppliers. Also consider requiring direct suppliers to include "flow-down" clauses in contracts with sub-suppliers to ensure the company's sub-suppliers are also bound by these requirements (see *Practice Note, Conflict Minerals Due Diligence: Reasonable Country of Origin Inquiry (http://us.practicallaw.com/0-510-6930)* for a discussion of flow-down clauses).
- Develop a risk management plan that includes procedures for suspending or terminating suppliers that do not comply with the company's procurement policies, as well as alternative sources for conflict minerals.

CONTACT SUPPLIERS

- Assemble a database of supplier personnel that should receive conflict minerals compliance materials. For the compliance program to efficiently meet its goals, it is critical that materials reach supplier compliance personnel. These may be different individuals than the company's regular contacts.
- Send an initial written communication to suppliers educating them on the conflict minerals rules and the company's compliance obligations.
- Send the company's supply chain policy or social responsibility policy, as applicable, to suppliers.
- Execute revised contracts with suppliers, if necessary.

Practical Law Company provides practical legal know-how for law firms, law departments and law schools. Our online corporate, securities and finance resources help lawyers practice efficiently, get up to speed quickly and spend more time on the work that matters most. This Checklist is just one example of the many resources Practical Law Company offers. Discover for yourself what the world's leading law firms and law departments use to enhance their practices.

Contact Us

Practical Law Company
747 Third Avenue, 36th Floor
New York, NY 10017
646.562.3405
plcinfo@practicallaw.com
www.practicallaw.com

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London

c) SRZ Conflict Minerals Resource Center Announcement

Schulte Roth&Zabel

SRZ Establishes Conflict Minerals Resource Center

December 21, 2011

We are pleased to announce that SRZ has established a Conflict Minerals Resource Center to assist public and private companies in complying with the SEC's proposed Conflict Minerals Rule. In addition to SRZ materials on the Rule, this regularly updated Resource Center contains SEC, State Department, OECD, industry group and NGO resources, form documents and other materials to assist with Conflict Minerals Rule compliance.

Click **here** to sign up to receive alerts when new materials are added to the Conflict Minerals Resource Center.

Click **here** to visit our Conflict Minerals Resource Center.

To subscribe to SRZ mailing lists by subject, please **click here**.

Follow us on **Twitter**

New York
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 Fax

Washington, DC
Schulte Roth & Zabel LLP
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 Fax

London
Schulte Roth & Zabel International LLP
Heathcoat House, 20 Savile Row
London, W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 Fax

www.srz.com

d) SRZ Annual Meeting Form of Public Company Director and Executive Officer Questionnaire

[**SRZ Annual Meeting Form of Public Company Director and Executive Officer Questionnaire January 2012**]

For Directors and Executive Officers of

[COMPANY NAME]

The purpose of this questionnaire is to provide [COMPANY NAME] and its counsel, Schulte Roth & Zabel LLP, with information (or confirmation of information) that will be used in the preparation of the Company's [2011] Annual Report on Form 10-K and [2012] Proxy Statement. This questionnaire is required to be completed by Directors and Executive Officers of the Company, and all persons who have been nominated or chosen to become Directors and who have consented to act in that capacity.

Unless otherwise indicated, capitalized terms used in this questionnaire have the meanings ascribed to them in Appendix A. For purposes of this questionnaire, as indicated in Appendix A, the term "**Company**" means, unless the context indicates otherwise, [COMPANY NAME] and its Subsidiaries (and their respective predecessors, if any).

Information requested in this questionnaire is to be provided as of the date you complete the questionnaire, unless otherwise indicated. If additional space is required to complete an answer, please attach additional pages as needed. The information supplied in response to this questionnaire will be used to ensure that certain information to be included in the Form 10-K and Proxy Statement will be correct. Under certain circumstances, Executive Officers and Directors are subject to personal liability if the Form 10-K or Proxy Statement misrepresents or omits a material fact.

PLEASE ANSWER EVERY QUESTION AND FILL IN ALL BLANKS, UNLESS A QUESTION OTHERWISE SPECIFICALLY PROVIDES. IF THE ANSWER TO ANY QUESTION IS "N/A," "0" OR "NONE," PLEASE SO STATE. SHOULD YOU FAIL TO PROVIDE AN ANSWER, WE WILL ASSUME THAT THE ANSWER IS IN THE NEGATIVE.

The completed, signed and dated questionnaire should be returned as soon as possible, but not later than [DATE], 2012, to [GENERAL COUNSEL NAME], at [ADDRESS], by email at [EMAIL ADDRESS] or facsimile at [FAX NUMBER]. If you have any questions regarding the questionnaire, please call [GENERAL COUNSEL NAME] at [TELEPHONE NUMBER].

Please retain a completed copy of this questionnaire for your files. If, following your return of this questionnaire, any events occur or information comes to your attention that would affect the accuracy of any of your answers in this questionnaire, please notify [GENERAL COUNSEL], at the telephone number above, of any such event or information as soon as possible.

PLEASE COMPLETE AND RETURN THIS QUESTIONNAIRE NO LATER THAN [DATE], 2012.

Table of Contents

BEFORE YOU COMPLETE THIS QUESTIONNAIRE, PLEASE REVIEW THE DEFINITIONS OF CERTAIN TERMS THAT ARE LISTED IN APPENDIX A.

Question 1. General Information. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Your full name: _____

Your date of birth: _____

Your business address: _____

APPENDIX B (IF ATTACHED) LISTS CERTAIN BIOGRAPHICAL INFORMATION CONCERNING YOU. PLEASE REVIEW THAT APPENDIX. PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION 1 ONLY IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) List all positions and offices you currently hold with the Company and its Affiliates, all positions and offices previously held with the Company and its Affiliates during the last five years and the time periods during which you served in any current and previous positions or offices.

Positions or Offices Held and Name of Entity	Period of Service (month and year)

(b) If you have been nominated to become a Director of the Company, do you consent to being named as such and to serve in such capacity if elected?

Yes_____ No_____

(c) Describe the nature of any arrangement or understanding between you and any other Person(s) (naming such Person(s)) pursuant to which you were or will be selected as a Director or Executive Officer of the Company (excluding arrangements or understandings with Directors or Executive Officers of the Company acting solely in their capacity as such).

_____

_____

(d) State the nature of any Family Relationship between you and any other Director, Executive Officer or person nominated or chosen to become a Director or Executive Officer.

_____

_____

(e) To the extent not addressed in (a) above, briefly describe your business experience during the past five years, including your principal occupation(s) and employment during that period and the name and principal business of any corporation or other organization in which such occupation(s) and employment were carried on. Please indicate whether any such corporation or organization is an Affiliate of the Company. In addition, for any position listed below, give a brief explanation as to the nature of the responsibilities undertaken by you in such position.

Position(s) Held	Name of Entity	Affiliate of the Company?	Period of Service (month and year)	Principal Business	Nature of Your Responsibilities

(f) Indicate any other directorships held by you during the past five years, including any committees upon which you serve or have served, with any company that (i) has a class of securities listed on a national securities exchange or otherwise registered pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), (ii) is subject to the requirements of Section 15(d) of the Exchange Act or (iii) is registered as an investment company under the Investment Company Act of 1940, as amended.

Position(s) Held	Name of Entity	Period of Service (month and year)

(g) Please indicate whether during the last ten years:

(i) a petition under any Federal bankruptcy law or any state insolvency law was filed by or against (A) you or your business, (B) any partnership in which you were a general partner at or within two years before the time of such filing, or (C) any corporation or business association of which you were an Executive Officer at or within two years before the time of such filing.

Yes_____ No_____

(ii) a receiver, fiscal agent or similar officer was appointed by a court for (A) you or your business, (B) any partnership in which you were a general partner at or within two years before the time of such appointment, or (C) any corporation or business association of which you were an Executive Officer at or within two years before the time of such appointment.

Yes_____ No_____

(iii) you were convicted in a criminal proceeding or are a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses).

Yes_____ No_____

(iv) you were convicted of fraud.

