

Client Alert

Corporate Department

July 2009

SEC Proposes Amendments to Proxy Disclosure and Solicitation Rules

On July 10, 2009, the U.S. Securities and Exchange Commission (the “SEC”) released proposed amendments to, among other things, the SEC’s rules and regulations relating to proxy statement disclosure about company compensation policies, executive compensation, director qualifications, board leadership policy and structure, and fees paid to compensation consultants who provide additional services to the company. In addition, the SEC proposes to shorten the time companies would be required to report shareholder voting results and to clarify rules relating to proxy contests involving short slates. This Client Alert summarizes the significant changes that would result if the SEC’s proposed revisions are adopted. If adopted, the SEC anticipates compliance with the amendments would be required beginning with the 2010 proxy season.

Compensation Policies and Practices

The proposed amendment would amend Item 402 of Regulation S-K to require companies to expand their “Compensation Discussion and Analysis” section of their Forms 10-K or registration statements, as applicable, to discuss and analyze their broader compensation policies and overall actual compensation practices for employees generally, including non-executive officers, if risks arising from those compensation policies or practices may have a material effect on the company. Companies would likely need to consider and discuss the level of risk that employees might be encouraged to take to receive incentive compensation.

The SEC noted that the following situations could trigger such discussion and analysis under the proposed rules.

- Compensation policies and practices at business units:
 - that carry a significant portion of the company’s risk profile;
 - with compensation structured significantly differently than other units within the company;
 - that are significantly more profitable than others within the company; or
 - where the compensation expense is a significant percentage of the unit’s revenues.
- Compensation policies and practices that vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.

The SEC also noted that under the proposed rules companies may need to discuss issues such as the following regarding the compensation policies or practices that may give rise to the material risk:

- The general design philosophy of the company's compensation policies for employees whose behavior would be most affected by the incentives established by the policies and the manner of its implementation;
- The company's risk assessment or incentive considerations in structuring its compensation policies or in awarding and paying compensation;
- How the company's compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw-backs or imposing holding periods;
- The company's policies regarding adjustments to its compensation policies to address changes in its risk profile;
- Material adjustments the company has made to its compensation policies or practices as a result of changes in its risk profile; and
- 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.

Summary Compensation Table

The proposed rules would amend Item 402 of Regulation S-K to require the company to disclose in its Forms 10-K or registration statements, as applicable, the aggregate grant date fair value of stock and option awards computed in accordance with generally accepted accounting principles on the executive compensation summary compensation table. Currently, companies must disclose the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with generally accepted accounting principles.

Information Concerning Directors or Nominees

The proposed rules would amend Item 401 of Regulation S-K to provide that, for each director or nominee for election as a director, disclosure be included in the Forms 10-K, registration statements or proxy or information statements, as applicable, that discusses the specific experience, attributes or skills that qualify that person to serve as a director (and any committees, if applicable), such as information about a director's or nominee's risk assessment skills or particular area of expertise. Companies would also be required to disclose any directorships held by each director and nominee at any time during the past five years at public companies (instead of only current board memberships). Finally, the amendment would lengthen the time a company must disclose the occurrence of certain legal proceedings involving directors from five to ten years.

Board Leadership

The proposed amendment would amend Item 407 of Regulation S-K to require a discussion of the company's leadership structure in its Form 10-K or proxy or information statements, as applicable. The company would also need to discuss whether and why it has combined or separate principal executive officer and board chair positions and, if they are combined, whether the board has a lead independent director and the specific role the lead independent director plays in the leadership of the company. This disclosure would need to indicate why the company has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the company. In addition, companies would need to disclose the extent of the board's role in the company's risk management process and the effect that this has on the company's leadership structure.

Compensation Consultants

The proposed amendment would amend Item 407 of Regulation S-K to require companies to disclose in their Forms 10-K or proxy or information statements, as applicable, the fees paid to compensation consultants when such consultants play a role in determining or recommending the amount or form of executive or director compensation *if* the consultants also provided additional services to the company during the company's last completed fiscal year.

Such disclosure would need to include:

- The nature and extent of all additional services provided to the company or its affiliates during the last fiscal year by the compensation consultants;
- The aggregate fees paid for all additional services;
- The aggregate fees paid for work related to determining or recommending the amount or form of executive and director compensation;
- Whether the decision to engage the compensation consultant or its affiliates for non-executive compensation services was made, recommended or subject to screening or reviewed by management; and
- Whether the board or compensation committee has approved all of these services in addition to executive compensation services.

The proposed amendments would not apply to those situations in which the compensation consultant's only role in recommending the amount or form of executive or director compensation is in connection with consulting on broad-based plans that do not discriminate in favor of executive officers or directors of the company, such as 401(k) plans or health insurance plans.

Reporting of Voting Results

The proposal would transfer the requirement to disclose voting results of any matter that was submitted to a vote of the company's shareholders from Form 10-Q or 10-K to Form 8-K. Companies would be required to disclose voting results within four business days of the end of the meeting instead of in the fiscal quarter following the fiscal quarter in

which the vote was held. In a contested election of directors, companies would only need to disclose preliminary results within four business days after preliminary results are determined if definitive results were not determined at the end of the meeting. Within four business days of the certification of the final voting results, the company would be required to disclose such results in an amendment to such Form 8-K.

Rounding Out Short Slate Solicitations

The SEC is proposing to revise the proxy solicitation rules to clarify that a non-management soliciting person nominating a short slate may supplement its short slate with nominees of other non-management soliciting persons in the same way it can with management nominees. The proposed exception would be available only when the non-management parties are not acting together. Although supplementing a short slate with nominees of other non-management soliciting persons would be allowed under the proposed rule, soliciting support for these other nominees would be prohibited, and non-management soliciting persons would not be able to share a proxy solicitor. Further, the non-management soliciting person seeking to supplement its short slate with nominees named in another non-management soliciting person's proxy statement would be required to represent in its proxy statement that it is not a participant in the other non-management person's solicitation.

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Please feel free to contact any of the partners listed below or any corporate partner with whom you work if you would like to discuss the proposed amendments to the SEC's rules and regulations and their potential ramifications.

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