



July 21, 2009



The SEC Proposes Enhanced Compensation and Corporate Governance Disclosures for the 2010 Proxy Season

On July 10, 2009, the Securities and Exchange Commission (the “SEC”) proposed a set of rule revisions for the stated purpose of improving the disclosures received by investors from reporting companies regarding compensation and corporate governance, and the timeliness of disclosing shareholder voting results. As part of the rule release, the SEC also outlined a number of related requests for comment and included proposed rules intended to clarify and address issues in the proxy solicitation process.

The following is a summary of the disclosure-related proposals included in the rule release, which the SEC intends, if adopted after the current public comment period ends on September 15, 2009, to take effect for the 2010 proxy season.

Enhanced Compensation Disclosure

The compensation proposals build on the prior action taken by the SEC in 2006 to implement a narrative disclosure for executive compensation in the form of the compensation discussion and analysis (“CD&A”) disclosure. In referencing the current economic climate and how compensation incentives relate to companies’ risk management and long-term well-being, the SEC noted that investors will benefit from expanded informative disclosure on how companies reward and incentivize employees and how their compensation practices and policies may have a material effect on a company and the risks it faces.

With respect to the risk issue, the SEC provides examples where compensation disclosure may be triggered, including where a particular business unit that carries a significant portion of the company’s overall risk is significantly more profitable than other business units, or where a business unit uses a risk/reward structure that varies significantly from that of the rest

Newsletter Editors

[Blase P. Dillingham](#)
Partner
bdillingham@manatt.com
310.312.4159

[James J. Vieceli](#)
Partner
jvieceli@manatt.com
310.312.4246

[Mark J. Kelson](#)
Partner
Chair, Capital Markets
Practice Group
mkelson@manatt.com
310.312.4156

Our Practice

Our Capital Markets Practice Group represents publicly held companies, investment banks and institutional shareholders in connection with public offerings of equity and debt securities. We have particular experience in initial public offerings and offerings of convertible and other hybrid securities. We represent leading national investment banks, as well as maintaining an extensive base of public corporate clients. Our lawyers regularly participate in transactions involving a wide variety of industries, including

of the company. This disclosure would be required only where the effects of the compensation policies may be material to the company and, if so triggered, may include discussion on factors such as (i) the general design of the compensation policies, (ii) risk assessment considerations, (iii) adjustments to policies to address changes in risk profiles, and (iv) monitoring of policies to determine whether risk management objectives are being met.

The proposals also seek to amend the content of the summary compensation table and director compensation table of stock and option awards. Under the proposals, companies would be required to present information based on the aggregate grant date fair market value of the awards received in the year being reported on, rather than the current disclosure requirement based on the amount of the awards recognized for financial statement purposes. The SEC stated that the proposal would provide more meaningful information to investors and align the disclosure to companies' compensation decisions.

Modifications to Director and Nominee Disclosures

The SEC also included proposals to expand the disclosure required on the experience, qualifications and skills of each director and nominee for the board of directors. The purpose of these proposals is to require additional information on an individual basis regarding how a person qualifies to serve on the board of directors and committees "in light of the company's business and structure." Rather than the current biographical disclosure that looks at the prior five-year period, the proposal would require additional disclosure and provide that companies should include information prior to the five-year look-back period if such information is material to understanding such person's skills and experience.

Furthermore, the proposals would expand the required disclosure on other directorships from current positions held to any positions held in the prior five-year period, and would lengthen the disclosure requirement on legal proceedings involving directors, nominees, and executive officers from five to ten years.

Disclosure of Leadership Structure and Risk Management

In addition to increased disclosure on the skills and qualifications of directors, the SEC included a proposal to implement a new disclosure requirement of a company's leadership structure. Specifically, the proposals would require a description of, and reasoning behind, the leadership structure, such as why the positions of chief executive officer and chairman of the board have been separated or are held by a single person, and the use and role of any lead independent director. The SEC has expressed the view that this disclosure provides increased transparency and meaningful insight on a company's corporate governance practices.

manufacturing, telecommunications, financial services, media, consumer products and retail. We also advise our clients with respect to corporate governance matters and the design and implementation of comprehensive compliance programs.

Info & Resources

- . [Subscribe](#)
- . [Unsubscribe](#)
- . [Sarbanes-Oxley Act](#)
- . [Newsletter Disclaimer](#)
- . [Manatt.com](#)

The SEC is also proposing that companies be subject to a new disclosure requirement on the structure of the board's role in the risk management process. For example, companies would be required to disclose the structure of risk reporting and whether the board had implemented its risk management role at the board or committee level. The purpose of this proposal is to address for investors the relationship between the board and management in dealing with material risks faced by a company.

Amendments to the Disclosure on Compensation Consultants

The SEC's release discussing the proposals noted a concern with the recently required disclosure in the CD&A of the involvement of compensation consultants. Specifically, the SEC noted that compensation consultants may provide a range of services to companies beyond merely advising on executive compensation issues. As a result, such additional services could be seen by investors to present, or have the appearance of, a conflict of interest. To remedy this issue, the SEC is proposing a requirement that, if the consultant does in fact provide additional services for a company, the company must disclose information on the fees paid to the consultant and its affiliates and the nature of such additional services provided. The proposed rule contains exceptions for advice relating to broad-based plans such as 401(k) and health insurance plans.

Acceleration of Disclosure of Voting Results

Finally, the rule release also contains a proposal to transfer the requirement to report the voting results of shareholder meetings from the next Form 10-Q or Form 10-K following the meeting to Form 8-K. To implement this change, a new item would be created under Form 8-K and companies would be required to make this disclosure within four business days after the shareholder vote occurred. The proposed rule contains some relief to report preliminary voting results (followed by final results) in the context of contested election of directors.

The proposals described above are a product of the SEC's expressed desire to improve the disclosure received by investors regarding compensation and corporate governance matters. The SEC notes the general focus by investors on corporate accountability matters and how greater transparency on such matters, and their relationship to risks faced by companies, will provide more informative disclosure to investors.

In asking for public comment on the proposals, the SEC has also identified a number of areas where the proposals may change prior to the final rule being released (if the proposals are ultimately adopted), which could include, for example, expanding compensation disclosure in the CD&A to all executive

officers, requiring the compensation committee report to be filed with the SEC rather than the current requirement to be “furnished,” and requiring disclosure on the expertise of compensation committee members with respect to compensation issues.

[back to top](#)

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

[James Vieceli](#)

Partner

jvieceli@manatt.com

[Matthew S. O'Loughlin](#)

Associate

moloughlin@manatt.com

ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.

© 2009 Manatt, Phelps & Phillips, LLP. All rights reserved.