Yes_____ No_____

(v) you were the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining you from, or otherwise limiting, the following activities:

(A) acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission (the "**CFTC**") or an associated person of any of the foregoing, or as an investment advisor, underwriter, broker or dealer in securities or as an Affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activity.

Yes_____ No_____

(B) engaging in any type of business practice.

Yes_____ No_____

(C) engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of any Federal or state securities laws, or Federal commodity laws.

Yes_____ No_____

(vi) you were the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or state authority barring, suspending or otherwise limiting for more than 60 days your right to engage in any activity described in paragraph (v) above, or to be associated with Persons engaged in any such activity.

Yes_____ No_____

(vii) you were found by a court of competent jurisdiction in a civil action or by the Securities and Exchange Commission ("**SEC**") to have violated any Federal or state securities law, and the judgment in such civil action or finding by the SEC has not been subsequently reversed, suspended or vacated.

Yes_____ No_____

(viii) you were found by a court of competent jurisdiction in a civil action or by the CFTC to have violated any Federal commodities law, and the judgment in such civil action or finding by the CFTC has not been subsequently reversed, suspended or vacated.

Yes_____ No_____

(ix) you were the subject of, or a party to, any Federal or state judicial or administrative order, judgment, decree or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of:

(A) any Federal or state securities or commodities law or regulation.

Yes_____ No_____

(B) any law or regulation respecting financial institutions or insurance companies, including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty, temporary or permanent cease-and-desist order, or removal or prohibition order.

Yes_____ No_____

(C) any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity.

Yes_____ No_____

(x) You were the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any Self-Regulatory Organization, any Registered Entity or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or Persons associated with a member.

Yes_____ No_____

If you answered "Yes" to any of the foregoing questions, please explain the circumstances in detail on a separate sheet of paper.

Question 2. Legal Proceedings. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Are there any pending or threatened legal proceedings (including administrative proceedings and investigations by governmental authorities) in which you or any of your Associates is a party adverse to the Company or any of its Affiliates, or in which such you or such Associate has any interest adverse to the Company or any of its Affiliates?

Yes_____ No_____

If you answered "Yes" to the foregoing question, please describe the circumstances on a separate sheet of paper.

Question 3. Compensation of Executive Officers. If you are an Executive Officer of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) ***Annual Compensation.*** Indicate the dollar value of your annual compensation for the most recently completed fiscal year. If you served as an Executive Officer during any part of the fiscal year, then information should be provided as to all of your compensation for the full fiscal year.

(i) ***Salary (Cash and Non-Cash).***

_____

(ii) ***Bonus (Cash and Non-Cash).***

_____

(iii) ***Awards of Stock.*** The date of award and number of shares awarded for any award of stock of the Company or any Affiliate thereof.

_____

_____

(iv) ***Options/SARs Awarded.*** If you received any grants of stock options (whether or not in tandem with stock appreciation rights ("**SARs**")) or freestanding SARs, please provide the date of award, the exercise price of such options and the number of options/SARs awarded, as applicable.

_____

_____

(v) ***NEIP Compensation.*** If you received any compensation under a non-equity incentive plan ("**NEIP**"), please provide the dollar value of amounts earned during the fiscal year or calculated with respect to the fiscal year.

_____

_____

(vi) ***Above-Market or Preferential Earnings.*** If you received above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans, please indicate such earnings.

Interest on deferred compensation is "above-market" only if the rate of interest exceeds 120% of the applicable Federal long-term rate, with compounding at the rate that corresponds most closely to the rate under the plan at the time the interest rate or formula is set. Dividends (and dividend equivalents) on deferred compensation denominated in Company stock are preferential only if earned at a rate higher than dividends on the Company's common stock.

_____

_____

(vii) ***Modification of Awards.*** At any time during the last fiscal year, did the Company or its Affiliates reprice or otherwise materially modify any outstanding option or other equity-based award (such as by extension of the exercise period, change of vesting or forfeiture conditions, change or elimination of applicable performance criteria or change of the bases upon which returns are determined)?

Yes_____ No_____

If your answer is "Yes," please describe each repricing or other material modification.

_____

_____

(viii) ***All Other Annual Compensation.*** Except as otherwise specified in this questionnaire, this category of compensation includes, without limitation, all compensation not properly categorized as stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings.

Examples include:

All Other Compensation	Amount/ Description
Perquisites and other personal benefits, securities or property.	
All gross-ups and other amounts reimbursed during the fiscal year for the payment of taxes.	

All Other Compensation	Amount/ Description
The compensation cost, if any, for any security of the Company or any of its Affiliates purchased from the Company or any of its Affiliates (through the deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the Company.	
The amount paid or accrued in accordance with a plan or arrangement in connection with (A) a termination, including, without limitation, through retirement, resignation, severance or constructive termination (including a change in responsibilities), of employment with the Company or any of its Affiliates, or (B) a change in control of the Company.	
Company contributions or other allocations to vested or unvested defined contribution plans.	
The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit.	
The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award.	
Any other compensation not covered in Question 3, stating the type of compensation and amount.	

(b) ***Employment Agreements.*** Are you a party to an employment agreement with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please provide the date of such agreement.

_____

(c) ***Option Exercises and Stock Vested.***

(i) Have you exercised any stock options or similar instruments during the last fiscal year?

Yes_____ No_____

If your answer is "Yes," please provide for each exercise the date and the number of shares or other securities received upon exercise.

_____

_____

(ii) Indicate the number of shares of stock that have vested during the last fiscal year, whether in the form of restricted stock grants or options.

_____

_____

(d) ***Pension Benefits.*** Are you a participant in any defined benefit or actuarial plan in connection with your services to the Company or its Affiliates?

Yes_____ No_____

If your answer is "Yes," please indicate:

(i) the plan's title.

_____

(ii) whether the benefits are determined primarily by final or average final compensation and years of service.

_____

(iii) your estimated credited years of service.

_____

(iv) your estimated annual benefits payable upon retirement.

_____

(v) the number of actual years of service you have given under the plan (if different from the number of years of credited service).

_____

(vi) the dollar amount of any payments and benefits paid to you during the last fiscal year.

_____

(e) ***Non-Qualified Deferred Compensation.*** Please provide the following information with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified:

(i) the dollar amount of your aggregate contributions during the last fiscal year.

_____

(ii) the aggregate dollar amount of interest or other earnings earned during the last fiscal year.

_____

(iii) the dollar amount of all withdrawals by and distributions to you during the last fiscal year.

_____

(iv) the dollar amount of the total balance of your account as of the end of the last fiscal year.

_____

(f) ***Personal Benefits.*** Have you received any of the following personal benefits from the Company or its Affiliates directly or through third parties during the last fiscal year? If so, check the applicable column for each benefit below.

Benefit	Yes	No
Home repairs and improvements (includes security systems).		
Housing or other living expenses (includes mortgage and rental payments and the cost of domestic servants) at your principal or vacation residence.		
Personal loans, including extensions of credit and renewals (including the arrangement of a loan from a third party).		
Personal use of a Company furnished automobile or other motor vehicle (includes commuting to and from home).		
Personal use of a Company furnished airplane.		
Personal use of a Company furnished boat or yacht.		
Personal use of a Company furnished apartment, hotel/motel room or suite, hunting or fishing lodge, or vacation home.		
Personal use of any other Company furnished property.		
Personal vacation or travel expenses.		
Personal entertainment and related expenses.		
Personal legal, accounting or other professional services for matters unrelated to the Company.		
Personal use of the staff or employees of the Company.		
Membership in a country club, luncheon club or other social or recreational club (excluding civic or service clubs).		
The ability to obtain benefits from third parties because the Company directly or indirectly compensates the third party for the benefit or discount.		
Other personal benefits not listed above.		

If your answer with respect to any of the above benefits is "Yes," or if you received any non-cash compensation from the Company or from any other source for or in connection with services that were provided to the Company or any of its Affiliates in the last fiscal year, please provide the following information for each such benefit.

