

Securities and Exchange Commission Proposes Additional Proxy Statement Disclosure; Eliminates Broker Discretionary Voting for Directors

July 2, 2009

At an open meeting held on July 1, 2009, the Securities and Exchange Commission voted to:

- Propose amendments to the proxy rules under the Securities Exchange Act of 1934 to help implement the requirements for US registrants receiving financial assistance under the Troubled Asset Relief Program ("TARP") with respect to nonbinding stockholder votes on executive compensation;
- Propose amendments to the proxy rules on compensation and corporate governance disclosure and proxy solicitation; and
- Approve amendments to New York Stock Exchange Rule 452 that eliminate broker discretionary voting in elections of directors.

Public comments on the proposed amendments to the proxy rules must be received by the SEC within 60 days after their publication in the Federal Register. The amendments to New York Stock Exchange Rule 452 are final and apply to stockholder meetings held on or after January 1, 2010.

Say on Pay for TARP Recipients

The SEC voted unanimously to propose for comment a new proxy rule to help implement the requirements for TARP recipients under Section 111(e) of the Emergency Economic Stabilization Act of 2008 ("EESA"). Section 111(e) requires TARP recipients to permit separate nonbinding stockholder votes on the compensation of executives while any obligations arising from financial assistance received under TARP remain outstanding. Under the proposed rule, stockholders would have a separate vote at annual meetings on the compensation of a TARP recipient's executive officers as presented pursuant to Item 402 of Regulation S-K. The proposed rule is not intended to change the substantive disclosure requirements set forth in Item 402.

TARP recipients would also have to state that they are providing the vote pursuant to EESA and explain the general effect of the vote.

Compensation and Corporate Governance Disclosure; Proxy Solicitation

The SEC voted unanimously to propose for comment new compensation and corporate governance disclosure requirements in the following areas:

- *Compensation and Risk Management:* The SEC proposed to broaden the scope of the Compensation Discussion & Analysis to require companies to analyze the role that risk and risk management play in the company's broader compensation policies and practices. Where risk is material, the proposed rules would require disclosure about compensation for all employees rather than just for the company's named executive officers. In addition, the SEC proposed to modify the reporting of stock and option awards in the Summary Compensation Table and the Director Compensation Table where the aggregate fair value of awards on their grant date would be reported rather than the FAS 123(R) charge recognized for financial statement reporting purposes for all outstanding awards.
- *Director and Executive Officer Qualifications:* The proposed rules would broaden required disclosure about directors and director nominees to include their particular qualifications for service on the board and board committee(s). In addition, information would be required about any public company directorships held within the past five years, rather than only current directorships, and any legal proceedings within the past ten years, rather than only the past five years. The SEC is also soliciting comments concerning disclosure relating to board diversity.
- *Company Leadership Structure:* The proposed rules would require disclosure of why a company chose its specific leadership structure and why the company believes its leadership structure is the best structure for the company. The rules would also require an explanation of whether and why a company has chosen to combine or separate the chief executive officer and chairman of the board positions and whether the company has a lead independent director. Disclosure would also be required about the board's role in the company's risk management process and the effect, if any, this had on how the company determined its leadership structure.
- *Compensation Consultant Conflicts of Interest:* The SEC proposed to require greater disclosure about potential conflicts of interest between compensation consultants and their affiliates and the companies they work for, including the fees paid to compensation

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

No part of this publication may be reproduced, in whole or in part, in any form, without our prior written consent.

© 2009 Dewey & LeBoeuf LLP
All rights reserved.

For further information on Dewey & LeBoeuf, please visit www.dl.com.

consultants with respect to executive and director compensation consulting services and other services.

In addition, the SEC proposed to accelerate the disclosure of voting results at stockholder meetings by requiring companies to file a Form 8-K disclosing the voting results within four business days after the date of the meeting rather than in the company's next Form 10-Q.

Also, the proposed rules contain amendments clarifying the manner in which the rules operate and facilitating stockholder communications and voting. These proposals, among other things, provide that:

- An unmarked copy of management's proxy card that is requested to be returned directly to management is not a "form of revocation" that would render the exemption under Exchange Act Rule 14a-2(b) unavailable; and
- A soliciting person can round out its short slate with nominees named in a non-management proxy statement in the same manner as already permitted by the rule for nominees named in the company's proxy statement.

Elimination of Broker Discretionary Voting in Director Elections

The SEC approved by a 3-2 vote an amendment to New York Stock Exchange Rule 452 that eliminates broker discretionary voting in an uncontested election of directors. Currently, Rule 452 permits brokers to exercise discretionary voting authority concerning routine matters, including director elections, with respect to shares for which proxy soliciting materials have been transmitted, but voting instructions have not been received by the tenth day preceding the meeting date. Rule 452, as amended, eliminates broker discretionary voting in director elections, whether contested or uncontested, and is effective for all stockholder meetings occurring on or after January 1, 2010.

This client alert was prepared by Elizabeth W. Powers and K. Oliver Rust. For more information, please contact your Dewey & LeBoeuf relationship partner or:

*Howard Adler at + 1 212 259 7115 or hadler@dl.com;
Lorenzo Borgogni at +1 212 259 7406 or lborgogni@dl.com;
Domnick Bozzetti at + 1 212 259 7829 or dbozzetti@dl.com;
Andrew J. Fawbush at + 1 212 259 6907 or afawbush@dl.com;
Mitchel C. Pahl at + 1 212 259 6720 or mpahl@dl.com;
Elizabeth W. Powers at +1 212 259 8662 or epowers@dl.com;
K. Oliver Rust at +1 212 259 8571 or krust@dl.com; or
Martha Steinman at + 1 212 259 8093 or msteinman@dl.com.*