

SEC Proposes Changes to Proxy Solicitation Rules and Expanded Governance and Executive Compensation Disclosures

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Last week,¹ the SEC released proposed rules that would expand the scope of required executive compensation and corporate governance disclosures, require 8-K reporting of shareholder vote results, and amend proxy rules to facilitate “withhold the vote” campaigns and permit dissidents to “round out” short slates with non-management and management nominees. The full text of the proposed rules is available at <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>.

Leadership Structure and Board Involvement in Risk Management. The proposed rules would require a description of, and justification for, a company’s leadership structure, including whether and why a company has chosen to combine or separate the CEO and Chairman positions, and whether and why a company has a lead independent director. In this regard, the SEC’s acknowledgement in the preamble to the proposed regulations that “different leadership structures may be suitable for different companies” is particularly welcome in light of recent legislative proposals to mandate one-size-fits-all approaches to board leadership. The proposed rules also would require a description in proxy statements of the board’s role in company risk management.

Qualifications and Experiences of Directors. The proposed rules would expand required information about directors and director nominees, mandating a discussion of the specific experiences and skills relevant to service as a director and, where applicable, as a committee member. In addition, longer look-back periods for disclosure of other directorships (5 years) and of legal proceedings (10 years) would apply. The SEC intends to adopt these rules in time for the 2010 proxy season. Accordingly, companies will need to update their D&O questionnaires to address the expanded requirements.

Exempt Solicitations. Under current rules, solicitations by shareholders and other non-company

parties who are not seeking proxy authority and do not have a substantial interest in the matter of the solicitation are exempt from most of the requirements of the proxy rules unless, among other things, the soliciting persons furnish or request a “form of revocation.” Under the proposed rules, providing shareholders with an unmarked duplicate of the company’s proxy card and directing that it be returned directly to the company (a common technique in “withhold the vote campaigns”) would not preclude reliance on the exemption, even if the use of the duplicate card would revoke the shareholder’s prior vote. As this approach is usually coupled with soliciting material designed to influence how the shareholder chooses to vote, requiring those using this method and availing themselves of the exemption to provide disclosure about themselves and file public notices of exempt solicitation would be desirable. Another proposed revision would narrow the scope of available exemptions, clarifying that a soliciting person generally may not rely on the exemption if it has a “substantial interest” in the outcome of the vote that makes it likely that it would receive a unique benefit from a successful solicitation and that the “substantial interest” test applies to all soliciting persons, not just shareholders.

Short Slates. In a codification of SEC guidance in the recent proxy contest involving Amylin Pharmaceuticals, Carl Icahn and Eastbourne Capital Management, the proposed rules would permit soliciting persons seeking minority representation on a board to round out their “short slates” with company nominees and shareholder nominees, whether contained in the company’s proxy statement (which, notably, could itself include shareholder nominees under the SEC’s proposed proxy access rules and company bylaws) or other persons’ proxy statements. The implications and complexities of this development are many, particularly if the SEC’s pending proxy access proposals are adopted.

Accelerated Disclosure of Shareholder Vote Results. The proposed rules would shift disclosure of shareholder vote results from periodic filings to Form 8-K which would be required to be filed within four business days after the end of the relevant shareholder meeting. In the case of contested elections where the vote outcome is not immediately clear, a company would be required to report preliminary results within four business days of the

¹ This memo was originally released July 13, 2009.

meeting and final results within four business days of the vote certification.

Valuation of Equity Compensation Awards. The proposed rules would modify the instructions to the summary compensation tables for named executive officers and directors to provide for valuation of equity awards based on the grant date fair value of awards made during the covered year, rather than on the accounting expense recognized during the covered year for all outstanding awards. The proposed approach represents a welcome development that would present a more accurate picture of compensation actions taken during the covered year and would reduce the risk of distortions in determining the identity of a company's named executive officers.

Risk and Broad-Based Compensation Programs. The proposed rules would require a new section in the Compensation Discussion & Analysis addressing the relationship between a company's overall employee compensation policies and risk management to the extent that specific programs or arrangements might have a material effect on the company.

Compensation Consultants. The proposed rules would impose detailed disclosures regarding compensation consultants who advise on executive and director compensation and provide other services to a company. Most significantly, the new disclosure would include quantification of the fees paid for each type of service.

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The proposed rules contain relatively few surprises in light of recent SEC pronouncements, but represent a significant development in the areas of compensation and corporate governance disclosure and proxy solicitation. Compliance with the proposed rules, if adopted, generally would begin in the 2010 proxy season.

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Treasury Submits Draft Legislation Mandating Say-on-Pay and Independence Standards for Compensation Committees to Congress

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Yesterday,² the Treasury delivered to Congress draft legislation that would require publicly traded companies to include a non-binding, advisory say-on-pay vote on executive compensation packages for each annual meeting and in the context of a change-in-control transaction, and to take steps intended to ensure the independence of compensation committees.

The proposed say-on-pay legislation would require all publicly traded companies to provide their shareholders a separate, non-binding vote to approve the compensation of executives, as disclosed pursuant to the SEC's compensation disclosure rules. Furthermore, in connection with a change-in-control transaction, the legislation would require an additional, separate non-binding shareholder advisory vote on any so-called "golden parachute" arrangements between the executive officers and the company or its potential acquiror for compensation related to the proposed transaction. The legislation would also require disclosure of such arrangements, the conditions upon which they may become payable and the aggregate amount of all such compensation in a "clear and simple tabular form." These requirements would apply with respect to any annual meeting (or special meeting in lieu thereof) or meeting to approve a transaction occurring on or after December 15, 2009. The proposed legislation would require the SEC to issue regulations (including regulations on the format of tabular disclosure of golden parachute arrangements) within one year after the date of enactment of the legislation.

The proposed legislation also would require members of the compensation committees of publicly traded companies and their advisors to be independent, and, if a compensation committee did not retain an independent compensation consultant, would require disclosure of why it did not.

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² This memo was originally released July 17, 2009.