Description of Benefit	Recipient of Benefit	Estimated Value of Benefit to Recipient	Company's Actual Cost of Providing Benefit

Question 4. Compensation of Directors. If you are a Director, please provide the following in respect of the Company's most recently completed fiscal year.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) The aggregate dollar amount of all fees earned or paid in cash for your services as a Director, including annual retainer fees, committee and/or chairmanship fees and meeting fees.

_____

(b) For awards of stock, the dates of award, the exercise price of such options and the number of shares you were given with respect to the fiscal year, as applicable.

_____

_____

(c) For awards of stock options, with or without tandem SARs (stock appreciation rights), the dates of award and number of options given to you.

_____

_____

(d) The dollar value of all of your earnings for services performed during the fiscal year pursuant to NEIPs (non-equity incentive plans) and all earnings on any outstanding awards.

_____

_____

(e) Any above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including earnings on nonqualified defined contribution plans. (See Question 3(a)(vi) for additional explanatory information.)

_____

_____

(f) All other compensation, including:

All Other Compensation	Amount/ Description
Perquisites and other personal benefits, securities or property.	
All gross-ups and other amounts reimbursed during the fiscal year for the payment of taxes.	
The compensation cost, if any, for any security of the Company or any of its Affiliates purchased from the Company or any of its Affiliates (through the deferral of Director compensation or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the Company.	
The amount paid or accrued in accordance with a plan or arrangement in connection with a change in control of the Company.	
Company contributions or other allocations to vested or unvested defined contribution plans.	
The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit.	
Consulting fees earned from, paid by or payable by the Company.	
The cost of payments and promises to you of payments pursuant to director legacy programs and similar charitable award programs.	
The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award.	
Any other compensation not covered in Question 4, stating the type of compensation and amount.	

(g) Have you received any of the following personal benefits from the Company or any of its Affiliates directly or through third parties during the last fiscal year? If so, check the applicable column for each benefit below.

Benefit	Yes	No
Home repairs and improvements (includes security systems).		
Housing or other living expenses (includes mortgage and rental payments and the cost of domestic servants) at your principal or vacation residence.		
Personal loans, including extensions of credit and renewals (including the arrangement of a loan from a third party).		
Personal use of a Company furnished automobile or other motor vehicle (includes commuting to and from home).		
Personal use of a Company furnished airplane.		
Personal use of a Company furnished boat or yacht.		
Personal use of a Company furnished apartment, hotel/motel room or suite, hunting or fishing lodge, or vacation home.		
Personal use of any other Company furnished property.		
Personal vacation or travel expenses.		
Personal entertainment and related expenses.		
Personal legal, accounting or other professional services for matters unrelated to the Company.		
Personal use of the staff or employees of the Company.		
Membership in a country club, luncheon club or other social or recreational club (excluding civic or service clubs).		
The ability to obtain benefits from third parties because the Company directly or indirectly compensates the third party for the benefit or discount.		
Other personal benefits not listed above.		

If your answer with respect to any of the above benefits is "Yes," or if you received any non-cash compensation from the Company or from any other source, for or in connection with services that were provided to the Company or any of its Affiliates in the last fiscal year, please provide the following information for each such benefit.

Description of Benefit	Recipient of Benefit	Estimated Value of Benefit to Recipient	Company's Actual Cost of Providing Benefit

Question 5. Security Ownership of Certain Beneficial Owners and Management. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) ***Beneficial Ownership.*** Please state, as of the most recent practicable date, as to each class of Equity Securities of the Company or any Parent, the amount of which you are the Beneficial Owner. See Question 5(f) for information concerning the disclaimer of beneficial ownership.

(i) Amount Beneficially Owned:

	Class of Stock	Amount of Stock	Amount Pledged As Security
Shares Beneficially Owned by you.			
Shares as to which you have sole voting power.			
Shares as to which you have shared voting power.			
Shares as to which you have sole investment power.			
Shares as to which you have shared investment power.			

(ii) Shares pledged as security:

If your answer to Question 5(a)(i) includes any shares pledged as security, please provide the name of the pledgee, the date when such pledge arose and the number of shares pledged.

_____

_____

(b) ***Change in Control.*** Please describe any arrangements to which you or any of your Affiliates are a party, including any pledge to any Person of Equity Securities of the Company or any Parent of the Company, the operation of which may at a subsequent date result in a change in control of the Company.

_____

_____

(c) ***Shared Voting Power or Investment Power.*** If you share voting power or investment power with respect to any of the Equity Securities referred to in Question 5(a)(i), please briefly describe below the contract, arrangement, understanding, relationship or other basis on which your voting or investment power is shared.

_____

_____

(d) ***Voting Trust.*** If the Equity Securities are held by you or any of your Affiliates subject to any voting trust or other similar agreement, please state the amount held pursuant to the trust or other agreement and the duration of the agreement. Please also provide the name and address of the trustees and outline briefly their voting rights and other powers under the trust or agreement.

_____

_____

(e) ***Right to Acquire Beneficial Ownership of Securities.*** If you included in your answer to Question 5(a)(i) any Equity Securities as to which you have a right to acquire Beneficial Ownership within 60 days (see the definition of "Beneficial Owner"), please set forth the affected number of Equity Securities, the date when such right to acquire Beneficial Ownership arose or will arise and any other relevant information.

_____

_____

(f) ***Disclaimer of Beneficial Ownership.*** In certain circumstances, it is possible to disclaim Beneficial Ownership of Equity Securities. Whether you make such a disclaimer is entirely a matter of your own decision. You may wish to consult your own counsel in connection with any such determination; a disclaimer may be important not only in connection with the securities

laws, but also because, without it, your reporting ownership of such Equity Securities might be construed as an admission of ownership by you for other purposes.

Do you disclaim Beneficial Ownership of any Equity Securities of the Company that are held by any of the following Persons:

- your spouse,
- your minor children,
- a relative of yours who lives in your home,
- a relative of your spouse who lives in your home,
- a partnership in which you are a member, or
- a corporation in which you have controlling influence.

Yes_____ No_____

If the answer is "Yes," please furnish the following information with respect to the Person(s) who should be shown as the Beneficial Owner(s) of the Equity Securities in question.

Class of Securities	Name of Beneficial Owner	Relationship of Such Person to You	Number of Shares Beneficially Owned by Such Person	Reason for Disclaiming Beneficial Ownership

Question 6. Related Party Transactions. If you are a Director or an Executive Officer of the Company or have been nominated to become a Director of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

Information should be furnished in answer to Question 6 with respect to transactions that involve remuneration from the Company or its Affiliates, directly or indirectly, to any of the Persons specified in Question 6(a) for services in any capacity, unless the interest of such Person arises solely from the

ownership of less than 10% of any class of Equity Securities of another Person furnishing services to the Company or its Affiliates.

(a) ***Transactions with Directors, Management and Others.*** Since the beginning of the Company's last fiscal year, have you or any member of your Immediate Family or your Associates had a direct or indirect material interest in any transaction, or any currently proposed transaction, or series of similar transactions, to which the Company or its Affiliates was or is to be a party in which the amount involved exceeds $120,000? [Smaller Reporting Companies can replace "$120,000" with the following "the lesser of (i) $120,000 and (ii) one percent (1%) of the average of the Company's total assets at year end for the last two completed fiscal years?"]

Yes_____ No_____

If your answer is "Yes," in each such case, please provide below the name of such Person, such Person's relationship to you (if you are not such Person) and to the Company or its Affiliates, the nature of such Person's interest in such transaction, the approximate dollar amount of such transaction and, where practicable, the approximate dollar amount of such Person's interest in the transaction.

_____

_____

(b) ***Other Material Information*.** Please provide any other information regarding the transaction, or you or members of your Immediate Family or your Associates in the context of the transaction, that may be material to investors in light of the circumstances of the particular transaction.

_____

_____

Question 7. Indebtedness to the Company or its Affiliates. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

(a) Indicate whether you have received an extension of credit or loan directly or indirectly through the Company or arranged by the Company.

