SECURITIES
ADVISORY January 5, 2010

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IMPORTANT CHANGES FOR THE 2010 PROXY SEASON AND BEYOND (UPDATED)

In the past year, the Department of Treasury, Congress, the Securities and Exchange Commission (the "SEC") and national stock exchanges have proposed and, in many cases, adopted a number of measures that will significantly change governance and disclosure obligations for public companies in the 2010 proxy season and beyond. In this recently updated advisory, we summarize these measures and their potential impacts on public companies. Below are the topics covered in this advisory.

BROKER DISCRETIONARY VOTING

On July 1, 2009, the SEC approved an amendment to New York Stock Exchange ("NYSE") Rule 452 that eliminates the rights of brokers to vote shares on a discretionary basis in elections of directors.[1] Rule 452 permits brokers to exercise discretion in voting "routine" matters on behalf of beneficial owner clients if those clients have not provided them with voting instructions at least 10 days prior to meetings of shareholders. Prior to the amendment to Rule 452, uncontested elections of directors were considered routine matters for purposes of Rule 452. Starting in January 2010, however, a broker may no longer vote shares with respect to the election of directors without instructions from the client on whose behalf it holds the shares.

As a result of this change to Rule 452, there will be lower vote levels in director elections, particularly amongst so-called retail voters. Depending on the make-up of shareholders at some companies, this will present increased challenges in elections of directors, especially where such elections are under majority voting standards. Without broker voting in the election of directors, for instance, we expect institutional investors to have more of an impact on voting than in years

[1] SEC Release No. 34-60215 (Jul. 1, 2009). Because it affects brokers regulated by the NYSE, Rule 452 implicates public companies even if their shares aren't listed on that exchange.

past. And, since many institutional voters rely heavily on the recommendations of proxy advisory firms, this also means that the recommendations of such firms will have an increased influence on voting in director elections.

Still other companies may have to worry about obtaining necessary quorums for meetings. This is most likely to be the case where an agenda has no items on the ballot for which brokers may cast discretionary votes under Rule 452, such as the ratification of the independent auditor. The change to Rule 452 compounds the challenges that some companies have already experienced obtaining quorums due to reduced voting participation resulting from new rules for electronic delivery of proxy materials.

As a result of the change in Rule 452, companies may incur higher proxy solicitation costs as they attempt to achieve the same vote levels that they have had in prior proxy seasons. These costs will come from the retention of proxy soliciting firms and the distribution of additional proxy materials in order to shore up retail participation.

Executive Compensation Disclosure

Changes to the SEC's Executive Compensation Disclosure Rules

On December 16, 2009, the SEC adopted a number of amendments to its executive compensation disclosure rules.[2] These amendments are effective on February 28, 2010, which means they will apply to most proxy statements distributed in the 2010 spring proxy season.[3]

Risks Related to Compensation Policies and Practices

The amendments require a public company to discuss the extent to which risks arising from its compensation policies and practices for *all employees* (not simply the company's named executive officers) are "reasonably likely to have a material adverse effect" on the company. This represents a narrowing of the disclosure threshold from that set forth in the proposed rules, which would have required disclosure if such risks "may have a material effect." If there is such a likelihood, a company must discuss its policies and practices of compensating its employees, including its non-executive officers, as they relate to risk management practices and risk-taking incentives.[4]

By way of example, new Item 402(s) provides that disclosure might be appropriate for compensation policies at the following:

- a business unit that carries a significant portion of the company's risk profile;
- a business unit with a significantly different compensation structure than other units within the company;
- business units that are significantly more profitable than others;
- a business unit where compensation expenses are a significant percentage of the unit's revenues; or

[2] SEC Release No. 33-9089 (Dec. 16, 2009).
[3] The staff of the SEC has indicated that these new rules will apply to any company whose fiscal year ends on or after December 20, 2009 that files its Form 10-K or proxy statement on or after February 28, 2010. The staff also has indicated that an issuer that is required to file a preliminary proxy statement and expects to file its definitive proxy statement on or after February 28, 2010 must ensure that the preliminary proxy statement complies with the new proxy disclosure requirements, even if the preliminary proxy statement is filed before February 28, 2010. *See* Q.1, Proxy Disclosure Enhancements Transition (Dec. 22, 2009).
[4] Smaller reporting companies are not subject to these new disclosures. A "smaller reporting company" is defined by Rule 12b-2 under the Securities Exchange Act of 1934 as a company with a public float of less than $75 million or annual revenues of less than $50 million in cases where the company does not have or is unable to calculate a public float

- compensation within one or more business units that varies 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.

