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RECENT SEC ACTIONS RELATING TO COMPENSATION AND CORPORATE GOVERNANCE DISCLOSURES AND VOTING PROCEDURES

On July 10, 2009 the Securities and Exchange Commission (the “SEC”) proposed amendments to its rules relating to executive compensation and corporate governance disclosure, a copy of which can be found [here](#). The amendments seek to increase and improve the information available to shareholders in the following areas: executive compensation, director and nominee qualifications, board governance, and potential compensation consultant conflicts of interest. In addition, the SEC proposed amendments to its rules governing the timing of disclosure of shareholder meeting voting results and the proxy solicitation process.

These proposed amendments are subject to a comment period and may change based on the comments received during this period. The deadline for submitting comments is September 15, 2009. If the proposed amendments are adopted, they would likely become effective for the 2010 proxy season.

Enhanced Compensation Disclosure

Compensation Discussion and Analysis (“CD&A”). The amendments broaden the scope of the disclosure required in the CD&A to include a new section providing information about how a company’s employee compensation policies and practices generally create incentives that can affect the company’s risk, and its management of that risk. The current rules only require this disclosure as it relates to the most highly compensated executive officers. This additional disclosure only applies if risks from those compensation policies or practices have a material effect on the company. These changes were proposed because the SEC believes that companies, and, in turn, investors, could be negatively impacted when compensation programs create incentives that influence behavior that is inconsistent with the overall interests of the company and its shareholders.

The SEC provided examples of situations that could potentially trigger this increased 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; or
- 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.

Summary Compensation Table and Director Compensation Table. The proposed amendments also revise the Summary Compensation Table and Director Compensation Table disclosure of stock awards and options awards to require disclosure of the aggregate grant date fair value of awards computed in accordance with FAS 123R for the year of grant. This disclosure would replace the currently mandated disclosure of the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with FAS 123R, which included amounts related to grants made in earlier years.

These amendments would rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table and corresponding footnote disclosure to the Director Compensation Table, as such disclosure would be duplicative. The proposed amendments also amend Instruction 2 to the salary and bonus columns of the Summary Compensation Table to provide that the amount of salary or bonus forgone at a named executive officer's election need not be reported in those columns. Instead, any non-cash awards received in lieu of salary or bonus would be reported under the column applicable to the form of award elected.

For purposes of transition, the SEC's goal is to facilitate year-to-year comparisons and is therefore considering requiring companies providing disclosure for a fiscal year ending on or after December 15, 2009, to conform the disclosure for each of the two preceding fiscal years included in the Summary Compensation Table. Thus, the Stock Awards and Option Awards columns for all three years would present the applicable full grant date fair values, and the Total Compensation would be recomputed accordingly. The SEC would not require companies to include different named executive officers for any preceding fiscal year based on re-computing total compensation for those years or to amend prior years' disclosure in previously filed Forms 10-K or other filings.

Enhanced Director and Nominee Disclosure

The SEC also proposed expanded disclosure related to the qualifications 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. The current rules only require general disclosure about director qualifications and brief biographical information about directors and nominees for the past five years. The proposed amendments would expand the information required to include the experience, qualifications, and skills that qualify the person to serve as a director. The types of information that may be disclosed include information about accounting or finance skills, risk assessment skills, particular area of expertise, and why the director's or nominee's service as a director would benefit the company.

The proposed amendments would also require disclosure of directorships held by each director or nominee during the past five years at any public company to allow investors to better evaluate the director or nominee's professional performance or any potential conflicts of interests. The proposed amendments also expand the time frame during which disclosure of



specific legal proceedings is required from five to ten years. The SEC is also considering whether diversity in the boardroom is an area requiring disclosure, and has solicited comments on this issue.

New Disclosure about Company Leadership Structure and the Board's Role in the Risk Management Process

The proposed amendments would require disclosure of a company's leadership structure and the reasons why the company believes its structure is best. Companies that combine the role of principal executive officer and board chairman would be required to disclose whether and why the company has a lead independent director, and the specific role the lead independent director plays in the leadership of the company. Additional disclosures about the board's role in the company's risk management process, including credit, liquidity, and operational risks, would also be required in order to provide investors with insight into how a company's board perceives and manages the company's risks.

New Disclosure Regarding Compensation Consultants

In an effort to address investor concerns regarding compensation consultant independence, the proposed amendments would require additional disclosure, if the consultant also provided other services to the company. The disclosure would include the aggregate fees paid to compensation consultants and their affiliates when they play any role in determining or recommending the amount or form of executive and director compensation. In addition, the proposed amendments would require a description of any additional services provided to the company during the last fiscal year by the compensation consultants and any affiliates of the consultants, and the aggregate fees for those additional services. The company would also be required to disclose whether the decision to engage the compensation consultant or its affiliates for additional services was made, recommended, subject to screening or reviewed by management, and whether the board of directors or the compensation committee approved the additional services.

Reporting of Voting Results on Form 8-K

The amendments would accelerate the disclosure of voting results of shareholder meetings by transferring this disclosure requirement from Forms 10-Q and 10-K to Form 8-K. New Item 5.07 would be added to Form 8-K, and would require companies to disclose the results of all shareholder votes within four business days. If the matter voted upon at the meeting relates to a contested director election and the voting results are not definitively determined at the end of the meeting, companies would be required to disclose on Form 8-K the preliminary voting results within the four business day time period, and file an amended report on Form 8-K within four business days after the final voting results are certified.

Proxy Solicitation Process

The SEC also proposed amendments to the rules governing the proxy solicitation process to provide greater certainty to soliciting parties, help shareholders receive timely and complete information and facilitate shareholder voting.

—[*Kelly C. Simoneaux*](#)



ELIMINATION OF BROKER DISCRETIONARY VOTING

On July 1, 2009, the SEC approved amendments to New York Stock Exchange (“NYSE”) Rule 452 that will eliminate broker discretionary voting for director elections, whether or not contested, at shareholder meetings held on or after January 1, 2010. The amendment applies to all NYSE member brokers, and thus will affect meetings of shareholders of companies listed on all U.S. stock exchanges, including the NYSE, AMEX, and NASDAQ. Supporters of the amendment view the change as empowering shareholders by preventing uninstructed broker voting in director elections. Opponents, including two SEC commissioners voting against the amendment, are concerned that it may have broader effects than have been analyzed. Such implications may include:

- Companies with sizeable retail brokerage stock ownership may be negatively impacted because a majority of brokerage shares do not typically vote unless prompted by solicitation efforts.
- Institutional investors may have increased influence on director elections because most brokers either vote proportionally with instructed retail votes or based on management recommendations.
- Public companies are likely to incur large expenses for additional solicitation activities to ensure that retail shareholders provide guidance to their brokers.
- Discretionary voting often plays a key role in ensuring that a quorum is present for the conduct of business at a shareholder meeting. As a result of this amendment, companies will have to be certain that there is at least one “routine” matter being considered at the meeting or use special efforts to obtain a quorum.

To prepare for the upcoming proxy season given the changes to NYSE Rule 452, public companies should take certain steps, including evaluating their governance practices under the various proxy advisory firm guidelines, review annual meeting bylaw and policy provisions to consider possible amendments, become familiar with their shareholder profile, and develop an action plan to educate shareholders.

—[*Kelly C. Simoneaux*](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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