Yes_____ No_____

If your answer is "Yes," please describe:

_____

_____

(b) At any time since the beginning of the last fiscal year, have any of your Affiliates, Associates or Immediate Family been indebted to the Company or its Affiliates in an amount exceeding $120,000? [Smaller Reporting Companies can replace "$120,000" with the following "the lesser of (i) $120,000 and (ii) one percent (1%) of the average of the Company's total assets at year end for the last two completed fiscal years?"] The amount of indebtedness is the largest aggregate

amount of all debt outstanding for the transaction at any time since the beginning of the Company's last fiscal year, including all amounts of interest payable in respect of the transaction during the last fiscal year. In the case of any lease or other transaction involving periodic payments or installments, the aggregate amount is the amount of all periodic payments or installments due on or after the beginning of the last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transaction providing for periodic payments or installments. You may exclude from indebtedness all amounts due for purchases of goods and services subject to usual trade terms, for ordinary travel and expense payments and for other transactions in the ordinary course of business.

Yes_____ No_____

If the answer is "Yes," please state in each case:

(i) The name of the indebted Person and the nature of the Person's relationship to you and to the Company by reason of which such Person's indebtedness is required to be described.

_____

_____

(ii) The largest aggregate amount of principal outstanding at any time during such period.

_____

_____

(iii) The amount of indebtedness presently outstanding as of the latest practicable date.

_____

_____

(iv) The rate of interest, if any, paid or charged on the indebtedness and the amount of interest paid during any such period.

_____

_____

(v) The nature of the indebtedness and of the transaction in which it was incurred.

_____

_____

(vi) The date on which the indebtedness was incurred.

_____

_____

Question 8. Section 16 Reporting Compliance. If you are a Director or an Executive Officer of the Company, you are required to make an annual Form 5 filing with the SEC within 45 days of the end of the Company's last fiscal year reflecting:

- any transactions in the Company's Equity Securities that you consummated during the past year that were not required to be reported on Form 4 (*e.g.*, certain gifts and inheritances) or
- any transactions in the Company's Equity Securities which you should have reported during the past year but did not **AND**
- your aggregate ownership of the Company's Equity Securities as of the end of the Company's fiscal year.

The annual Form 5 filing is not required if:

- you have not engaged in any transactions in the Company's securities during the past year which required reporting on Form 5 or
- all such transactions were previously reported on a Form 4 prior to the date the Form 5 was due **AND**
- you do not have any holdings or transactions which were otherwise required to be reported during the past year and which were not reported to the SEC.

(a) Were you required to file a Form 5 with the SEC for the past fiscal year?

Yes_____ No_____

(b) If you answered "Yes" to (a) above, did you file a Form 5 or was one filed on your behalf?

Yes_____ No_____

(c) Was the Form 5 complete and accurate?

Yes _____ No_____

If "No," please explain.

_____

_____

(d) Were any of your Section 16 filings (Forms 3, 4 or 5) filed after the date on which they were due to be filed? If so, please indicate the number of late filings, the number of transactions that were not reported on a timely basis and any other known failure to file a required form.

_____

_____

(e) Have you engaged in any transactions in the Company's Equity Securities that have not yet been reported in the most recent Form 4 or Form 5 that you filed?

Yes _____ No _____

If your answer is "Yes," please describe the transactions.

_____

_____

Question 9. Compensation Committee Interlocks. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question as applicable. [Note that this Question 9 can be omitted for Smaller Reporting Companies.]

(a) If you are an Executive Officer of the Company, during the most recently completed fiscal year, did you serve as a member of the board or compensation committee (or other board committee performing equivalent functions) of another entity, one of whose Executive Officers served as a Director on the Board of Directors or compensation committee of the Company?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(b) If you are a Director who is not an Executive Officer of the Company, during the Company's most recently completed fiscal year, did an Executive Officer of the Company serve as a member of the board or compensation committee (or other board committee performing equivalent functions) of another entity of which you are an Executive Officer?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

Question 10. Director Independence. Except as indicated in the next paragraph, if you are a Director, or have been nominated to become a Director of the Company, please answer this Question.

YOU ARE NOT REQUIRED TO COMPLETE THIS QUESTION IF IT ALREADY HAS BEEN DETERMINED THAT YOU ARE NOT AN INDEPENDENT DIRECTOR.

For purposes of this Question, "material relationships" can include commercial, industrial, banking, consulting, legal, accounting, charitable, familial and other relationships. A Director can have this relationship directly with the Company or its Affiliates, or a Director can be a partner, stockholder, officer or employee of an organization that has such a relationship.

(a) Are you, or is a member of your Immediate Family, or have you, or has a member of your Immediate Family, been within the past five years, a partner, stockholder, officer or employee of an organization that has a material relationship with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(b) Do you currently have, or have you had within the past three years, a direct business relationship (*e.g.*, as a consultant) with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(c) Are you currently, or at any time during the last three years were you, an employee of the Company, or is a member of your Immediate Family currently, or at any time during the last three years was a member of your Immediate Family, an Executive Officer of the Company?

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

(d) Do you, or does a member of your Immediate Family, have any other relationship not described in (a) or (b) above, either directly or indirectly, with the Company or any of its Affiliates? For purposes of this Question, you can exclude any arrangements arising out of your service as a Director.

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

(e) **[NYSE Only** — Have you or any member of your Immediate Family received any compensation from the Company or any Subsidiary or Parent in excess of $120,000 during any 12-month period within the past three years, other than (i) compensation for service as a Director or as member of a board committee or (ii) pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way upon continued service)?**]**

[NASDAQ Only — Have you or any member of your Immediate Family accepted any compensation (including indirect benefits such as a donation to a charity with which you are Affiliated or a contribution to a Immediate Family member's political campaign) from the Company or any Subsidiary or Parent in excess of $120,000 during any 12-month period within the past three years, other than (i) compensation for service as a Director or a member of a board committee, (ii) compensation paid to a Immediate Family member who is an employee of the Company but not an Executive Officer or (iii) benefits under a tax-qualified retirement plan or non-discretionary compensation, or do you or any members of your Immediate Family expect to receive such payments during the current fiscal year?**]**

Yes_____ No_____

If your answer is "Yes," please describe the compensation or refer to the portion of this Question above where it is described.

_____

_____

(f) **[NYSE Only** — Please state whether (i) you are or any Immediate Family member is currently a partner in the Company's internal or external auditing firm, (ii) you are a current employee of such firm, (iii) any Immediate Family member is a current employee of such firm and personally works on the Company's audit or (iv) you or any Immediate Family member was a partner or employee of such firm who personally worked on the Company's audit at any time during any of the past three years.**]**

[NASDAQ Only — Please state whether you or any Immediate Family member (i) is currently a partner in the Company's outside auditing firm or (ii) was a partner or employee of the Company's current or former outside auditing firm who worked on the Company's audit at any time during any of the past three years.**]**

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(g) [**NYSE Only** — Did you or any member of your Immediate Family serve, in the last three years, as an Executive Officer of another company where any of the Company's present Executive Officers at the same time serve or served on that company's compensation committee?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(h) **[NYSE Only** — Are you a current employee, or is any Immediate Family member a current Executive Officer, of any organization (including any non-profit entity) that has made payments to, or received payments from, the Company or any Subsidiary or Parent for property or services in an amount which, in any of the last three fiscal years, exceeded the greater of (i) $1 million or (ii) 2% of such other organization's consolidated gross revenues?**]**

[NASDAQ Only — Have you or any Immediate Family member been, or are you or any Immediate Family member currently, a partner in, or a controlling shareholder or Executive Officer of, any for-profit or non-profit organization that has made payments to or received payments from the Company or any Parent or Subsidiary for property or services during the current fiscal year or any of the last three fiscal years, in excess of the greater of (i) $200,000 or (ii) 5% of the recipient's consolidated gross revenues for such fiscal year (other than payments arising solely from an investment in Company securities and payments under non-discretionary charitable contribution matching programs)?**]**

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

(i) **[NYSE Only** - Are you an executive officer of a charitable organization which received contributions from the Company in any of the three preceding years in an amount which exceeds the greater of $1 million or 2% of the charitable organization's consolidated gross revenues?

