



December 21, 2009



The SEC Adopts Enhanced Proxy Disclosure Rules

On December 16, 2009, the Securities and Exchange Commission (the "SEC") approved amendments to the proxy disclosure rules that significantly enhance disclosures relating to compensation policies and practices and Board of Director disclosures. In particular, the new rules require disclosure of the following:

- Compensation policies and practices and their effect on risk management;
- Enhanced information regarding director background and qualifications;
- Additional legal proceedings involving directors, nominees and executive officers;
- Diversity considerations with respect to the director nomination process;
- Board leadership structure and board oversight of risk management;
- Stock and option awards for company directors and executives; and
- Conflicts of interest considerations relating to retained compensation consultants.

In addition, the SEC has updated rules requiring expedited reporting of shareholder voting results. The new rules will become effective February 10, 2010, in time for implementation in the upcoming annual reporting and proxy season for most public companies.

Enhanced Proxy Disclosure

The SEC has expanded the types and levels of disclosure that reporting

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

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companies must now present in their annual proxy materials. Several categories of disclosures are affected by these new rules.

Compensation Policies and Practices

The new rules now include an expansion of the compensation disclosures contained in proxy materials for reporting companies, other than smaller reporting companies. Building on new disclosures required for financial institutions that have participated in the U.S. Treasury's capital enhancement programs, companies will be required to disclose whether their compensation policies and practices provide incentives or create risks that are "reasonably likely to have a material adverse effect on the company." This disclosure requirement applies to policies applicable to all employees, not just executives, and if the company determines that its policies could have such an effect, the company must disclose its policies and practices separate from its Compensation Discussion and Analysis. In evaluating whether such disclosures are required, companies may consider mitigating factors or practices that reduce the overall impact of the risk. Reporting companies must now begin the process to undertake a comprehensive compensation risk analysis in preparation for their 2010 proxy disclosure. Proper planning and ample lead time will be important in this process.

Director and Nominee Disclosures

The new rules also amend the director biographical disclosure requirements. Registrants must disclose the following information:

- The experience, qualifications, attributes or skills of a director or a nominee that led the board to conclude that the person should serve as a director as of the time of the filing containing such disclosure;
- A listing of other directorships at public companies held during the last five years (instead of current directorships); and
- Each director's, director nominee's, and executive officer's involvement with an expanded list of legal proceedings, such as fraud, judicial or administrative proceedings, and disciplinary and other enforcement actions, for the previous ten years (as opposed to the current requirement regarding the past five years).

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Nominating committees will have to incorporate these new and expanded disclosure obligations into their deliberations as they consider the nominees at their 2010 annual meetings.

Diversity

The SEC has also implemented enhanced reporting requirements with respect to how diversity is incorporated in identifying director nominees. Companies will be required to disclose whether and how a nominating committee considered diversity in its choice of director candidates. If the board or its nominating committee has an explicit policy on diversity, the company must disclose how such policy is implemented and how the board or nominating committee assesses its effectiveness.

Leadership Structure

The new rules also require that companies describe their board leadership structure and the board's role in risk oversight. The new rules require disclosure of (i) whether and why the company combines or separates the role of CEO and chairman, (ii) why its current board leadership structure is most appropriate, (iii) whether and why the company chooses to have a lead independent director and, if so, the nature of such director's role, and (iv) how the board implements its oversight of corporate risk.

Revisions to Summary Compensation Table

The SEC has adopted revisions to the reporting of stock and option awards in the Summary Compensation and Director Compensation table typically appearing in proxy statements. Companies will now be required to report the aggregate grant date fair value of stock and option awards made during the prior fiscal year instead of disclosing of the dollar amount recognized for financial statement reporting purposes under the current rules. Performance-based awards are now valued as of the grant date and computed based on the probable outcome of the performance condition(s) as of the grant date, with the maximum potential value appearing in a footnote. Companies with fiscal years ending on or after December 20, 2009 are also required to recompute the amounts in such tables relating to prior years in accordance with these new standards.

Compensation Consultants

Finally, the SEC has also adopted rules to promote additional disclosure related to the fees companies pay to compensation consultants. Companies will be required to disclose if the board or a compensation committee engages a compensation consultant who provides services to the company, other than advising on the amount or form of executive and

director compensation, and such services exceed \$120,000. Such disclosure should include the aggregate amount of fees paid, whether management recommended the consultant for any additional services, and whether the board or committee approved such additional services. Additionally, if management retains a consultant to advise on the form or quantity of executive compensation at a cost of \$120,000 or more, the company must disclose the aggregate fees paid for such advice and any other services provided by the consultant. These new rules include an exception with respect to any general information or services that are not developed on behalf of the company directly and for which the consultant did not provide advice (e.g., surveys and market research). It appears this rule is also intended to enhance transparency, in this case by focusing shareholders and investors on potential conflicts of interest between compensation consultants and the products they recommend for the executives who hire them.

Reporting of Voting Results

In addition to the disclosure requirements adopted by the new rules, the SEC also added an item to Form 8-K that now requires that companies report the voting results of shareholder meetings within four business days from the date of the meeting. Previously, companies were required to report results on Forms 10-K and 10-Q for the period in which the meeting was held, which often resulted in a significant time gap between a shareholder meeting and disclosure of voting results that are useful to investors and the markets.

Conclusion

Given the timing of the effectiveness of the new rules in relation to the upcoming proxy season, companies should begin to gather the necessary information and analyze the level of new disclosures that will be required to provide the necessary time to prepare and approve the additional disclosures. Companies are also advised to begin a review of their disclosure procedures, including an update of their D&O questionnaires, in the context of the new disclosures adopted by these rules.

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For Additional Information on This Issue, Contact:

[Craig D. Miller](#)

Partner

Corporate & Finance

cmiller@manatt.com

[James J. Vieceli](#)

Partner

Corporate & Finance

Mergers & Acquisitions

jvieceli@manatt.com

[Daniel E. Abrams](#)

Associate

Corporate & Finance

Mergers & Acquisitions

dabrams@manatt.com

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