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SEC PROPOSES DELAY OF AUDITOR ATTESTATION REPORT REQUIREMENT FOR NON-ACCELERATED FILERS

On January 31, 2008, the Securities and Exchange Commission (SEC) proposed to extend for one additional year the deadline for non-accelerated filers to provide in their annual reports an auditor's attestation report on the company's internal control over financial reporting. (Click [here](#) to link to the full text of the SEC's proposed rules.) A "non-accelerated filer" is a reporting company whose aggregate market value of voting and non-voting common equity held by non-affiliates is less than \$75 million as of the last day of the reporting company's most recently completed second fiscal quarter.

Section 404 of the Sarbanes-Oxley Act of 2002 requires a public company to comply with certain internal control over financial reporting requirements, including the auditor's attestation report requirement in Item 308(b) of Regulation S-K. In 2006, the SEC postponed the auditor's attestation report compliance date for non-accelerated filers to fiscal years ending on or after December 15, 2008. Under the proposed rules, a non-accelerated filer would be required to begin including the auditor's attestation report in its annual report for fiscal years ending on or after December 15, 2009. Until that time, (1) a non-accelerated filer would still be required to state in its management's report on the company's internal control over financial reporting that the company's annual report does not include an auditor attestation report, and (2) management reports that are not accompanied by an auditor's attestation report would be considered "furnished" rather than filed and, accordingly, would not be subject to liability under Section 18 of the Exchange Act.

The proposal to further delay the auditor's attestation report compliance date is intended to allow the SEC to conduct a cost-benefit study to determine whether the auditor attestation requirement is being implemented in a manner that is cost efficient for smaller reporting companies. In addition, the one-year deferral would allow the Public Company Accounting Oversight Board (PCAOB) additional time during 2008 to promulgate its guidance for internal control over financial reporting audits of smaller public companies, as well as additional time for the auditors to incorporate the PCAOB's guidance in their planning and conduct of their audits in 2009.

Comments on the proposed rules were required to be submitted to the SEC no later than March 10, 2008.

— *Monique A. Cenac and Scott D. Chenevert*

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SEC CODIFIES ITS STANCE ON SHAREHOLDER ACCESS TO PROXY MATERIALS

The SEC recently issued an [adopting release](#)¹ amending its rules governing stockholder proposals. The amended rule specifically addresses recent efforts by shareholder proponents to require companies to include a stockholder proposal in their proxy materials that would relate to the election of directors. The SEC's action was in response to a Second Circuit decision handed down in 2006 which contradicted the SEC's prior interpretation of its own rule.

Background

Beginning in 1990, the SEC routinely granted no action letters to issuers who sought to exclude stockholder proposals that, if approved, would have required the company to create a process by which stockholders would have direct access to the Company's proxy materials for conducting an election contest. In 2006, this long-standing position of the SEC was set aside by the Second Circuit Court of Appeals in *American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc.*² In that decision, the plaintiff, who was the proponent of such a proposal, challenged the action of the SEC in supporting AIG's exclusion of a proposal to amend the bylaws to establish procedures by which shareholders could nominate candidates for seats on the company's board of directors. In its *amicus* brief, the SEC argued that since 1990 the Commission had routinely permitted issuers to exclude such proposals (and others similar to it) that had the potential to create a contested directors election in the current year or in future years. The basis for the SEC's position was that there were a separate set of proxy rules that dealt specifically with election contests, and that the investor protections embedded in those rules could easily be circumvented if a stockholder proponent could gain direct access to the company's proxy materials. The court ignored this argument and its supporting evidence and sided with the plaintiff, ruling that 14a-8(i)(8) (which was the applicable rule purporting to permit companies to exclude proposals relating to the election of directors) applied only to proposals that would create a contested election in the current year, and not to proposals that would establish a process for the inclusion of stockholder nominees in future years.

Subsequent to the court's decision, the SEC expressed its concern that the ruling would create uncertainty in those jurisdictions outside of the Second Circuit. Due to this concern, the Commission felt the need to take affirmative action before the upcoming proxy season.

As a result, in July 2007, the SEC put forth alternative proposals that would provide finality to the issue. The first release, the "[Shareholder Access Release](#)³," proposed amendments to Rule 14a-8 which would have given shareholders access to proxy materials in order to include proposed bylaw amendments regarding the procedure for including shareholder board nominees in the proxy materials. The alternative proposal,

¹ Release No. 34-56914

² 462 F.3d 121 (2d Cir. 2006)

³ Release No. 34-56160

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referred to as the “Status Quo Release”⁴,” reflected the Division of Corporation Finance’s historical application of Rule 14a-8(i)(8) by proposing an amendment to 14a-8(i)(8) which would allow issuers to exclude such proposed bylaw amendments. In a 3-1 vote, the Commission elected to adopt the Status Quo Release over the Shareholder Access Release, and by doing so, it codified its previous stance on the issue.

As a result, and to specifically address the holding of the Second Circuit, Rule 14a-8(i)(8) has been amended to now provide that an issuer may exclude a shareholder’s proposal “if the proposal relates to an election for membership on the company’s board of directors or analogous governing body or a procedure for such a nomination or election.” In its adopting release, the SEC has made it clear that it will rule in favor of companies seeking to exclude proposals that directly or indirectly would attempt to circumvent its rules on election contests.

– Curtis R. Hearn and Justin D. DesHotel

⁴ Release No. 34-56161

Please 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 you may contact the head of our Corporate and Securities practice group:

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