Compensation committees should consider these issues as a matter of course, even if they ultimately conclude that disclosure is not required.[5]

Where a company determines that disclosure is required because the risks arising from its compensation practices or policies are reasonably likely to have a material adverse effect on the company, Item 402(s) provides the following examples of issues the company may need to address:

- the general design philosophy of the company's compensation policies and practices for employees whose behavior would be most affected by the incentives established by such policies and practices;
- the company's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;
- how the company's compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short-term and the long-term (e.g., claw-backs or holding periods);
- the company's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;
- material adjustments the company has made to its compensation policies and practices as a result of changes in its risk profile; and
- the extent to which the company monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to creating incentives for its employees.

Disclosure of Equity Awards

The SEC amended its executive compensation rules to require disclosure of the aggregate grant date fair value of equity awards in the Summary Compensation Table and the Director Compensation Table. This reverses the current requirement that public companies disclose such awards using the amount expensed for financial statement reporting purposes.[6]

The final rules depart from the proposed rules in two ways. First, the rules contain an instruction that the value of awards subject to performance conditions should be computed based upon the probable outcome of the performance conditions as of the grant date, rather than the maximum amount that the officer or director could receive as a result of the award. If, in reliance on this instruction, the maximum amount is not reported in a table, it must be shown in a footnote to that table.

Second, contrary to its original proposal, the SEC has declined to eliminate the requirement that companies disclose the grant date fair value of equity awards in the Grants of Plan-Based Awards Table. This decision was based on the SEC's view that this disclosure will reveal the value associated with each type of equity award granted and the mix of values among various

[5] Companies need not, however, affirmatively state that they have determined that risks arising from their compensation policies are not reasonably expected to have material effect on the company.

[6] To facilitate year-to-year comparisons, the SEC will require that companies provide recomputed disclosure for each fiscal year required to be included in the Summary Compensation Table, so that the stock awards and option awards columns present the applicable full grant date fair values, and the total compensation column is correspondingly recomputed. However, the SEC has indicated that companies will not be required to include different named executive officers based on recomputed total compensation for such years.

awards with different incentive effects, thereby helping investors better evaluate the decisions of compensation committees.

Compensation Consultant Services

The last area of change to executive compensation disclosure involves compensation consultant information. As proposed, the new requirement calls for disclosure where a compensation consultant provides services to a company that are in addition to services relating to executive or director compensation (e.g., benefits administration, human resources consulting and actuarial services). Specifically, this new disclosure will include fees paid to the consultant for each category of services, but only if the fees paid for the additional services exceed $120,000 in the last fiscal year. Also, where the compensation consultant has been engaged by the board or compensation committee to provide advice regarding executive or director compensation and the consultant provides additional services to the company, the company must disclose whether the decision to engage the consultant for the additional services was made or recommended by management and whether the compensation committee or board approved such other services.

The SEC also has adopted two exclusions from the current disclosure requirements for services provided by compensation consultants. Specifically, a company will not be required to disclose services provided by a compensation consultant where such services are (i) limited to consulting on broad-based plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors, and that are generally available to all salaried employees, or (ii) in the nature of providing information that either is not customized for a particular company or is customized based on parameters that are not developed by the compensation consultant and about which the consultant provides no advice.

STAFF GUIDANCE REGARDING EXECUTIVE COMPENSATION DISCLOSURES

A Deputy Director of the SEC's Division of Corporation Finance recently provided guidance regarding the staff's executive compensation disclosure review program.[7] In her remarks, the Deputy Director gave the following disclosure recommendations to companies in preparing their 2010 materials:

- explain *why* compensation decisions were made when discussing decision-making processes; [8]
- disclose any material performance targets used in determining executive compensation for the named executive officers for the periods covered by the disclosure and the actual achievement level against the targets;
- be prepared to explain to the staff, with specificity, how disclosure of material performance targets would cause competitive harm, if this is the argument against disclosure of such targets, and provide meaningful disclosure regarding the degree of difficulty in achieving performance targets;
- disclose the names of any peer group companies used for benchmarking purposes, how such names were selected, and how the actual awards compared to the benchmarks; and

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[7] Executive Compensation Disclosure: Observations on the 2009 Proxy Season and Expectations for 2010, Shelley Parratt, Deputy Director, Division of Corporation Finance (Nov. 9, 2009).
[8] Pointedly, the Deputy Director focused on the "analysis" in CD&A, in part noting,

> I can't stress the "analysis" part of the Compensation Discussion and Analysis enough. Factual statements about what the company or compensation committee did or did not do are not enough. It isn't sufficient for a company to state that its compensation committee used tally sheets, wealth accumulation analyses, or internal pay equity analyses in making compensation decisions. The company should discuss how the committee used these tools to determine compensation amounts and structures, and explain why it reached its decisions.

