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The Latest SEC Revisions and Proposals

The SEC has been busy this summer. Outlined below are summaries of some actions taken by the SEC in July.

Final Rule

- **Broker-Dealer Votes - Uncontested Elections**

In July, the SEC gave final approval to an amendment to NYSE Rule 452 to prohibit broker discretionary voting in uncontested director elections. The rule change is effective for shareholder meetings held on or after January 1, 2010. (Broker discretionary voting in contested elections is already prohibited.) As a result of this change, uncontested director elections will no longer be considered "routine" under Rule 452 and shareholders must affirmatively vote (or instruct their brokers to vote) in director elections.

Proposed Rules

In July, the SEC made the following proposals which, if adopted, the SEC expects to be effective during the 2010 proxy season.

- **Say on Pay for TARP Recipients**

This proposal (Proposed Rule 14a-20) is intended to implement in the proxy rules the requirements under Section 111(e)(i) of the Emergency Economic Stabilization Act of 2008 ("EESA") that TARP recipients provide a separate shareholder vote to approve the compensation of the company's executives. Under the Proposed Rule 14a-20, the separate vote would only be required on a proxy solicited for an annual (or special meeting in lieu of the annual) shareholder meeting for which proxies will be solicited for the election of directors. The separate shareholder vote would not be binding on the Board of Directors. Proxy statements containing a vote on executive compensation would be required to be filed as a preliminary filing.

- **New Form 8-K for Shareholder Vote Results**

The SEC also proposed a new Form 8-K requirement that the results of a shareholder vote be disclosed within four business days after the meeting. This accelerated timetable would be in lieu of the currently required disclosure in the next following Form 10-Q/10-K.

- **Risk and Compensation Disclosure**

The SEC has proposed additional disclosure requirements for the CD&A intended to highlight, where material, compensation programs that may have the potential to raise material risks to a company. The disclosure would only be required if the materiality threshold is triggered. The disclosure requirement is not limited to executive compensation. For example, the proposal suggests the CD&A address compensation policies and practices (1) at a business unit that carries a significant portion of a company's risk profile; (2) at a business unit where compensation is structured significantly differently from other units in the company; (3) at business units that are significantly more profitable than others within the company; (4) at a business unit where compensation expense is a significant percentage of a unit's revenue; or (5) that vary significantly from the overall risk and reward structure of the company. The SEC makes clear that this list of examples is not an exclusive list of situations where compensation programs may raise potential material risks. The proposal would not affect smaller reporting companies.

- **Revisions to Summary Compensation Table and Director Compensation Table**

These proposed amendments to Item 402 of Regulation S-K would require disclosure of the aggregate grant date fair value of stock and option awards computed in accordance with FAS 123R instead of the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with the FAS 123R. The SEC believes that the full grant date fair value method better reflects compensation decisions.

This proposal would include awards with performance conditions. In addition, the proposal would revise the salary and bonus columns to provide that any amount of salary or bonus forgone at the election of an NEO, pursuant to a program under which a different, non-cash form of compensation may be received, need not be included in the salary or bonus column but instead would be reported in

the appropriate other column of the Summary Compensation Table.

- **Expanded Director and Nominee Disclosure**

This proposal would amend Item 401 of Regulation S-K to expand the disclosure for qualification of directors and nominees, past directorships held by directors and nominees and the time frame for disclosure of legal proceedings involving directors, nominees and executive officers.

In particular, the proposal would require details about a director's and nominee's experience, qualifications and skills that qualify him or her to serve as a director or member of a committee. In addition, directorships held at public companies during the past five years by a director or nominee would be required to be disclosed and the time during which disclosure of legal proceedings is required would be lengthened from five to ten years.

- **New Disclosure about Leadership Structure and Board's Role in Risk Management**

This proposal would add a new disclosure requirement to Item 407 of Regulation S-K to require disclosure of the company's leadership structure and why the company believes it is the best structure for the company. A discussion of whether and why the company has a combined or separate chief executive officer and chairman would be required. An expanded disclosure of the specific role that the lead independent director plays in leadership would also be required. The proposal would require additional discussion in proxy and information statements about the role of the Board of Directors in the risk management process of the company.

- **Compensation Consultants**

Proposed amendments to Item 407 of Regulation S-K would require disclosures about compensation consultants similar to those currently required for auditors. Specifically, if a compensation consultant (or affiliate) plays a role in determining or recommending the amount or form of executive or director compensation and also provides other services, then the following disclosures would be required:

- All other services provided to the company
- Aggregate fees paid for these other services
- Aggregate fees paid for services related to recommending/determining executive compensation
- Management's involvement in engaging the compensation consultant for non-executive compensation services
- Whether the board of directors or compensation committee has approved these compensation services

- **Proxy Solicitations**

The SEC has also proposed revisions to certain proxy rules relating to the solicitation process and shareholder voting. These proposals provide that:

- an unmarked copy of management's proxy card that is requested to be returned to management is not a "form of revocation" under Rule 14a-2(b)(1);
- a person need not be a security holder of a class of securities being solicited and a benefit need not be related to or desired from any security holdings in the class being solicited for Rule 14a-2(b)(1)(ix) to disqualify the person from relying on the Rule 14a-2(b)(1) exemption;
- a person soliciting for nominees who would become a minority of the board may vote for another soliciting person's nominees in addition to, or instead of the issuer's nominees to round out its short slate consistent with Rule 14a-(d)(4);
- a "reasonable specified condition" under which the shares represented by a proxy will not be voted under Rule 14a-4(e) must be objectively determinable; and
- participant information under Rule 14a-12(a)(1)(i) must be filed under cover of Schedule 14A by the time the first soliciting communication is made.

We will follow these proposals and others, including the proxy access rules proposed in June, and let you know what final form they take. In the meantime, if you have any questions, please free to call any member of our group.

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