

[Alerts and Updates]

SEC Proposals on Proxy Disclosure and Solicitation Enhancements

July 20, 2009

The U.S. Securities and Exchange Commission (SEC) recently proposed substantial revisions to its proxy rules, [SEC Release No. 34-60280](#). The proposed amendments are intended to improve the disclosure public companies give to their shareholders regarding compensation and corporate governance, and to clarify certain rules governing proxy solicitation. If adopted, the amendments would greatly increase the information included in proxy and information statements, annual reports and registration statements under the Exchange Act and registration statements under the Securities Act. The additional disclosure would include information about the relationship of a company's overall compensation policies to risk, director and nominee qualifications, company leadership structure and the potential conflicts of interests of compensation consultants. In addition, the proposed amendments would add a new Form 8-K disclosure item for real-time reporting of proxy voting results.

Enhanced Compensation Disclosure

Item 402 of Regulation S-K would be amended to broaden the scope of the Compensation Discussion and Analysis (the "CD&A") and would require a company to discuss and analyze its compensation policies and overall actual compensation practices for employees generally, including non-executive officers, if such policies have a material effect on the company's risk profile. The SEC would require broader CD&A to include information about how the company's overall compensation policies for employees create incentives that can affect the company's risk and management of that risk. The SEC staff indicated that the nature and extent of the specific additional required disclosures will vary, depending on the particular company and its compensation policies. The additional disclosure the SEC would mandate includes the general design philosophy of the company's compensation policies and the company's risk assessment or incentive considerations in structuring its compensation policies, as well as the extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees. The SEC believes that such disclosure will help investors identify whether a particular company has established a system of incentives that can lead to excessive or inappropriate risk-taking by employees. The SEC requested comments regarding whether the SEC should require the company, if it determines that disclosure under the proposed amendments is not required, to affirmatively state in the CD&A that it has determined that the risks arising from its broader compensation policies are not reasonably expected to have a material effect on the company.

The proposed amendments would also require disclosure of the value of stock and option awards reported in the Summary Compensation Table and Director Compensation Table at the aggregate grant-date fair value of such awards computed in accordance with Statement of Financial Accounting Standards (FAS) No. 123R. This would replace currently mandated disclosure of the annual accounting expense of such equity awards. The SEC opines that the revised valuation requirement could more closely align the identification of named executive officers with company compensation decisions. The SEC stated that disclosure of full grant-date fair value permits investors to better evaluate the amount of equity compensation awarded.

Enhanced Director and Nominee Disclosure

A proposed amendment to Item 401 of Regulation S-K would require a discussion of the particular experience, qualifications, attributes or skills that qualify each director and any nominee for director to serve as a director of the company and as a member of any committee, in light of the company's business. The proposed amendment would also require disclosure of any directorships at

public 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 10 years. The revisions are aimed at providing investors with more information regarding an individual's competence and character and at helping investors determine whether a particular director and the entire board composition is an appropriate choice for a given company.

New Disclosure About Board Leadership Structure

Proposed amendments to Item 407 of Regulation S-K and Item 7 of Schedule 14A would require proxy and information statements to include disclosure of the company's leadership structure and why the company believes it is the best structure for it at the time of the filing. Companies would also need to disclose whether and why they have chosen to combine or separate the CEO and board chair positions, and whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the leadership of the company. Additionally, the proposed amendments would mandate additional disclosure about the board's role in the company's risk management process and the effect of this role, if any, on the way the company has organized its leadership structure. These revisions are intended to increase the transparency into how boards function.

New Disclosure Regarding Compensation Consultants

A proposed amendment to Item 407 of Regulation S-K would require disclosure about the fees paid to compensation consultants and their affiliates when they play *any* role in determining or recommending the amount or form of executive and director compensation, if they also provide other services to the company. To provide information to shareholders and investors regarding potential conflicts of interest, companies would be required to include in their proxy statements: the additional services provided, the aggregate fees paid for all additional services, the aggregate fees paid for work relating to executive and director compensation consulting, whether the decision to engage the consultant or its affiliates for any other service was recommended or made by management, and whether the board or compensation committee has approved these other services.

The SEC requested comment as to whether additional disclosure should be required as to any currently contemplated services by the consultant.

Reporting of Voting Results on Form 8-K

To expedite the timely reporting of shareholder voting results, the proposed amendment would transfer the requirement to disclose vote results from Forms 10-Q or 10-K to Form 8-K. The new Item 5.07 in Form 8-K would require the results of the shareholder votes to be filed within four business days following the meeting at which the vote was held.

Proxy Solicitation Enhancements

To clarify existing rules regarding proxy solicitations and facilitate shareholder communications and voting, the SEC also proposed the following amendments:

- **Rule 14a-2(b):** The proposed amendments would clarify that a person who provides a shareholder with an unmarked copy of a management proxy card and requests the shareholder to return the proxy card directly to management does not, by doing so, lose the exemption from the proxy rules under Rule 14a-2(b) for solicitations by non-management

parties who are not seeking proxy authority and do not have a substantial interest in the subject matter of the solicitation. The proposed amendments would also clarify that a substantial interest in the subject matter of the solicitation, which would make the Rule 14a-2(b) exemption unavailable, may be present even if the soliciting party is not a shareholder.

- **Rule 14a-4(d):** The proposed amendments would codify an existing no-action position that a soliciting person can round out its short slate with nominees named in a non-management proxy statement in the same manner as already permitted by the rule for a soliciting person to round out its short slate with nominees named in management's proxy statement.
- **Rule 14a-4(e):** The proposed rule would clarify current language in the rule that any conditions specified by a soliciting party in the proxy statement or form of proxy as to when that party may not vote shares over which it has received proxy authority must be objectively determinable.
- **Rule 14a-12:** This rule, which permits certain solicitations before furnishing a full proxy statement, so long as the soliciting communications contain information regarding the identity and interests of participants in a solicitation or a legend advising where such information can be found, would be revised to clarify that if such legend is used, the information to which the legend refers must be available on file with the SEC no later than the time the soliciting communication is made.

These proposals are yet another step in the SEC's process to enhance shareholder participation and decision making in electing directors and managing the compensation process. Public comments on the proposed amendments must be received by the SEC within 60 days after their publication in the *Federal Register*. We will continue to monitor these and other proxy disclosure and solicitation developments.

For Further Information

If you have any questions regarding the proxy disclosure and solicitation proposals presented above, including how they may affect your company, please contact one of the [members](#) of the [Securities Law Practice Group](#) or the lawyer in the firm with whom you are regularly in contact.