- in addition to the examples provided in Regulation S-K, provide any additional disclosure in the CD&A that would be material to an understanding of a company's compensation policies or decisions.

The Deputy Director also sent a message to companies that lag in terms of their compliance with executive compensation disclosure requirements. Any company that does not materially comply in this area, she noted, should be prepared to amend its current filing, rather than simply addressing staff comments in future filings. This doesn't mean the end of "futures" comments, but it may signal a shift towards less lenience where significant comments are the result of sub-par compliance.

CORPORATE GOVERNANCE DISCLOSURE

Along with the executive compensation amendments described above, the SEC adopted several amendments to its corporate governance disclosure requirements.

Leadership Structure Disclosures

The amendments require a public company to describe briefly its board's leadership structure, including why the company has determined that its leadership structure is appropriate, and whether the company combines or separates the positions of CEO and chairman of the board. The amendments also require that a company that has combined the positions of CEO and board chair disclose whether the company has a lead independent director, as well as the specific role that the lead independent director plays in the company's leadership structure.

Enhanced Director Qualification Disclosures

The amendments require enhanced disclosures regarding the particular qualifications of directors and director nominees, including a description of the specific experience, qualifications, attributes or skills that qualify such individuals to serve on the company's board.[9] Examples of the type of disclosures that may be called for include information about the person's risk assessment skills, financial reporting expertise, and any other particular areas of expertise. In addition, the rules now require information about public company directorships held over the prior five years (versus just those currently held).

Legal Proceedings

The amendments expand the period and categories of legal proceedings disclosure under Item 401(f) of Regulation S-K for directors, director nominees and executive officers. This area will now cover the prior 10, versus five, years. And, new categories of proceedings have been added, to the extent that such proceedings are not subsequently reversed, suspended or vacated, which include the following:[10]

- proceedings involving any law or regulation prohibiting mail or wire fraud;
- proceedings involving federal or state securities, commodities, banking or insurance laws and regulations, and any settlement to such actions;[11] and
- disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

[9] In a break from the rule proposal, the SEC decided not to require disclosure regarding the qualifications of a director or director nominee to serve on a particular committee.
[10] Item 401 of Regulation S-K requires disclosure only if the enumerated proceeding is "material to an evaluation of the ability and integrity" of a director.
[11] No disclosure is required with respect to any settlement of civil proceedings involving private litigants.

Policy Regarding Diversity in the Boardroom

The SEC adopted amendments to require disclosure about whether a nominating committee considers diversity in identifying nominees for director. In addition, if the nominating committee or the board has a policy regarding the consideration of diversity in identifying director nominees, disclosure will be required about how this policy is implemented, as well as how the nominating committee or the board assesses the effectiveness of its policy.

Board Role in Risk Oversight

Finally, the SEC adopted amendments to its rules to require disclosure regarding the extent of the board's role in the risk oversight of the company. Among other things, the SEC has suggested that applicable disclosures might address how the company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.

Reporting of Shareholder Voting Results

The SEC approved amendments to Form 8-K that will require companies to disclose the results of a shareholder vote within four business days after the end of the meeting at which the vote was held. To the extent that the results are not final by that time, a company may report the preliminary results on Form 8-K as long as it amends the Form 8-K to include the final results when they become available. This will replace the current requirement to disclose voting results on Forms 10-K and 10-Q.

Say-on-Pay

Say-on-Pay for TARP Participants

The Emergency Economic Stabilization Act of 2008 sets forth a number of requirements applicable to companies that have received government funds under the Troubled Asset Relief Program ("TARP"). In particular, TARP participants are required to provide a "say-on-pay" vote – a non-binding shareholder advisory vote with respect to the compensation paid to their company executives – while TARP funds remain outstanding. On July 1, 2009, the SEC proposed new rules to implement this say-on-pay requirement.[12] Under proposed Rule 14a-20, TARP participants must give their shareholders a non-binding vote on the compensation of the company's named executive officers, as disclosed under SEC rules (e.g., in the CD&A and compensation tables) in connection with an annual meeting of shareholders (or special meeting in lieu thereof) for which proxies are solicited for the election of directors. In addition to providing for this vote, a TARP participant must disclose in its proxy the existence, purpose and general effect of the vote, including its advisory nature. The SEC has not prescribed any specific form of resolution for this mandatory say-on-pay vote.

