

## *Client Alert*

# SEC Proposes Modifications to the Proxy Disclosure Rules Regarding Compensation

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## EXEQUITY

Independent Board and  
Management Advisors

On July 10, 2009, the Securities and Exchange Commission (SEC) released new proposed rules regarding proxy disclosure and solicitation.<sup>1</sup> While these changes cover a number of substantive topics, they are one in a series of many potential legislative and regulatory changes that we expect will alter the landscape of executive compensation in the near term. Taken together, we expect the final set of implemented rules to necessitate substantial changes to executive compensation programs, decision-making processes, and the manner in which consulting advice is provided. When more clarity on the scope of these changes is given (which we expect in the next few weeks), we will loop back with more comprehensive analysis.

### Summary of Key Compensation Disclosure Changes

- **CD&A Disclosure**—The proposed rules would expand the CD&A disclosure to include a discussion of the impact of compensation policies on risk and risk management, *if material*. Note, this discussion is required for employees generally, not just named executive officers. At this stage, there is virtually no detail on the process for how risk assessments should be conducted. However, some process will be required in order for companies to determine that risks are immaterial. And of course if risk is material, a discussion of those risks will be required.
- **Summary Compensation Table and Director Compensation Table**—The proposed rules would require disclosure of the full, FAS 123(R) grant date fair value of stock awards and option awards in the Summary Compensation and Director Compensation Tables as well as elimination of the FAS 123(R) grant date fair value column for equity awards in the Grants of Plan-Based Awards Table.

As a result of last-minute changes made in December 2006, the proxy disclosure rules currently require that the annual FAS 123(R) expense amount be included in the Summary Compensation and Director Compensation Table and that the Grants of Plan-Based Awards Table report the full FAS 123(R) grant date fair value for each equity award granted during the past year.

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<sup>1</sup> SEC Release No. 33-9052, *Proxy Disclosure and Solicitation Enhancements* (July 10, 2009), available at: <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>

The SEC has asked for comments on its proposed transition method for the change to the reporting of equity awards. The SEC is considering requiring companies for fiscal years ending on or after December 15, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table, so that the Stock Awards and Option Awards columns would present the applicable full grant date fair values, and Total Compensation would be recomputed. The SEC would not require companies to amend prior Summary Compensation Tables to include different named executive officers based on the changes being proposed in the Stock Awards, Option Awards, and Total Compensation columns.

- **New Disclosure Regarding Compensation Consultants**—The proposed rules would require companies with compensation consultants that “played a role in determining or recommending the amount or form of executive and director compensation” to disclose the nature and extent of all additional services, including a breakout of fees on an aggregate basis for these other services and for executive and director compensation consulting services.
- **Transition to New Rules**—If adopted, the SEC expects compliance with the new rules would begin in the 2010 proxy season.

#### **Other Proposed Changes in the SEC Release**

- **New Disclosure About Company Leadership and the Board’s Role in the Risk Management Process**—The proposed rules would require companies to disclose the company’s leadership structure and why the company believes it is the best structure for it at the time of the filing. Companies will also be required to disclose whether and why a lead independent director role exists, and the specific role played by the lead independent director in the leadership of the company. The proposed rules would also require disclosure of the Board’s role in the company’s risk management process.
- **Director and Nominee Changes**—The proposed rules would expand the disclosure requirements regarding the qualifications of directors and nominees, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings involving directors, nominees, and executive officers. The proposals would require companies to disclose details of each director’s and nominee’s particular experience, qualifications, attributes, or skills that qualify that person to serve as a director as of the time of the filing, and as a member of any committee that the person serves on or is chosen to serve on in light of the company’s business and structure.
- **Reporting of Voting Results on Form 8-K**—The proposed rules would require companies to report the results of a shareholder vote within four business days after the end of the meeting at which the vote was held on a Form 8-K.
- **Proxy Solicitation Process**—The proposed rules would revise the rules governing the proxy solicitation process.

### Expected Additional Regulation/Legislation

As previously mentioned, there are numerous legislative and/or regulatory changes that are likely to have a significant impact on the executive compensation landscape. The key items are identified below:

- **Say-on-Pay**—The most recent form of this proposal was included in The Shareholder Bill of Rights Act of 2009, proposed by Senator Charles Schumer. The proposal requires a non-binding shareholder vote on a company's executive compensation. Note, this has already become a requirement for TARP recipients. The proposal also included a shareholder vote on golden parachutes provided in a merger or other corporate transaction.
- **Shareholder Voting and Proxy Access**—The SEC has also recently proposed rules eliminating broker voting in director elections. Further, both SEC proposed rules and the Schumer legislation propose to give shareholders greater access by allowing them to include their own slate of director nominees in the company-sponsored proxy statement.
- **Compensation Advisor Conflicts**—Going beyond the proposed disclosure rules meant to address compensation advisor conflicts of interest, Reuters recently reported that the Obama administration is considering legislation that would prohibit compensation advisory firms from providing any other human resources work for the same company.<sup>2</sup> This is consistent with a legislative proposal from Hillary Clinton when she served as Senator of New York.
- **Risk Management**—In addition to the risk disclosure that the proposed proxy rules address, Senator Schumer's proposed legislation would require all companies to establish a risk committee comprised entirely of independent directors.



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<sup>2</sup> Reuters, *White House seen clamping down on pay consultants*, Rachele Younglai, (July 8, 2009), available at: <http://www.reuters.com/article/marketsNews/idINN0839353420090708?rpc=44>.

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