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

(j) Are you aware of any other relationships that could potentially interfere, or could appear to interfere, with your exercise of independent judgment in carrying out the responsibilities of a Director, including **[NYSE only** — (i)**]** any transaction, arrangement or relationship since the beginning of the Company's last fiscal year involving you or any member of your Immediate Family and any other Executive Officer or Director of the Company or any of its Affiliates **[NYSE only** — or (ii) any other relationship with the Company or any of its Affiliates, either directly or as a shareholder, Executive Officer or partner of an organization that has such a relationship**]**, including any relationships with charitable, educational, political or other not-for-profit organizations?

Yes_____ No_____

If your answer is "Yes," please describe the nature of the relationship.

_____

_____

Question 11. Audit Committee Independence. If you are a Director who is on the Audit Committee or expects to become a member of the Audit Committee, or if you have been nominated to become a Director of the Company and expect to become a member of the Audit Committee, please answer this Question.

(a) Are you currently serving as a member of the audit committee of any other corporation or organization?

Yes_____ No_____

If your answer is "Yes," please list the name(s).

_____

(b) Has the Company paid, or do you expect it to pay, any consulting, advisory or other compensatory fee (other than compensation for your Board service) directly or indirectly to (i) you, (ii) any members of your Immediate Family, or (iii) any entity that provides accounting, consulting, legal, investment banking or financial advisory services to the Company and in which you are a member, partner, Executive Officer, managing director, or serve in a similar position?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(c) Are you an Executive Officer, Director who is also an employee, general partner, managing member or otherwise in control, in each case of the Company or any entity that Controls, is controlled by or is under common control with the Company?

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

Question 12. Certain Activities. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Are you aware of any of the following:

(a) any political contributions by the Company or from its assets, whether legal or illegal;

(b) the disbursement or receipt of the Company's funds outside the normal system of accountability;

(c) the improper or inaccurate recording of payments and receipts on the books of the Company;

(d) payments, whether direct or indirect, to or from any foreign or domestic government, official, employee (excluding anyone whose duties are essentially ministerial or clerical), agent, political party, official thereof or candidate to (i) influence an act or decision by the payee in an official capacity (including a decision not to perform official functions) or (ii) induce him or her to use his or her influence with any governmental instrumentality, in order to assist the payor in obtaining, retaining or directing business;

(e) any transaction which has as its intended effect the transfer of Company assets for the purpose of effecting a payment described in (d) above; and

(f) any other matters of a similar nature involving disbursements of the Company's assets?

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

Question 13. Indemnification Agreements. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Describe any plan or agreement pursuant to which any Person has agreed to insure or indemnify you against any liability that you may incur in your capacity as a Director or Executive Officer of the Company. For purposes of this Question, you do not need to describe any indemnification pursuant to the Company's charter or bylaws or any indemnification agreement between you and the Company.

_____

_____

Question 14. Board and Committee Meetings. If you are a current Director, please answer this Question.

Appendix C sets forth a list of all meetings of the Board of Directors and committees of the Board of Directors held during the Company's most recent fiscal year and indicates which of those meetings you attended as reflected in the Company's records. Please review Appendix C to confirm that it is complete and accurate.

Appendix C is complete and accurate. _____

I have made corrections to Appendix C. _____

SIGNATURE PAGE

My answers to the Questions in this questionnaire are correctly stated to the best of my information and belief. I understand that material misstatements or the omission of material facts in the Form 10-K and/or Proxy Statement may give rise to civil and/or criminal liabilities to the Company, to each Director of the Company and to certain of its officers and other Persons. I will notify the Company of any such misstatement or omission known to me, as soon as practicable after a copy of the Form 10-K or Proxy Statement or any amendment thereto has been provided to me.

Dated: _____, 2012

_____
Signature of Signatory

_____
Typed or Printed Name of Signatory

Relationship to the Company:

_____

APPENDIX A

Definitions

1. An *"**Affiliate**"* of a Person is any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the first such Person. See also the definitions of "Parent" and "Subsidiary" below.

   The term *"**Affiliated**"* has a correlative meaning.

2. An *"**Associate**"* of yours means any of the following:

   (a) Any corporation or organization (other than the Company);

      (i) of which you are an officer or partner, or

      (ii) in which you Beneficially Own, directly or indirectly, 10% or more of any class of Equity Securities.

   (b) Any trust or other estate:

      (i) in which you have a substantial beneficial interest, or

      (ii) as to which you serve as trustee or in a similar capacity.

   (c) Your spouse, or any relative of your spouse, who has the same home as you or who is a director or officer of the Company or its Parent.

3. A *"**Beneficial Owner**"* of a security includes a Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares:

      (i) voting power, which includes the power to vote, or to direct the voting of, such security, and/or

      (ii) investment power, which includes the power to dispose, or direct the disposition of, such security.

   The terms *"**Beneficially Owned**"* and *"**Beneficial Ownership**"* have correlative meanings.

   Note that a Person will be deemed to be the Beneficial Owner of a security if that Person has the right to acquire Beneficial Ownership within 60 days, including, but not limited to, rights to acquire Equity Securities through the exercise of an option or warrant, through conversion, or pursuant to the power to revoke a trust or discretionary account.

4. The *"**Company**"* refers collectively to [COMPANY NAME] and its Subsidiaries.

5. *"**Control**"* (including the terms *"**controlling**"* *"**controlled by**"* or *"**under common control with**"*) means the possession, directly or indirectly, of the power to direct or cause to be directed the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

6. An *"**Equity Security**"* is (a) any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest,

interest in a joint venture or certificate of interest in a business trust, (b) any security future on any such security, (c) any security convertible, with or without consideration, into such a security or carrying any warrant or right to subscribe to or purchase such a security, (d) any such warrant or right, or (e) any put, call, straddle or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

7. "***Executive Officer***" means an entity's president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy-making functions. For purposes of completing this questionnaire, the Company may designate additional employees as Executive Officers.

8. "***Family Relationship***" means any relationship by blood, marriage or adoption not more remote than first cousin.

9. "***Immediate Family***" means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of a Director, Executive Officer or nominee for Director, and any Person (other than a tenant or employee) sharing the household of such Director, Executive Officer or nominee for Director.

10. A "***Parent***" of a Person is any corporation, partnership, association or other entity that directly, or indirectly through one or more intermediaries, Controls such Person.

11. "***Person***" means, as applicable, (a) an individual, (b) a corporation, limited liability company, partnership, association, joint-stock company, trust, unincorporated organization or other entity, or (c) a government or political subdivision thereof.

12. "***plan***" includes, but is not limited to, any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which cash, stock, restricted stock, restricted stock units, phantom stock, stock options, stock appreciation rights, stock options in tandem with stock appreciation rights, warrants, convertible securities, performance units, performance shares or similar instruments may be received. A plan may be applicable to one Person. For purposes hereof, a "plan" does not include group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in favor of Executive Officers or Directors and that are available generally to all salaried employees.

13. "***Registered Entity***" means (i) a board of trade designated as a contract market under Section 5 of the Commodity Exchange Act (the "CEA"), (ii) a derivatives transaction execution facility registered under Section 5(a) of the CEA, (iii) a derivatives clearing organization registered under Section 5(b) of the CEA, (iv) a board of trade designated as a contract market under Section 5(f) of the CEA and (v) with respect to a contract that the CFTC determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

14. "***Self-Regulatory Organization***" means any national securities exchange, registered securities association or registered clearing agency.

15. A "***Subsidiary***" of a Person is any corporation, limited liability company, partnership, association or other entity that is directly, or indirectly through one or more intermediaries, controlled by the first such Person.

APPENDIX B

Biographical Information

APPENDIX C

Board and Committee Meetings

e) New York Courts May Be Wavering on 'Zeig'

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 110
THURSDAY, DECEMBER 8, 2011

Expert Analysis

CORPORATE INSURANCE LAW

New York Courts May Be Wavering on 'Zeig'

By **Howard B. Epstein**

And **Theodore A. Keyes**

In the June 2011 edition of this column,[1] we discussed the U.S. Court of Appeals for the Second Circuit's seminal decision in *Zeig v. Massachusetts Bonding & Ins. Co*., a widely followed decision from 1928 that addressed issues concerning the trigger of excess insurance.[2] The *Zeig* court held that an excess policy can be triggered as a result of a settlement between the insured and its primary carriers, even where the settlement payment is less than the full limits of the primary insurance, as long as the insured's loss exceeds the primary limits. In such circumstances, the excess policy does not drop down below the attachment point, but it does cover loss incurred above the underlying limits.

