

SEC Adopts Additional Compensation and Corporate Governance Disclosure for 2010 Proxy Season

At an open meeting today, the SEC voted to adopt amendments intended to enhance compensation and corporate governance disclosures. The new rule, which becomes effective February 28, 2010, was adopted substantially as proposed with some changes described below. The SEC deferred consideration of changes to the proxy solicitation rules until it considers the proxy access proposal. Chairman Mary L. Schapiro reaffirmed her commitment to bring final proxy access rules to a vote “early next year.”

This summary was based on oral discussions at the SEC’s open meeting. We will discuss the new rule in more detail as part of a broader discussion on planning for the 2010 proxy season on Wednesday, January 6, 2010 in a webcast entitled “Planning for the 2010 Proxy Season: Evolving Issues, New Rules.” Details and a link to the webcast to follow.

Material risks arising from compensation policies. The new rule will require a discussion and analysis of compensation practices or policies for employees, if the risks arising from such policies or practices are “reasonably likely” to have a “material adverse effect” on the company. The proposal would have required disclosure if the risks arising from such policies or practices “may” have a “material effect” on the company. The disclosure will not be part of the CD&A, as the requirement will cover all employees and not just executive officers. Smaller reporting companies will be exempt.

Changes to reporting the value of equity awards. The new rule will require that the value of options and stock awards reported in the summary compensation table and director compensation table be disclosed at the aggregate “grant date fair value” of such awards. The previous rule required disclosure of the annual accounting expense instead. The grant date fair value approach, widely preferred by most users of reported compensation data, may affect not only the total compensation reported but also the composition of the named executive officer group. The new rule will also require companies to recompute the information for all the years shown in the tables. Additionally, the new rule clarifies that awards subject to performance conditions are to be reported based on the probable outcome of performance conditions rather than the maximum potential value of the award, which is to be disclosed in a footnote to the table.

Directors and director nominees. The new rule will require disclosure for each director and new nominees regarding the particular experience, qualifications, attributes or skills that make the individual qualified to serve as a director. The new rule does not contain a similar requirement related to service on a board committee as was proposed. Additionally, the amendment requires disclosure of any public company directorships held at any time during the past five years instead of only current directorships, and lengthens the time period for which disclosure of legal proceedings involving directors or executive officers is required from five to ten years. While not specifically proposed, the amendment expands the list of legal proceedings covered by the rule to include those based on mail or wire fraud or fraud in connection with any business entity; violations of federal or state securities, commodities, banking or insurance laws and regulations or settlements to these actions; and disciplinary sanctions or orders imposed by any stock commodities or derivatives exchange or other self-regulatory organization. Settlements of private civil litigation need not be disclosed.

Considerations of diversity in the nominations process. The new rule will require disclosure of whether and if so how, a nominating committee considers diversity in identifying directors. If a company has a diversity policy, the new rule will require disclosure of how the policy is implemented and how the board assesses the effectiveness of its policies. According to Chairman Schapiro, companies will have

the ability to define diversity “as broadly or as narrowly as they choose” as the rule will not have a set definition.

Board leadership structure and role in risk oversight. The new rule will require disclosure of a company’s board leadership structure and a discussion of why the company believes that this board leadership structure is the best structure for the company, including a discussion of whether and why the company has chosen to combine or separate the CEO and board chairperson positions. If one person serves as both the CEO and chair, the company must state whether and why it has a lead independent director and such director’s role. Companies must also disclose the extent of the board’s role in the risk oversight of the company.

Compensation consultants. The new rule will require specified disclosure of the fees and services paid to compensation consultants and their affiliates if they provide both consulting services relating to executive or director compensation and additional services, if the cost of such additional services exceeds \$120,000.

Accelerated vote result reporting. A new Form 8-K item will require that annual meeting voting results be reported within four business days of a company’s annual meeting, instead of on Form 10-Q or Form 10-K. Where results will not be known by the deadline, companies will be permitted to disclose preliminary voting results and file an amended 8-K reporting the final voting results within four business days after the final results are known.

- ▶ [See a copy of the SEC’s press release](#)
- ▶ [See a copy of the final rule release](#)

SEC Reopens Public Comment Period on Proxy Access

Also, earlier this week, the SEC reopened the comment period for its proxy access proposal. The comment period for the proposal, which received over 500 comment letters in the original comment period, was extended in order to allow interested persons to comment on data and related analyses received at or after the close of the original public comment period on August 17. The SEC notice specifically mentioned the following submissions:

- ▶ [Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable](#), NERA Economic Consulting (submitted on August 17, 2009 by the Business Roundtable, beginning on pp. 127)
- ▶ [Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation](#), Andrea Beltratti and Rene M. Stulz (submitted on September 11, 2009 by the Business Roundtable)
- ▶ [The Limits of Private Ordering: Restrictions on Shareholders’ Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process](#), The Corporate Library (submitted on November 18, 2009 by the Shareowner Education Network and the Council of Institutional Investors)
- ▶ [Supplemental analysis of share ownership and holding period patterns from Form 13F data by the Commission’s Division of Risk, Strategy, and Financial Innovation](#), (November 24, 2009)

The new deadline to submit comments to the proxy access proposal is January 19, 2010.

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