

SEC Adopts Additional Proxy Disclosure Requirements

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On December 16, 2009, the Securities & Exchange Commission (“SEC”) finalized rules that will require most public companies to provide enhanced proxy statement disclosures over a broad range of topics, including compensation practices that may promote material risks, the grant-date fair value of stock and option awards made to executives and directors, director qualifications and the director selection process. The new rules, which are effective for proxy statements filed on or after February 28, 2010, are summarized below.

RISKS OF COMPENSATION PRACTICES

Responding to concerns that compensation practices at various companies encouraged executives to take excessive risks, the SEC now requires a company to address its compensation policies and practices if those policies and practices create risks that are reasonably likely to have a material adverse effect on the company. The SEC listed several examples of situations that might trigger this disclosure, including compensation policies and practices:

- At a business unit of the company that carries a significant portion of the company’s risk profile;
- At a business unit with compensation structured significantly differently than other units within the company;
- At a business unit that is significantly more profitable than others within the company;
- At a business unit where the compensation expense is a significant percentage of the unit’s revenues; and
- That vary significantly from the overall risk and reward structure of the company.

The SEC also listed several illustrative examples of the types of disclosure that may be applicable if a company determines that disclosure is required.

A company is not required to affirmatively state that its compensation policies are not reasonably expected to have a material adverse effect on the company if it has concluded that disclosure is not required. In addition, smaller public companies (that is, companies whose market value of voting and non-voting common equity held by nonaffiliates is less than \$75 million) are exempt from this reporting requirement.

COMPENSATION CONSULTANTS

For some companies, the new rules require significant new disclosures regarding compensation consultants retained by the board or compensation committee to provide advice or recommendations on the amount or form of executive and director compensation. If the consultant (or an affiliate of the consultant) provided additional services to the company in an amount exceeding \$120,000 during the company's fiscal year, the company must disclose the aggregate fees for executive and director compensation consulting services and the aggregate fees for such additional services. Disclosure is also required as to whether the decision to engage the compensation consultant or its affiliate for non-executive compensation consulting services was made or recommended by management, and whether the board or compensation committee has approved these non-executive compensation consulting services provided by the compensation consultant or its affiliate.

If the board or compensation committee has not engaged its own consultant, but management has engaged a compensation consultant to provide advice or recommendations on the amount or form of executive and director compensation, similar fee disclosures are required if the consultant provided additional services in an amount exceeding \$120,000 during the company's fiscal year.

Services involving only broadbased non-discriminatory plans or the provision of information, such as surveys, that are not customized for the company, or are customized based on parameters that are not developed by the consultant, are not treated as executive compensation consulting services for purposes of the compensation consultant disclosure rules.

STOCK COMPENSATION AND OPTIONS

The final rule revises the Summary Compensation Table and Director Compensation Table disclosures of stock awards and option awards to require disclosure of the aggregate grant date fair value of such awards. Previously, these tables required disclosure of the dollar amount of such awards recognized for financial statement reporting purposes for the fiscal year of disclosure. The SEC concluded, however, that disclosing aggregate grant date fair value better reflects the compensation committee's decision with regard to stock and option awards.

For stock or option awards conditioned upon performance, the SEC added instructions that the fair value of such awards should be computed based upon the probable outcome of the performance condition(s) as of the grant date. However, the Summary Compensation Table and/or Director Compensation Table must contain a footnote disclosure of the award's maximum value assuming the highest level of performance conditions is probable.

QUALIFICATIONS OF DIRECTORS AND NOMINEES

The final rule requires companies to disclose, for each director and any nominee for director, the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director for the company. Companies must also disclose any directorships at public companies and registered investment companies held by each director and nominee at any time during the past five years. These new disclosures will be required for all nominees and for all directors, including those not up for reelection in a particular year.

In a change from the proposed rule, the final rule does not require disclosure of the specific experience, qualifications or skills that qualify a person to serve as a member of a committee of the board. However, if an individual is chosen to be a director or a nominee because of a particular qualification, attribute or experience related to service on a specific committee, such as the audit committee, then this should be disclosed.

In addition, a company must disclose whether and how a nominating committee considers diversity in identifying nominees for director. If the nominating committee or the board has a policy with regard to the consideration of diversity in identifying director nominees, disclosure is required of how this policy is implemented, as well as how the effectiveness of the policy is evaluated. However, recognizing that the concept of diversity can have many meanings, the SEC has not defined the term "diversity" in the new rules.

With respect to legal proceedings involving directors, director nominees and executive officers, the SEC lengthened the period of time for which disclosure is required from five to ten years. The list of legal proceedings that must be disclosed has also been expanded to include proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity; proceedings based on violations of federal or state securities, commodities, banking or insurance laws and regulations, or any settlement to such actions; and disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

BOARD LEADERSHIP STRUCTURE

Under the new rules, a company must describe the leadership structure of its board of directors, including whether and why it has chosen to combine or separate the principal executive officer and board chairman positions. A company must also provide reasons why the company believes that its board leadership structure is the most appropriate structure for the company. In addition, a company must disclose the board's role in the risk oversight of the company, and the effect that the board's involvement in risk oversight has on the board's leadership structure.

REPORTING VOTING RESULTS

Finally, the SEC added a new item to Form 8-K requiring the disclosure of the results of shareholder votes. As a result, voting results must now be reported within four business days after the end of the meeting at which the vote was held. If the final vote result is not known within that timeframe, the company may file the preliminary voting results within four business days, and then file an amended report on Form 8-K within four business days after the final voting results are known.

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