We observed that courts in certain other jurisdictions had recently begun to call the *Zeig* decision into question, but we noted that New York courts continued to follow *Zeig*. Specifically, we reviewed the Southern District's decision in *Pereira v. Nat'l Union Fire Ins. Co. of Pitt, PA*, which followed *Zeig*, holding that an excess policy would be triggered with regard to loss that exceeded the underlying limits where the underlying carrier was insolvent, and therefore would never actually pay out the underlying limits.[3]

On Sept. 28, 2011, however, Judge Richard J. Sullivan of the Southern District issued a ruling that directly conflicts with *Pereira* and, while it does not explicitly reject *Zeig*, it certainly seems to base its conclusion on a rejection of the *Zeig* rationale. Judge Sullivan's opinion in *Federal Ins. Co. v. The Estate of Irving Gould* is the first New York case to stray from *Zeig* and gives us reason to reconsider this topic while we wait for the Second Circuit to address this issue again.[4]

The 'Zeig' Decision

To briefly recap, in *Zeig*, the insured had three underlying policies with combined limits of $15,000. The insured settled its claims under these policies for $6,000 and sought additional payment from its excess insurer. The excess carrier denied coverage on the grounds that the insured had not actually collected the full $15,000 in underlying limits. Accordingly, the excess carrier argued that the underlying layers had not been "exhausted in the payment of claims to the full amount of the expressed limits of such other insurance" as required by the language of the excess policy. The Second Circuit disagreed and held that such policy language was ambiguous because the term "payment" need not be interpreted only as "payment in cash," but could also connote "satisfaction of a claim by compromise," such as the settlement of a claim for less than policy limits.[5]

The court expressed concern that requiring collection of the full amount of the underlying insurance would unduly burden the insured by promoting litigation and preventing settlement, while being of "no rational advantage" to the excess insurer who, in any event, would only be called upon to pay that portion of the loss in excess of the underlying limits. The court explained that such an "unnecessarily stringent" construction of the policy should only be reached "where the terms of the contract demand it." Holding that the terms of the policy at issue did not require such stringent construction, the court ruled that the insured should have been given the opportunity to prove that the amount of his loss exceeded the underlying limits, and if so, to recover the excess amount from the excess carrier.

Over the years, the *Zeig* decision became the leading decision on this issue nationwide.[6] Courts following *Zeig* found the "exhaustion" requirement to be satisfied by what they termed the "functional" or "virtual" exhaustion of underlying limits and a concept described as "settlement with credit"—which permits the insured to settle its underlying policies for less than the total limits but gives the excess carrier credit for the remaining amount of the limits, with the insured bearing the cost of the difference.[7] The U.S. Court of Appeals for the Seventh Circuit, for example, in *Trinity Homes*, recently found an exhaustion provision to be ambiguous, relying on the decisions of its "sister circuits" in *Zeig* and a U.S. Court of Appeals for the Third Circuit decision in *Koppers*.[8]

Recently, however, some courts have begun to depart from the *Zeig* line of cases. These courts have concluded that *Zeig's* policy considerations should not impact the interpretation of the unambiguous language of an insurance contract and that, by their plain language, excess policies that require exhaustion by "payment" of underlying limits are not triggered unless the underlying limits have actually been paid.[9]

The 'Gould' Decision

In *Gould*, Judge Sullivan of the Southern District joined the list of judges that have refused to follow the *Zeig* reasoning.[10] In *Gould*, the former directors and officers of Commodore International Limited, the makers of the Commodore 64 computer, sought coverage under Commodore's D&O policies with respect to litigation in which claimants sought $100 million in damages from the directors and officers.

Fortunately for the directors and officers, Commodore had purchased a tower of D&O insurance totaling $51 million, including a primary policy with limits of $10 million and eight layers of excess

HOWARD B. EPSTEIN *is a partner at Schulte Roth & Zabel, and* THEODORE A. KEYES *is special counsel at the firm.* SAMI GROFF, *an associate at the firm, assisted in the preparation of this column.*

coverage. Unfortunately for the Commodore directors and officers, however, Reliance and Home Insurance, the carriers providing excess coverage at the first, third and fourth layers, became insolvent in 2001 and 2003. Though the damages claimed were clearly in excess of those layers, the remaining excess insurers denied coverage, arguing that their policies required exhaustion of the lower layer policies "solely as a result of payment of losses thereunder…."[11]

The Commodore directors and officers asked the court to enter a judgment declaring that the remaining excess policies were triggered once the insureds' obligations exceeded the limits of the underlying excess layers, regardless of whether the now insolvent carriers had actually paid those limits. Based on *Zeig* and *Pereira*, one would have expected the court to agree with the directors and officers and issue the declaration.

The *Gould* court, however, denied the motion of the directors and officers, holding, in no uncertain terms, that such relief "contradicts the plain language of the Excess Policies." Judge Sullivan ruled that the excess policies are not triggered "solely by the aggregation" of the insureds' losses because the "express language of these policies establishes a clear condition precedent to the attachment of the Excess Policies" that is not satisfied until there is actual payment of the underlying limits.[12]

The court rejected the directors' and officers' reliance on *Zeig* and *Koppers*, explaining that *Zeig* is distinguishable because it concerned a situation where the insured had settled with the primary insurers for less than the total limits, not a situation where the insurer of an underlying layer was insolvent and unable to pay. According to Judge Sullivan, *Zeig* and *Koppers* provided no guidance "because in those cases the insured agreed to accept partial reimbursement for his losses while maintaining responsibility for the uncompensated portion of his claim." In contrast, in *Gould*, "the liability covered by the insolvent insurers would not be discharged by payment or settlement, but would simply be bypassed."[13]

'Gould's' Departure From 'Zeig'

Although Judge Sullivan avoided expressly rejecting *Zeig*, it is difficult to read the *Gould* and *Zeig* cases without seeing a fundamental conflict. While the factual scenarios may be different, in both the *Zeig* and *Gould* scenarios, the insured would have borne responsibility for the unpaid portion of underlying limits and only sought to recover the loss that exceeded the excess carriers' attachment point.

Judge Sullivan made no attempt to reconcile his ruling with Judge Laura Taylor Swain's decision in *Pereira*, with which *Gould* directly conflicts. In *Pereira*, as in *Gould*, the insured sought to bypass lower levels of coverage due to the insolvency of the underlying insurer, Reliance. However, in *Pereira*, Judge Swain expressly reaffirmed the continuing precedential value of *Zeig* and, specifically, the relevance of *Zeig* to the facts at hand.[14]

After analyzing the *Zeig* decision in detail, Judge Swain held that an exhaustion clause providing that the excess policy will pay only after the "Underlying Insurance has been exhausted by actual payment of claims or losses thereunder" is ambiguous and concluded that the policy should not be interpreted to "excuse the excess insurers from providing coverage within their respective layers." The court expressed concern that such an interpretation would "work a hardship on the insureds, who have already been deprived of a layer of coverage by the insolvency, and provide a windfall to the excess insurers."[15]

In the *Gould* decision, Judge Sullivan disregards this conflict, merely noting in a footnote that *Pereira* is distinguishable because the language in *Pereira* was "ambiguous with respect to whether 'actual payment' of underlying 'claims or losses' was necessary to trigger excess policy."[16] Strangely though, the *Pereira* language seems less ambiguous than the *Gould* language, as the policy in *Pereira* specifically requires "actual payment of claims or losses," whereas the policy in *Gould* only requires "payment of losses."

> Judge Sullivan's opinion in 'Gould' is the first New York case to stray from 'Zeig' and gives us reason to reconsider this topic.

It appears, instead, that the actual conflict is not about how to interpret the language of the policies, but whether the court chooses to strictly adhere to that interpretation regardless of context or whether the court is willing to review the facts of the case to determine whether there may be more than one "rational" explanation for the same or similar policy terms.

