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SEC Approves Amendments to Proxy Disclosure Rules Relating to Compensation and Corporate Governance

On December 16th, the Securities and Exchange Commission (“Commission”) approved amendments to the proxy disclosure rules to enhance the disclosure provided to shareholders of public companies regarding compensation and corporate governance matters. The final rules adopted by the Commission are generally in line with the original rules proposed in July of this year.¹

The Commission clarified or changed several key areas under the amendments in response to comments received on the proposed amendments. The amendments will have an immediate impact on the 2010 proxy season, and companies should plan accordingly to comply with the amendments.

This letter provides a highlight of the key items that were updated or changed in the final amendments:

Compensation Disclosure

Compensation and Risk Management

- Discussion and analysis of risks of compensation policies and programs are required only if the risks are “*reasonably likely* to have a material *adverse* effect on the company”
 - Original proposal would have required discussion and analysis of compensation policies if risks arising from those compensation policies “may have a material effect on the company”
- The risk discussion and analysis, if required, will not be a part of the compensation discussion and analysis (“CD&A”) and instead will be in a narrative form in a company’s executive compensation disclosure
- A company will not be required to make an affirmative statement that the company has determined that the risks arising from its compensation policies and programs are not reasonably likely to have a material adverse effect on the company

¹ See our letter of July 14, 2009, “SEC Proposes Disclosure and Corporate Governance Revisions.”
http://www.fwcook.com/alert_letters/07-14-09_SEC_Proposes_Proxy_Disclosure_&Corp_Governance_Revisions.pdf

Summary Compensation Table (“SCT”)

- The original proposal requiring disclosure of the aggregate grant date fair value of new equity awards computed in accordance with FASB ASC Topic 718² was adopted, replacing the current requirement to report the amount recognized for financial statement reporting purposes during the covered year
- Under a new special instruction for awards subject to performance conditions, grant date fair value is to be computed based upon the probable outcome of the performance conditions
 - The amount is to be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under ASC 718, excluding the effect of forfeitures
 - Footnote disclosure is required of the maximum value assuming the highest level of performance will be achieved
- The Commission rejected the idea of allowing disclosure of aggregate grant date fair value of equity granted for services in the relevant fiscal year, even if granted after fiscal year-end
 - Disclosure is required of awards granted during the relevant fiscal year
 - The Commission stated that companies should continue to analyze in the CD&A their decisions to grant post-fiscal year-end equity awards where those decisions could affect a fair understanding of named executive officer (“NEO”) compensation for the last fiscal year and consider including supplemental tabular disclosure
- The Commission decided not to adopt the proposed salary and bonus column revisions. Companies must continue to report in these columns the amount of salary or bonus forgone at the NEO’s election, with footnote disclosure of the receipt of non-cash compensation
- The Commission decided not to rescind the requirement to report the full grant date fair value of each equity award in the Grants of Plan-Based Awards Table and the Director Compensation Table
- Regarding transition, companies with fiscal years ending on or after December 20, 2009 must present recomputed disclosure for each preceding fiscal year required to be included in the table (i.e., 2008 and 2007 in addition to 2009)
 - Companies are not required to include different NEOs for any preceding fiscal year based on recomputing total compensation for those years pursuant to the new rules (or amend prior years’ disclosure in previously filed 10-Ks or other filings)

² Formerly referred to as FAS 123(R).

Enhanced Director and Nominee Disclosure

- The rules were adopted generally as proposed, except the final rules do not require disclosure of the specific experience, qualifications or skills that qualify a director or nominee to serve as a *committee member*
- A new rule was added requiring disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director (including disclosure of a policy, if it exists, how it is implemented as well as how the committee assesses the effectiveness of its policy)

New Disclosure about Board Leadership Structure and the Board's Role in Risk Oversight

- The Commission adopted substantially as proposed the requirement to disclose whether and why the company has chosen to combine or separate the CEO and board chair positions
 - In cases where the two roles are combined, disclosure is required of whether and why the company has a lead independent director as well as the specific role the lead independent director plays in the leadership of the board
- The Commission adopted substantially as proposed the requirement to disclose the extent of the board's role in the risk oversight of the company

New Disclosure Regarding Compensation Consultant Independence

- The Commission adopted certain modifications to the proposed amendments:
 - A threshold requirement of \$120,000 or greater *in non-executive compensation consulting services*³ during the fiscal year is necessary before fee disclosure is required
 - Disclosure for consultants that work with management is not required (regardless of amount) *if the board or committee has its own (different) consultant*
- The Commission retained the requirement to identify the compensation consultant and describe its role in determining or recommending the amount or form of executive and director compensation

³ For purposes of these rules, services involving only broad-based non-discriminatory plans or the provisions of such plans are not treated as executive compensation consulting services for purposes of the compensation consultant disclosure rules.

Reporting of Voting Results on Form 8-K

- The Commission adopted as proposed the acceleration of the reporting of voting results of annual and special meetings by requiring filing on Form 8-K (and therefore eliminated the requirement to disclose shareholder voting results on Form 10-Q and 10-K)

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This letter is intended to alert compensation professionals about developments that may affect their companies, and should not be considered or relied upon as legal advice. Specific questions about the applicability of the rules to proxy disclosure of compensation of executives and directors should be discussed with appropriate counsel. General questions about this letter may be directed to Lou Taormina in our New York office at (212) 299-3717 or by email at lctaormina@fwcook.com. This letter and other published materials are available on our website, www.fwcook.com.