Say-on-Pay for All Public Companies

Various pending legislative measures seek to impose an annual say-on-pay vote for all public companies, not just TARP participants. Most notably, the United States House of Representatives approved legislation that would impose say-on-pay requirements on all domestic public companies.[13] If enacted, the legislation would require public companies to provide shareholders with an annual advisory (non-binding) say-on-pay vote regarding the compensation disclosed in the CD&A and compensation tables. In addition, the bill would require public companies to provide shareholders with a non-binding advisory say-on-pay vote

[12] *See* SEC Release No. 34-60218 (Jul. 1, 2009).

[13] *See* Title II of The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) ("H.R. 4173").

regarding golden parachute payments to executive officers in connection with extraordinary transactions, such as mergers.[14]

Electronic Proxies

On October 14, 2009, the SEC proposed amendments to the proxy rules to clarify and improve the notice and access model of proxy delivery.[15] Under existing rules, a company may satisfy its proxy delivery obligations by posting its proxy materials on an Internet website, sending shareholders a notice that tells them that the proxy materials are available (the "Notice") and providing paper copies of such materials to shareholders upon request.

The proposed amendments address several concerns that companies and shareholders have raised with respect to the operation of the notice and access model. The proposed rules:

- provide flexibility regarding the language to be used in the Notice by eliminating the requirement that companies use the exact language included in the rule;
- eliminate the requirement that the Notice mirror the proxy card;
- allow the distribution of an explanation of the notice and access model with the Notice; and
- give more time for a soliciting shareholder to (a) rely on the notice and access model, i.e., by allowing a soliciting shareholder to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement, and (b) to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC.

Notably, the SEC did not propose amendments to address two other criticisms of the notice and access rules: the requirement that the Notice be sent 40 days in advance of the shareholder meeting and the prohibition against the inclusion of a proxy card or voting instruction form with the initial Notice. These items may be taken up by the SEC in 2010.

Shareholder Proposals

On October 27, 2009, the staff of the SEC issued Staff Legal Bulletin 14E ("SLB 14E"), which announced new approaches to shareholder proposals relating to risk assessment and succession planning for CEOs.[16] Prior to the issuance of SLB 14E, the staff had taken the position that shareholder proposals which requested a company to conduct an internal assessment of risk could be excluded from company proxy materials as relating to ordinary business matters. Similarly, the staff had taken the position that shareholder proposals relating to executive succession, including CEO succession, could be excluded from company proxy materials as relating to ordinary business matters.

SLB 14E reverses the staff's historical approach to shareholder proposals involving the evaluation of risk and CEO succession. Going forward, the staff will evaluate arguments to exclude risk proposals on a case-by case-basis rather than excluding them as presumptively related to ordinary business. In conducting this evaluation, the staff will focus on the subject matter to which the risk at issue pertains. If the risk relates to a significant policy issue, the proposal generally will not be excludable under the ordinary business exclusion, while risks that relate to ordinary business will remain excludable.[17] Similarly, going forward, the staff's view is that CEO

[14] Although the Senate has not passed legislation that would require a say-on-pay vote, there are several bills that have been introduced that would create such a requirement.
[15] SEC Release No. 34-60825 (Oct. 14, 2009).
[16] Shareholder Proposals, Staff Legal Bulletin No. 14E (CF) (Oct. 27, 2009).
[17] An example of such a significant policy issue is a risk proposal that focuses on the board's role in the oversight of the management of risk, which SLB 14E indicates will not generally be excludable under the ordinary business exclusion. *See* SLB 14E.

succession planning raises a significant policy issue regarding the governance of the corporation that transcends day-to-day business matters.