The *Zeig* and *Pereira* courts determined that it would be inequitable for the policyholder to lose the ability to trigger their excess coverage, especially in circumstances where the excess insurer is not being asked to drop down or cover any more than it would have had the underlying policy limits been actually exhausted by payment. On the other hand, the *Gould* court and the other courts that have questioned *Zeig* have rejected this insertion of public policy concerns into what they view as the interpretation of the simple, plain language of unambiguous policy provisions.

Looking Forward

Given the erosion of *Zeig's* influence in other jurisdictions, it should not be surprising that New York courts are re-examining the issues addressed in that decision. What is surprising is that *Gould*, the first case that has departed from *Zeig's* rationale, concerns a situation where the insured could not access the excess layers due to the insolvency of the insurers responsible for the underlying layers. In that situation, the insured's position is more sympathetic than the situation presented in *Zeig*, where the insured has settled with the underlying carriers for less than the total limits.

Nevertheless, as a result of *Gould* and *Pereira*, we now have two decisions in the Southern District that reach opposite conclusions in very similar circumstances. Consequently, it has become difficult to predict whether New York courts will remain true to the *Zeig* precedent or begin to find ways to chip away at its influence.

At least one other case currently awaits a decision in the Southern District as to these issues. In *Lexington Ins. Co. v. Tokio Marine*, a motion is pending regarding the application of *Zeig*, although it concerns the situation where the insured has settled for less than full policy limits, not the insolvency situation presented in *Gould* and *Pereira*.[17] It will be interesting to see how Judge Deborah A. Batts rules on the pending motion. In addition, notice of appeal was filed by the insureds in *Gould* in late November. Therefore, it appears that the Second Circuit will ultimately have the last word on the continuing viability of *Zeig* in New York.

1. Howard B. Epstein and Theodore A. Keyes, "Zeig Still Governs Exhaustion of Underlying Policy Limits in New York," New York Law Journal, Vol 245-No. 125, June 30, 2011.
2. *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665 (2d Cir. 1928).
3. *Pereira v. Nat'l Union Fire Ins. Co. of Pitt, PA*, 2006 WL 1982789 at *7 (S.D.N.Y. July 12, 2006).
4. *Federal Ins. Co. v. the Estate of Irving Gould,* 1:10-cv-01160 (RJS), Memorandum & Order, 9/28/2011
5. *Zeig*, 23 F.2d at 666.
6. See, e.g., *Rummel v. Lexington Ins. Co.*, 123 N.M. 752 (1997); *Stargatt v. Fidelity & Cas. Co. of N.Y.*, 67 F.R.D. 689 (D.Del. 1975), *Gasquet v. Commercial Union Ins. Co.*, 391 So.2d 466 (Ct. App. La. 1980).
7. *UMC/Stamford Inc. v. Allianz Underwriters Insurance Co.*, 647 A.2d 182, 190 (N.J. Super. 1994).
8. *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653 (7th Cir. 2010); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1454 (3d Cir. 1996).
9. *Comerica Inc. v. Zurich American Ins. Co.*, 498 F.Supp.2d 1019 (E.D. Mich. 2007); *Great American Ins. Co. v. Bally Total Fitness Holding Corp.*, 2010 WL 2542191 (N.D.Ill. June 22, 2010); *Qualcomm Inc. v. Certain Underwriters at Lloyds London*, 161 Cal.App.4th 184, 192-193 (Cal. Ct. App. 2008).
10. *Federal Ins. Co. v. the Estate of Irving Gould*, 1:10-cv-01160 (RJS), 2011 WL 4552381 (S.D.N.Y. Sept. 28, 2011).
11. Id. at *1-2.
12. Id. at *6-7.
13. Id. at *7-8.
14. *Pereira*, 2006 WL 1982789 at *7.
15. Id..
16. *Gould*, 2011 WL 4552381 at *7, n.2.
17. *Lexington Ins. Co. v. Tokio Marine & Nichido Fire Ins. Co.*, 11-cv-0391 (DAB).

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London

f) Second Circuit Upholds Coverage For Investigation-Related Costs

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 57
WEDNESDAY, SEPTEMBER 21, 2011

CORPORATE INSURANCE LAW

Expert Analysis

Second Circuit Upholds Coverage For Investigation-Related Costs

By **Howard B. Epstein**

And **Theodore A. Keyes**

In today's economic climate, one of the most important issues concerning Directors' and Officers' (D&O) insurance is whether and to what extent the policy provides coverage for the costs of defending and responding to government investigations. Whether the investigation is commenced by a federal, state or local government agency, and whether it concerns financial, intellectual property, environmental or trade laws, the expense associated with properly responding can be very significant. There are often voluminous amounts of documents to review—both paper and electronic—and more often than not there are legal issues that require the retention of outside legal counsel.

D&O insurance policies vary considerably with regard to the scope of coverage for expenses associated with investigations. Some policies cover only formal investigative proceedings such as those commenced by a formal order of investigation. Others provide coverage as long as a target letter or subpoena has been issued to an individual. Still others provide even broader coverage, including costs associated with informal investigations.

In the recent case of *MBIA Inc. v. Federal Insurance Co.*,[1] the U.S. Court of Appeals for the Second Circuit determined that the policies at issue covered costs incurred to respond to investigations conducted by the U.S. Securities and Exchange Commission (SEC) and the New York Attorney General. The Second Circuit also held that MBIA was entitled to reimbursement of expenses incurred by two special committees formed to investigate derivative demands and derivative lawsuits related to these investigations. While the Second Circuit's ruling hinged in large part on the policy language and the specific fact pattern, policyholders can be expected to rely on *MBIA* to push for liberal interpretation of the scope of coverage for costs associated with investigations.

The Investigations of MBIA

MBIA is a Connecticut corporation, based in New York, which provides financial guarantee insurance for bonds or structured financial obligations. In 2001, the SEC issued a formal order of investigation, commencing an inquiry into certain companies' compliance with securities laws, financial recordkeeping, financial reporting and related matters. As part of that larger investigation, on Nov. 12, 2004, the SEC issued the first of a series of subpoenas to MBIA. These subpoenas did not identify specific transactions, but rather sought documents regarding transactions involving "Non-Traditional Product(s)."[2] A few days later, the Attorney General issued the first in a series of subpoenas to MBIA, mirroring the scope of the SEC subpoena.

> D&O insurance policies vary considerably with regard to the scope of coverage for expenses associated with investigations.

Ultimately, the SEC and the Attorney General focused their investigation on three MBIA transactions: (i) MBIA's purchase of reinsurance on its guarantee of bonds issued by Allegheny Health, Education and Research Foundation (AHERF) two years after AHERF had declared bankruptcy; (ii) MBIA's use of a subsidiary to guarantee securitization of certain liens purchased by Capital Asset Holdings GP, thereby transferring the risk of loss from MBIA's investment in Capital Asset to the subsidiary; and (iii) MBIA's guarantee of securities used to purchase airplanes for U.S. Airways, MBIA's subsequent foreclosure on U.S. Airway's airplanes following the airline's bankruptcy and the treatment of the transaction as an investment instead of an insurance loss. In May 2005, MBIA provided notice of claim to its insurers.

In the summer of 2005, with the SEC and New York Attorney General considering issuing additional subpoenas related to these transactions, MBIA, concerned with the impact additional subpoenas would have on its reputation, agreed to respond to informal document requests if the agencies would forgo formal subpoenas. The investigations proceeded in this informal manner and, in August 2005, the SEC and Attorney General advised MBIA that they would take action against it for violation of securities law in connection with the AHERF transaction.

In the fall of 2005, MBIA made a settlement offer which included retention of an independent consultant, paid for by MBIA, to complete the investigations into the Capital Asset and U.S. Airways transactions. In early 2007, the SEC and Attorney General agreed to a settlement which did include retention of that independent consultant. Ultimately, the independent consultant cleared MBIA of wrongdoing with regard to those two transactions.

