

Securities Law ADVISORY

July 2, 2009

SEC Proposes New Rules Related to Executive Compensation and Improving Proxy Disclosure; SEC Approves Amendment to NYSE Rule 452

At an open meeting held yesterday, the Securities and Exchange Commission (SEC) proposed new rules relating to executive compensation, corporate governance and the proxy voting and solicitation processes. Additionally, with a 3-2 vote, the SEC approved the proposed rule change to New York Stock Exchange (NYSE) Rule 452, eliminating broker discretionary voting for the election of directors, whether contested or uncontested.

Proposed Rules for Shareholder Approval of Executive Compensation for TARP Recipients

The SEC proposed amendments to the proxy rules under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), which establish requirements for U.S. registrants that have received financial assistance under the Troubled Asset Relief Program (TARP) and that are required, pursuant to Section 111(e) of the Emergency Economic Stabilization Act of 2008 (EESA), to hold an annual advisory shareholder vote on executive compensation. This is the so-called “say-on-pay” non-binding shareholder vote requirement that became mandatory for all TARP participants as of February 17, 2009, as a result of the enactment of the American Recovery and Reinvestment Act of 2009 (ARRA). Under ARRA, the SEC was given until February 17, 2010, to adopt implementing regulations for this requirement.

The proposed say-on-pay regulations would

- require public company TARP participants, while their TARP obligations remain outstanding, to provide for a separate advisory shareholder vote for annual shareholder meetings for the purpose of voting on the election of directors;
- require companies to disclose in their proxy statements that they are providing a separate shareholder vote on executive compensation and briefly explain the vote’s effect; and
- not require smaller reporting companies that are TARP participants to include a compensation discussion and analysis section in their proxy statements.

The proposed regulations do not set forth specific language that must be included in the say-on-pay proposal. This allows companies flexibility in complying with the EESA requirement by tailoring the proposal to elicit more informative responses from the shareholder vote. Comment is solicited as to whether specific language for the say-on-pay proposal should be included in the rule.

Proposed Rules to Enhance Proxy Disclosures and Solicitations

The SEC also proposed amendments to rules under the Exchange Act and Regulation S-K to enhance the disclosures that companies are required to make about compensation and other corporate governance matters, and to clarify certain rules governing proxy solicitations.

These new disclosures would require discussion of

- the relationship of a company's overall compensation policies to its risk profile, in addition to a description of the board's role in the risk management process;
- potential conflicts of interest of compensation consultants;
- the experiences, attributes and skills of directors and director nominees that qualify them to serve on the board and designated committees; and
- the company's leadership structure and why such leadership structure is deemed appropriate.

Improving Compensation Related Disclosure

To improve compensation related disclosure, the proposed amendments would expand the Compensation Discussion and Analysis section by requiring a company to discuss compensation policies for employees generally, including non-executive officers, and how these overall compensation policies affect the company's risk and management of that risk. Such disclosure, however, would only be required in situations where such risks would have a material effect on the company.

In addition, the proposed amendments would require disclosure of stock and option awards in the summary compensation and director compensation tables to be based on the fair value of the awards on the date they are granted (the original 2006 method of reporting), instead of based on the expense recognized during the year for financial statement reporting purposes. Disclosure would also be required regarding fees paid to compensation consultants (or their affiliates) who play a role in determining the amount and form of compensation for executives and directors, if those consultants (or their affiliates) also provide other services to the company (in which case, a description of the additional services would also be required).

Corporate Governance Related Disclosure

The proposed amendments would require disclosure of the particular experience, qualification, attributes or skills that qualify an individual to serve as board director or member of any board committee. Companies would also be required to disclose any directorships held by each director or nominee at any public company during the previous five years, in addition to those currently held, and to disclose any legal proceedings involving directors, director nominees and executive officers for the past 10 years, instead of five years as required by the current rules.

Further, the proposed amendments would require a company to disclose its leadership structure, including whether and why it has chosen to combine or separate the principal executive officer and board chair positions, and why it believes it is the most appropriate leadership structure for the company. Registered investment companies would be required to disclose whether the board chair is an independent director and, if not, whether it has a lead independent director and what role such person plays in the leadership of the fund. Additional disclosure in proxy and information statements regarding the board's role in the company's risk management process would also be required.

Finally, to effectuate more timely disclosure of annual meeting voting results, the proposed amendments would require the company to disclose the results of a shareholder vote on a Form 8-K within four business days after the end of the meeting at which the vote was held.

Clarifying Proxy Solicitation Rules

Yesterday's proposals also include amendments intended to clarify certain proxy rules regarding shareholder communications and voting, including the following:

- A proposal to amend Rule 14a-2(b) to clarify that an unmarked copy of management's proxy card that is requested to be returned to management is not a "form of revocation" that would render the exemption unavailable. Rule 14a-2(b) would also be amended to clarify that a substantial interest in the subject matter may be present even if the soliciting party is not a shareholder.
- A proposal to amend Rule 14a-4(d) to clarify that a soliciting person can round out its short slate of board nominees with nominees named in the company's proxy, as currently permitted, or nominees in a non-management proxy.
- A proposal to amend Rule 14a-4(e) to clarify that any condition imposed by a soliciting party to the exercise of a proxy be "objectively determinable."
- A proposal to amend Rule 14a-12 to clarify a long-standing staff position that information regarding the identity and interests of participants in a solicitation must be available to the shareholders when the solicitation begins.

Approval of Amended NYSE Rule 452

In a 3-2 vote, the SEC approved the proposed rule change, as modified by Amendment No. 4, filed by the NYSE to amend NYSE Rule 452 and corresponding Listed Company Manual Section 401.08. The amendment eliminates broker discretionary voting for the election of directors, regardless of whether the election is contested, by adding "election of directors" to the list of items for which a proxy to vote may not be given without instructions from the beneficial owner. The amendment contains a specific exception for companies registered under the Investment Company Act of 1940, and further codifies two previously published interpretations that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company. Amended Rule 452 applies to shareholder meetings held on or after January 1, 2010.

The full texts of the proposals on enhanced proxy disclosures and the NYSE rule change are not yet available, so the description of those proposals provided in this Special Alert is based on the SEC's press release and statements made by the Commissioners and the staff at the open meeting. The proposed rules will be subject to a 60-day comment period, beginning with their publication in the Federal Register, which should occur in the next several weeks.

For more information, contact your Alston & Bird LLP attorney or one of the attorneys in the firm's [Securities Group](#).

For other related securities advisories, [click here](#). If you or a colleague would like to receive future *Securities Law Advisories* and *Special Alerts* electronically, please forward your contact information, including your e-mail address, to securities.advisory@alston.com. Be sure to put "subscribe" in the subject line.