In announcing its changes in position, the staff gave companies some ammunition in defending themselves against the predictable increase in risk and CEO succession proposals. First, the staff indicated that a risk proposal only raises significant policy considerations if there is a sufficient nexus between the subject of the proposal and the company's operations. Second, in discussing the change in the staff's approach to CEO succession planning proposals under Rule 14a-8(i)(7), the staff noted that it will continue to evaluate whether a proposal micromanages a company's business by probing too deeply into matters that are inappropriate for shareholder action.[18]

Shareholder Access to Proxy Statements

On May 20, 2009, the SEC proposed changes to the proxy rules that would require that companies include shareholder director nominees to the board in company proxy materials if certain conditions were met. This proposal marked the third attempt to address the controversial issue over the past six years. The SEC's 2009 access proposals proposed a two-pronged approach to this issue: the SEC proposed new Rule 14a-11, which would create a universal access right for shareholders who satisfy the rule's minimum ownership requirements, and the SEC also proposed amendments to Rule 14a-8 under which shareholder proposed access bylaws would no longer be excludable as relating to the election of directors.[19] The SEC also proposed a new disclosure form, Schedule 14N, which would require that a nominating shareholder provide a company with disclosures that are comparable to the disclosures required in proxy contests.

As with each of the prior attempts to address shareholder access, the SEC's proposals were met with significant resistance, eliciting over 500 comments and indications from some organizations that they might challenge the rule in the courts, if adopted.[20] Of the two prongs of the proposal, the universal access right drew the most objections, in part because such right would operate independently of any right of access granted under state law. [21]

In light of the number and nature of the comments on the proposed universal access right, many had assumed the SEC may delay taking action on that part of its overall proposal. On December 14, 2009, the SEC re-opened the public comment period for its shareholder access rulemaking proposal to seek views on additional data and related analyses received by the SEC at or after the close of the original public comment period. Nonetheless, various SEC Commissioners have made clear that they intend to adopt some form of shareholder access in 2010.

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[18] SLB 14E at footnote 5. ("Such a proposal could be excluded under Rule 14a-8(i)(7), however, if it seeks to micro-manage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. (*See* Exchange Act Release No. 40018"). Although the staff made this point in the context of CEO succession planning, we expect the staff to apply this principle, as it has done in the past, to all shareholder proposals, including risk assessment proposals.
[19] SEC Release No. 34-60089 (Jun. 10, 2009).
[20] *See* Comment Letter dated Aug. 17, 2009 from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation. Questions about the SEC's authority to adopt a shareholder access rule may be resolved before the SEC revisits these issues in 2010. There currently are several bills under consideration in Congress that would expressly give the SEC authority to adopt a shareholder access rule. *See, e.g.*, Title V of H.R. 4173; Shareholder Bill of Rights Act S. 1074, 111th Cong. (1st Sess. 2009).
[21] *See* Comment Letter dated Jun. 30, 2009 from the Business Roundtable, National Association of Corporate Directors, National Investor Relations Institute, Securities Transfer Association Inc., Shareholder Communications Coalition, Society of Corporate Secretaries and Governance Professionals Inc. and US Chamber of Commerce.

SEC's Review of the Proxy Process

The SEC has announced that it is working on a "proxy plumbing" project that will focus on the mechanics of proxy voting and related issues. SEC Chairman Mary Schapiro described the contours of the project in a speech before the Practising Law Institute in November.[22] According to Chairman Schapiro, the SEC will issue a concept release which is expected to address the following issues:

- vote tabulation;
- whether votes are cast by those with an economic interest in the securities;
- how to address voting participation by retail investors;
- the need to allow beneficial owners of a company's securities to object to having their names and addresses disclosed to the company;
- the role of proxy advisory firms in corporate voting;
- whether shareholders should be more easily able to communicate with one another; and
- whether any rule amendments are necessary to ensure that the federal proxy rules are flexible enough to adapt to changing legal developments at the state level, such as dual record dates for annual meetings.

The staff of the SEC has indicated that it will be making recommendations to the SEC this year with the expectation that the concept release will be published in early 2010. The concept release will likely solicit comments and lead to rulemaking in 2010.

NYSE Corporate Governance Listing Standards

On November 25, 2009, the SEC approved a number of amendments to the NYSE's corporate governance listing standards.[23] In general, the amendments do not effect substantive changes to requirements set forth in Section 303A of the NYSE listed company manual but, rather, align the NYSE's disclosure requirements better with related SEC requirements and codify certain NYSE interpretations. As such, the changes are not likely to alter significantly a listed company's corporate governance disclosure practices. The amendments become effective on January 1, 2010, and apply to proxy materials for meetings held after December 31, 2009. Among other things, the amendments:

