

# LAW ALERT

## Ruskin Moscou Faltischek's Corporate & Securities Services

- Mergers and Acquisitions
- Complex Business Transactions – Structuring, Negotiation, Implementation
- Securities Offerings – Public and Private, Equity/Debt, Municipal Bond Financing
- Securities Law Compliance – Federal and State
- Corporate Governance
- Business Organization and Structuring – Corporations, LLC, LLP, LP, Partnerships, Joint Ventures And Strategic Alliances
- Technology Transfers – Software, Technology, Intellectual Property
- Employee Stock Ownership Plans



*Irvin Brum*

## SEC Adopts Proxy Disclosure Enhancements

On December 16, 2009, the Securities and Exchange Commission (“SEC”) adopted substantial revisions to its proxy rules. (See SEC Release No. 33-9089.) The new proxy disclosure requirements, effective February 28, 2010, are intended to enhance the disclosure public companies provide to their

shareholders regarding compensation and corporate governance. The amendments to the disclosure rules greatly increase the information included in proxy and information statements, annual reports and registrations under the Exchange Act and registration statements under the Securities Act. The additional disclosures include information about compensation policies and practices that present material risks, equity awards of executives, director and nominee qualifications, leadership structure and the potential conflicts of interests of compensation consultants.

### Compensation Disclosure

Item 402 of Regulation S-K is amended to create a new section, distinct from the Compensation Discussion & Analysis (“CD&A”). The new section requires companies to address their compensation policies and practices for all employees if the policies and practices create risks that are reasonably likely to have a material adverse effect on the company. The disclosure required by the amendment parallels that of the Management Discussion and Analysis rules, which require risk-oriented disclosure of known trends and uncertainties that are material to the business. Smaller reporting companies are exempt from this new disclosure because they are not currently required to provide CD&A disclosure.

The amended rules will also require disclosure in the Summary Compensation Table and Director Compensation Table of the aggregate grant date fair value of stock and option awards computed in accordance with FASB ASC 718 (Stock Compensation), with a special instruction for awards subject to performance conditions. This instruction provides that performance-based equity awards should be computed based upon the probable outcome of the performance conditions as of the grant date and the maximum value of the award must be disclosed in a footnote to the table. This replaces the existing disclosure under which a company is required to report the dollar amount recognized for financial statement reporting purposes for the fiscal year with respect to such equity awards.

**RMF**  
RUSKIN MOSCOU FALTISCHEK P.C.

Smart Counsel. Straight Talk.

East Tower, 15th Floor  
1425 RXR Plaza, Uniondale, NY 11556-1425  
516.663.6600 ▼ www.rmfpcc.com

Companies providing Item 402 disclosure for a fiscal year ending on or after December 20, 2009 will be required to re-compute the value of option and stock awards reported in the Summary Compensation Table for each previous year already reported so that the stock and option awards columns present the applicable full grant date fair values.

## Director and Nominee Disclosure

Item 401 of Regulation S-K is amended to require the disclosure of the particular experience, qualifications, attributes or skills that led the company's board of directors to conclude that a person should serve as a director of the company. Such disclosure is required annually for all directors and nominees, including those not up for reelection in a particular year. The amended rules also require disclosure of any directorships at public companies and registered investment companies held by each director or nominee at any time during the past five years and lengthen the time for which disclosure of legal proceedings is required from five to ten years. Additionally, the list of legal proceedings required to be disclosed is expanded to include: (i) any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity, (ii) any judicial or administrative proceeding based on violations of federal or state securities, commodities, banking, or insurance laws and regulations or any settlement to these actions and (iii) disciplinary sanctions or orders imposed by a stock, commodities, or derivatives exchange or other self-regulatory organization.

In an attempt to provide investors with information regarding how the board considers and addresses diversity, amended Item 407(c) of Regulation S-K requires disclosure of whether and how the board considers diversity in identifying nominees for director. If the company has a diversity policy, disclosure of how this policy is implemented and how the effectiveness of this policy is assessed is required.

## Board Leadership Structure

Amendments to Item 407 of Regulation S-K and Item 7 of Schedule 14A require proxy and information statements to include disclosure of whether and why the company has chosen to combine or separate the principal executive officer and board chairman positions, and the reasons why the company believes that this leadership structure is the best structure for it. Companies will also need to disclose whether and why the company has a lead independent director, as well as the specific role the lead independent

director plays in the company's leadership. Additionally, the final rules require companies to describe the board's role in the oversight of risk in an attempt to improve investor understanding of the board's role in the organization's risk management practices.

## Compensation Consultants

Item 407 of Regulation S-K is amended to require the disclosure of fees paid to compensation consultants and their affiliates who play a role in determining the amount or form of executive or director compensation during the company's fiscal year, if they also provide other services to the company. If the board has engaged a compensation consultant or there is a firm providing executive compensation consulting services, fee disclosure is required if the consultant or its affiliates also provide other non-executive compensation services to the company and is paid a fee exceeding \$120,000 during the company's most recently completed fiscal year. Exceptions to the rule include (i) fee and related disclosure for consultants that work with management if the board has its own consultant and (ii) fees paid for consulting on broad-based non-discriminatory plans, such as surveys, that are not customized for the company. The rule does not require disclosure of the nature and extent of additional services provided by the compensation consultant and its affiliates.

## Reporting of Voting Results on Form 8-K

The new rules require disclosure of the results of shareholder votes on a Form 8-K within four business days after the shareholder meeting at which the vote was held, thereby eliminating this disclosure entirely on Forms 10-Q and 10-K.

---

*If you have questions regarding this or any securities-related topic, please contact **Irvin Brum, Esq.**, partner and chair of Ruskin Moscou Faltischek's Corporate & Securities Department. He can be reached at 516-663-6610 or [ibrum@rmfpc.com](mailto:ibrum@rmfpc.com). This article was prepared with the assistance of Corporate & Securities associate Allison Eig.*

  
RUSKIN MOSCOU FALTISCHEK P.C.

Smart Counsel. Straight Talk.

East Tower, 15th Floor  
1425 RXR Plaza, Uniondale, NY 11556-1425  
516.663.6600 [www.rmfp.com](http://www.rmfp.com)

Copyright © 2009 Ruskin Moscou Faltischek, P.C. All Rights Reserved.