

# PUBLICATION

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## SEC Amends Rules on Proxy Disclosure, Corporate Governance and Executive Compensation

December 17, 2009

Yesterday, the U.S. Securities and Exchange Commission (the "SEC") adopted amendments to the SEC's disclosure rules relating to director and director nominee qualifications, the structure of board governance, compensation consultants' fees and conflicts of interest, and the relationship between a company's overall compensation policy and its risk profile. The following is a summary of the new and amended rules.

### Effective Date

The amended rules are effective February 28, 2010, meaning that they will apply to most companies during the 2010 proxy season.

### Amended Proxy Disclosures

#### *Director and Nominee Qualifications*

The SEC amended Item 401 of Regulation S-K to require expanded disclosure about director and director nominee qualifications. Under the amendments, a company must disclose, for each director or nominee for director, the experience, skills or attributes, and qualifications that make the director qualified to serve as a director. In a change from the proposed rule, the final rules will not require information on qualifications with respect to service on committees, as the SEC acknowledged such disclosure would be impractical given the movement of board members among committees. In addition, the amended rules will require directors to disclose any directorships held at public companies in the last five years, as opposed to only current directorships. The amendments also expand the disclosure period for material legal proceedings involving directors or nominees for director from five to ten years.

The amendments will also require a company to discuss the role diversity plays in its selection process for directors. This new disclosure requirement will require companies with diversity policies to discuss how the policy is implemented and how the board assesses the effectiveness of the policy.

#### *Board Governance*

The SEC amended Item 407 of Regulation S-K and Schedule 14A to require disclosure regarding why the company believes its leadership structure is the best for the company under the particular circumstances. In particular, a company will now be required to disclose whether and why it has chosen to combine or separate the positions of chief executive officer and chairman of the board. If the roles are combined, the company must disclose whether it has a lead independent director and what role this director plays in the leadership of the company. In addition, a company will now be required to discuss its board's role in risk oversight and how this role affects the leadership structure of the company.

### Annual Meeting Voting Results

The amended rules will require disclosure of shareholder voting results in Form 8-K, instead of the Form 10-K and 10-Q for the period in which the meeting took place. This new Form 8-K requirement will require a company to disclose the results of a shareholder vote within four business days after the meeting at which the vote was held.

### **Compensation Consultant Disclosures**

The SEC has made additional amendments to Item 407 of Regulation S-K about compensation consultants' fees and conflicts of interest. Disclosure will now be required about fees paid to compensation consultants or their affiliates, whether they have any role in determining compensation, and if they perform any additional services for the company if the fees for these additional services exceed \$120,000 during the company's fiscal year. If this threshold is not met, no disclosure about compensation consultants' fees or conflicts of interest will be required.

Additionally, the amendments contain two exemptions to this disclosure requirement. First, disclosure will not be required if the compensation consultant's role is broad-based, such as consultation about 401(k) or health plans. In addition, if the compensation consultant only provides services that are not specifically tailored to the company, such as a general survey, the company is not required to disclose fees and conflicts of interest. Second, fees and related disclosure will not be required if the consultant works with management and the board has its own compensation consultant. To highlight any potential conflicts of interest in a manner similar to the current fees of the company's independent auditors, a company will be required to disclose in its proxy statement: the additional services provided, the aggregate fees paid for all additional services, aggregate fees paid for work relating to executive compensation, and whether the additional services were recommended by management and approved by the board.

### **Enhanced Compensation Disclosure**

The SEC adopted two amendments to the executive compensation disclosure required by Item 402 of Regulation S-K. First, companies will be required to analyze their overall compensation practices and policies as they relate to employees generally, and must discuss these practices and policies if risks arising from these compensation policies are reasonably likely (different from the standard in the rules as originally proposed in order to make the requirement similar to the MD&A standard) to have a material adverse effect on the company. For example, discussion would be required if a company's compensation policies and practices provide bonuses based upon the accomplishments of a task when the income and risk to the company from the task extend over a significantly longer period of time. In addition, the amendments will require a company to disclose how its compensation policies create incentives that can affect the company's risk.

Second, the Summary Compensation Table has been revised now to require, for stock and option awards, the disclosure of the full grant date fair value of awards made during the fiscal year in question. This contrasts with the current method of reporting the amount expressed by the company in its financial statements, irrespective of the date of grant. For companies providing disclosure for fiscal years ending after December 20, 2009, each of the preceding fiscal years in the table will be required to be recomputed using the revised standard. The proposal to eliminate the corresponding column in the Grants of Plan-Based Awards Table was not adopted in the final rule amendments.

### **Proxy Solicitation Clarifications and Enhancements**

The SEC deferred consideration of various technical amendments to the proxy rules.

### **Going Forward: Considerations for Companies for 2010**

Given the adoption of these amendments, companies should:

- Immediately revise their forms of officers and directors questionnaires in order to gather the additional information now required with respect to directors and nominees (e.g., qualifications, directorships, litigation history).
- Institute within their board (or appropriate committee) a process for analysis and review of the demographics and skill set needs of the board and how the incumbent board members meet those needs – in other words, be prepared to ask the tough question – "Why is this person on our board?"
- Seriously discuss, if applicable, the reasons for the roles of chairman of the board and chief executive officer being unified.
- Ensure that the company's compensation committee undertakes the requisite discussions in order to make the appropriate new compensation disclosures.
- Review the relationship of any compensation consultants used by the company in order to address the new consultant independence and fee disclosures.
- In its overall assessment and mitigation of risks that face the company, assess whether and how its compensation policies could affect the company in any material way. For example, does the company's compensation structure achieve a healthy balance between necessary, valuable business risk and unnecessary, excessive risk? In that light, issues such as retention, clawbacks, and incentives should be analyzed when evaluating the relationship between compensation and risk.

The full text of amended rules is available on the SEC website at: [www.sec.gov/rules/final/2009/33-9089.pdf](http://www.sec.gov/rules/final/2009/33-9089.pdf)