- eliminate NYSE disclosure requirements that overlap with Item 407 of Regulation S-K (e.g., disclosures regarding the identity of independent directors, the basis upon which a board determines independence, and any exemptions from the independence requirements upon which a company relies);
- provide a listed company with the option to disclose solely via its website certain information currently required to be disclosed in its proxy or annual report (e.g., disclosure regarding contributions made by the company to a tax-exempt organization in which any independent director serves as an executive officer);
- allow a listed company to satisfy its obligations to hold regular executive sessions of "non-management" directors by holding regular sessions of independent directors;
- eliminate the requirement that a listed company disclose that print copies of its committee charters, governance guidelines and codes of ethics and business conduct are available upon request if such materials are available on the company's website;

[22] *See* Speech by SEC Chairman: Address to the Practising Law Institute's 41st Annual Institute on Securities Regulation, Chairman Mary Schapiro, U.S. Securities and Exchange Commission (Nov. 4, 2009), publicly available at http://sec.gov/news/speech/2009/spch110409mls.htm.
[23] SEC Release No. 34-61067 (Nov. 25, 2009).

- require a listed company to provide written notice to the NYSE when an executive officer becomes aware of any non-compliance with the listing standards; and
- require a listed company to disclose waivers of its code of conduct and ethics granted to an executive officer or director in a press release, on its website or in a Form 8-K within four business days (rather than "promptly" as is currently required).

Action Items for the 2010 Proxy Season

Based on the above, there are various measures companies should follow for the coming proxy season.

Preparation for the Elimination of Broker Votes in the Election of Directors

In response to the changes to Rule 452, every public company should take the following steps to prepare for the loss of broker votes in the election of directors during the upcoming proxy season:

- review its shareholder profile to determine the percentage of its shareholder base that is comprised of retail shareholders;
- consider whether the election of directors will require additional solicitation efforts and budget for such efforts;
- consider whether to include, if it doesn't routinely, the ratification of the independent auditor in the proxy to help ensure that the company achieves quorum for the annual meeting; and
- review the impact of policies of proxy advisory services, such as RiskMetrics and Glass Lewis, on upcoming governance and other decisions that could sway the recommendations of such firms on director elections.

Alert Directors and Executive Officer about the New Rules

Under the SEC's new disclosure rules, directors and executive officers will need to provide and review additional disclosures for their companies' proxy statements. Because this requirement has come at the last minute, companies, particularly those with calendar year-ends, will want to alert their directors and executive officers quickly, underscoring that the additional required information spans a longer period of time and broader scope than was required last year.

Director & Officer Questionnaires

Companies should revise their D&O questionnaires to solicit information about (i) all public company directorships held by their directors during the preceding five years and (ii) legal proceedings, including expanded categories, for the preceding 10, rather than five, years.

Board and Committee Deliberations

Companies also should ensure that their boards and compensation committees are keyed into the disclosure requirements regarding the company's leadership structure, the board's role in overseeing a company's risk management program and the impact of their compensation programs on their risk profile. Boards should add the company's leadership structure and risk management structure to the agendas for their upcoming meetings. To provide an opportunity for meaningful discussion, boards should familiarize themselves with the rationale for the company's choice in leadership structure and their company's risk management policies and procedures. Similarly, a board or its compensation committee should discuss whether there are any risks arising from a company's compensation policies and overall actual compensation practices which are reasonably likely to have a material adverse effect on the company, all with a view to possible disclosure if such risks exist.

Notice and Access

Although the SEC's proposed amendments to the notice and access rules will not be a significant change to the current rules, companies should talk with their transfer agents and other service providers regarding how they can take advantage of the new flexibility. We understand that several service providers already have prepared educational inserts about the notice and access delivery model that could be included with a Notice.

Executive Compensation Changes

The guidance given by the staff of the SEC regarding executive compensation disclosures should be helpful as companies prepare their CD&A and compensation tables for the 2010 proxy season. Although three years have passed since the SEC adopted the current executive compensation rules, the staff continues to police compliance with the rules with the same vigor as it did then. Although much of the guidance from the staff is consistent with its guidance in prior years, three themes emerge. First, the staff remains focused on disclosure of performance targets. Second the staff continues to look for "analysis" in CD&A. Finally, the staff wants companies to take compliance with form requirements seriously, reinforced by the reminder that companies with significant shortcomings in executive compensation disclosures may be expected to amend those disclosures in real time.

Compensation Consultant Disclosures

The new compensation consultant disclosure requirements will require a thorough understanding of all of the services provided by compensation consultants who play a role in setting executive or director compensation and the process by which companies approve such services. Part of this understanding will require the identification of any such compensation consultants used by a particular company, including its subsidiaries, all the services provided by such consultants, the fees paid for such services, and the process by which such services were approved.

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