

Securities Law Advisory: Preparation for 2009 Fiscal Year SEC Filings and 2010 Annual Shareholder Meetings

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As our clients and friends know, each year Mintz Levin provides an analysis of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings and annual shareholder meetings. This memorandum discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2010.¹ A summary of key changes and considerations for 2010 can be found below, followed by a more detailed exploration of the changes and general year-end considerations in the [full advisory](#).

Revised Compensation and Corporate Governance Disclosures: “Risk Management”

As the United States economy gradually appears to be emerging from the Great Recession, the theme of many of the new disclosure requirements that take effect for 2010, and speeches from the Securities and Exchange Commission (SEC) about existing requirements, appears to be “risk management.” The SEC has adopted new rules in which companies will be required to provide enhanced disclosure regarding the ways in which they manage the risks that they face, and the ways in which their compensation structures may encourage risk-taking. These rules also require additional disclosure about the background and qualifications of directors and director nominees, the leadership structure of boards, and the fees paid to compensation consultants. The new rules also change the reporting of equity compensation in the Summary Compensation Table and Director Compensation Table to the way this reporting was initially proposed by the SEC in its 2006 executive compensation rule changes. This memorandum includes a detailed analysis of the new disclosure rules, which take effect for the 2010 proxy season. We expect that, as a result of some of these new disclosure requirements, companies’ nominating and governance committees will have more work to do than in years past in order for companies to file their proxy statements, as these new disclosure rules enhance the role of the nominating and governance committee much like past SEC rules have enhanced the role of audit and compensation committees.

In addition, the SEC Staff continues to focus its attention on the quality of issuers’ disclosures in the Compensation Discussion and Analysis (CD&A) sections of proxy statements. The Deputy Director of the SEC’s Division of Corporation Finance, Shelley Parratt, indicated in a speech given in November 2009 that the SEC Staff expects issuers in their 2010 proxy statements to comply with the guidance it has issued to date on CD&A disclosure, and not wait for a comment

letter from the Staff in order to comply with that guidance. The Staff may require companies that it believes fail to comply with the SEC's expected CD&A disclosure to amend their proxy statements prior to the annual meeting in order to respond to Staff comments, as opposed to the Staff's practice in recent years of allowing issuers to respond to comments on CD&A disclosure in the next year's proxy statement filing. In light of this, we recommend that all companies refer to the guidance issued by the SEC on CD&A disclosure, in the form of public speeches, the rules themselves, and in publicly available comment letters issued to similarly situated companies, prior to drafting their CD&As this year. Key themes from Ms. Parratt's speech are discussed in further detail in the [full advisory](#)

Continued Erosion of Broker Discretionary Voting

On July 1, 2009, the SEC voted to approve changes in New York Stock Exchange (NYSE) Rule 452 in order to eliminate broker discretionary voting in the election of directors. This rule, which became effective on January 1, 2010 and applies to brokers who trade in securities on **all** U.S. stock exchanges, not just the NYSE, no longer permits brokers to exercise the right to vote shares on their clients' behalf where the clients have not provided the brokers with instructions as to how they wish their shares to be voted in an uncontested election of directors. As described in the [full advisory](#), issuers will need to evaluate their ability to achieve a quorum at their stockholder meetings, and the potential impact of the loss of broker non-votes on director elections for stockholder meetings to be held after January 1, 2010.

E-Proxy Rules In Effect

The 2010 proxy season represents the second year that all public companies, regardless of size, are required to comply with the SEC's electronic proxy delivery rules (referred to as the "e-proxy" rules) in distributing their proxy materials. Under these rules, all companies must make their proxy materials available on an Internet website, regardless of the method that they select for delivery of their proxy materials. Companies have two choices for the method of delivery, which are described in further detail in the [full advisory](#): the "notice only" model, in which stockholders receive only a notice that the proxy materials are available on the Internet and must either log in to view the materials or request a paper copy be delivered, or the "full set delivery" model, which is the traditional method of delivery of the materials through the mail. Under either model, companies must follow detailed procedural and notice requirements in distributing their proxy materials, including the annual report to shareholders. The SEC has recently proposed rules that will make some adjustments to the e-proxy process, based on issuers' and the SEC's experiences with the e-proxy rules during the 2009 proxy season. The SEC's principal concern in proposing the adjustments was the observation that rates of retail stockholder participation in the voting process for companies that had adopted the notice only model had declined significantly when compared to prior years. The SEC's hope is that the adjustments contained in the proposed rules will contribute to greater retail stockholder participation in the proxy process.

The e-proxy rules and the proposed amendments are described further in the [full advisory](#).

Internal Control over Financial Reporting

Companies continue to manage the disclosure requirements that accompany internal control reporting obligations under Section 404 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). The SEC has extended once again the requirement that non-accelerated filers include an attestation report of their auditors with respect to their internal control over financial reporting. Under the latest extension, non-accelerated filers will first be required to include the attestation report of their auditors in annual reports for their fiscal years ending on or after June 15, 2010. The previous compliance date for non-accelerated filers would have required them to include this report in annual reports for fiscal years ending on or after December 15, 2009.

We look forward to working with you to make this year's annual reporting process as smooth as possible.

[Click here to read the full advisory.](#)

Endnotes

¹ We invite you to review our memorandum from last year, which analyzed regulatory changes that were new last year, and we would be happy to provide you with another copy upon request.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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