As a result of these investigations, MBIA received two derivative demand letters from shareholders. In response, MBIA organized a Demand Investigation Committee (DIC) made up of independent directors to investigate the derivative claims. When the DIC failed to make a recommendation within the statutory time period, two derivative lawsuits were filed. In response, MBIA formed the Special Litigation Committee (SLC), also made up of independent directors, to investigate the claims. The SLC retained outside counsel to investigate the derivative claims. Ultimately, the SLC determined that pursuit of the derivative claims was not in MBIA's best interest and recommended their dismissal. The court dismissed the claims.

MBIA claimed that it incurred a total of $29.5 million in defense costs and expenses responding to the SEC and New York Attorney General investigations and investigating and defending against the derivative lawsuits.

Insurers' Position

MBIA had purchased $15 million in primary insurance from Federal Insurance Company and $15 million in excess coverage from ACE American Insurance Company. The insuring agreement of the primary policy provided coverage for "all Securities Loss for which [MBIA] becomes legally obligated to pay on account of any Securities Claim…."[3] The

HOWARD B. EPSTEIN *is a partner at Schulte Roth & Zabel, and* THEODORE A. KEYES *is special counsel at the firm.*

policy defined Securities Claim as "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document."[4] The policy provided coverage for defense costs incurred for Securities Claims. The policy also provided coverage for investigation into derivative demands from shareholders, but only up to a separate $200,000 sub limit.

Federal agreed to pay $6.4 million, including the costs incurred to respond to the SEC investigation of the AHERF transaction and the $200,000 sublimit for the DIC investigation into the derivative demands. Federal denied coverage for the (i) Attorney General investigation into the AHERF transaction; (ii) the SEC and Attorney General investigations into the Capital Asset and U.S. Airways transactions; (iii) the costs incurred to pay the independent consultant; and (iv) the SLC expenses. ACE refused to pay on the grounds that the primary policy was not exhausted.

The District Court's Ruling

MBIA and the insurers filed cross-motions for summary judgment before the Southern District. On Dec. 30, 2009, Judge Richard M. Berman issued a ruling granting summary judgment to MBIA on most but not all of the issues in dispute. Judge Berman held that MBIA was entitled to coverage for the costs incurred in connection with the SEC and Attorney General investigations of all three transactions as well as for the legal costs incurred by counsel to the SLC to investigate and defend against the derivative demands.

Judge Berman found, however, that the policies did not cover the costs associated with the independent consultant, because MBIA did not provide adequate advanced notice of its intent to retain the consultant to review the Capital Asset and U.S. Airways transactions in accordance with the settlement agreement.[5]

The Second Circuit's Ruling

On appeal, the Second Circuit affirmed most of the Southern District's ruling but further expanded the scope of coverage. In a decision authored by Chief District Court Judge Loretta A. Preska (sitting by designation), on July 1, 2011, the Second Circuit affirmed the portion of the ruling granting coverage to MBIA for the costs incurred to respond to the SEC and Attorney General investigations of the three transactions. In addition, the Second Circuit also held that MBIA was entitled to coverage for the fees paid to the independent consultant in connection with the Capital Asset and U.S. Airways investigation. Finally, the Second Circuit granted MBIA's request for coverage of the fees incurred by counsel to the SLC.[6]

Investigation Costs

The Federal policy language defining the scope of a Securities Claim is actually quite broad, including a "formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document." As a result, it is not surprising that the Southern District and the Second Circuit had little trouble concluding that at least some of the costs incurred by MBIA in response to the SEC and Attorney General investigations were incurred to defend a Securities Claim.

The fact that both courts held that the costs incurred in response to the informal agency document requests, in lieu of subpoenas, were also covered may be of particular significance to policyholders. The Second Circuit first found that the Attorney General investigation into the AHERF transaction was, like the SEC investigation into AHERF, a Securities Claim, because the Attorney General's service of a subpoena constituted the commencement of an investigation or at minimum service of a document similar to a "formal or informal investigative order." Next, the Second Circuit held that the SEC and Attorney General investigations of the Capital Asset and U.S. Airways transactions, whether by subpoena or informal agreement, were within the scope of the formal investigations commenced by the SEC and the New York Attorney General.

There are relatively few reported cases addressing disputes over the scope of coverage for investigation-related costs under D&O policies. But in the current regulatory climate, disputes over these issues can be expected to become more prevalent.

Costs incurred to comply with informal agreements to produce documents are not likely to be covered in every situation. However, in *MBIA*, because of the broad scope of the definition of Securities Claim and because the informal agreements followed and were connected with the formal investigation, the Second Circuit concluded that those costs were covered. The same might not be true, even under MBIA's policies, if the formal order did not pre-date the voluntary compliance.

Consultant and Committee

The Second Circuit also found that the fees paid to the independent consultant were covered, reversing the District Court on this issue. The insurers argued that the appointment of the independent consultant in the course of settlement discussions breached the insurers' "right to associate" in the defense of the insured. The Second Circuit, however, held that MBIA gave the insurers sufficient notice of the claims and settlement discussions, early enough in the process, so that the insurers had the opportunity to associate in the defense if they so chose. The court held that it is not the insured's duty to "return to the nonparticipating insurer each time negotiations about the same claim take a new twist and ask if the insurer still wants to opt out."[7]

The District Court had determined that the SLC's costs were covered legal defense costs, relying in part on its finding that outside counsel that performed the investigation for the SLC also defended MBIA (and filed motions to dismiss) in the derivative action.[8] The Second Circuit took an even broader view, finding that the SLC's costs were covered because the SLC was not a separate entity from MBIA and was therefore an insured person under the policy.[9]

This is an interesting analysis because the SLC was comprised of independent directors and charged with investigating the derivative claims to determine whether there was alleged wrongdoing such that MBIA should pursue claims against certain directors and officers or whether the derivative claims lacked merit. As the SLC determined that the claims lacked merit, it recommended dismissal of the claims and the court dismissed the derivative actions. In that sense, the SLC costs do seem like defense costs. However, the Second Circuit's analysis does not explain whether the SLC's costs would have been covered even if the SLC determined that the derivative claims should be prosecuted by MBIA.

Looking Forward

There are relatively few reported cases addressing disputes over the scope of coverage for investigation-related costs under D&O policies. But in the current regulatory climate, disputes over these issues can be expected to become more prevalent. For example, the recent enactment of the whistleblower provisions under the Dodd-Frank Act is likely to provide incentives that may lead to an increase in regulatory investigations. Scrutiny of the financial services industry by the SEC, New York Attorney General and other government agencies continues. Recently, the New York Attorney General also commenced an investigation into certain companies in the gas exploration and production and hydraulic fracking industries.

Reportedly, at least one insurance company is considering issuing standalone coverage for government investigations. Unless and until such separate policy forms become the norm, however, cases like MBIA, concerning the scope of coverage for investigations under D&O policies, are likely to take on added significance.

1. *MBIA Inc. v. Federal Insurance Co.*, __F.3d.__, 2011 WL 2583080 (2d Cir. July 1, 2011).
2. "Non-Traditional Products" were defined, in relevant part, as "any product or service developed, marketed, distributed, offered, sold, or authorized for sale…that could be or was used to affect the timing or amount of revenue or expense recognized in any particular reporting period, including without limitation, transferring assets off of a Counter-Party's balance sheet, extinguishing liabilities, avoiding charges or credits to the Counter-Party's financial statements, [or] deferring the recognition of a known and quantifiable loss…." Id at *2.
3. Id at *5.
4. Id at *5.
5. *MBIA Inc. v. Federal Insurance Co.*, No. 08 Civ. 4313, 2009 WL 6635307 (SDNY Dec. 30, 2009).
6. *MBIA*, 2011 WL 2583080 at *12.
7. Id. at *14.
8. *MBIA*, 2009 WL 6635307 at *9.
9. *MBIA*, 2011 WL 2583080 at *10.

Schulte Roth&Zabel
Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
New York
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Schulte Roth & Zabel LLP
Washington, DC
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

Schulte Roth & Zabel International LLP
London
Heathcoat House, 20 Savile Row
London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

www.srz.com