

Governance and Executive Compensation Alert

SEC Releases Proposed Proxy Rule Amendments

July 15, 2009

Introduction

On July 10, 2009, the U.S. Securities and Exchange Commission released the text of the proposed amendments to the proxy disclosure rules it had previously announced on July 1. The proposals are subject to a comment period expiring September 15, 2009 and are proposed to take effect with respect to annual reports on Form 10-K and proxy disclosure materials filed on or after January 1, 2010. The Commission is also “exploring” other ways proxy disclosures could be improved and has specifically requested comment on a number of other compensation-related disclosure items.

The proposals are highlighted below.

A. *Enhanced Compensation Disclosure (Item 402 of Regulation S-K)*

As proposed, a company would be required to include a new section in its Compensation Discussion and Analysis that provides information about how the company’s overall compensation policies for employees create incentives that can affect the company’s risk and management of that risk. The company would be required to discuss and analyze its compensation policies and practices for employees generally, including non-executive officers, if risks arising from those compensation policies and practices may have a material effect on the company.

A company would also be required to report the aggregate grant date fair value of equity-based awards granted during the fiscal year to named executive officers and directors (as computed in accordance with FAS 123R) as compensation in the Summary Compensation Table and Director Compensation Table, respectively, rather than reporting compensation based on the dollar amount recognized/accrued for financial statement reporting purposes for that fiscal year.

A more detailed summary of the proposal is available in Exhibit A.

B. *Enhanced Director and Nominee Disclosure (Items 401 and 407 of Regulation S-K)*

As proposed, a company would be required to disclose the following with regard to its nominees for director:

- Each director nominee’s experience, skills, and attributes that qualify him or her to serve on the board of the company and on any board committee of which he or she is a member;
- The directorships held at public companies by each director nominee at any time in the

past five years — this would expand the current requirement that calls for disclosure of current directorships; and

- Certain legal proceedings that occurred in the past 10 years with regard to each director nominee — this would expand the current requirement that calls for disclosure of certain legal proceedings for the past 5 years.

A more detailed summary of the proposal is available in Exhibit B.

C. *New Disclosure about Company Leadership Structure and the Board’s Role in the Risk Management Process (New Item 407(h) of Regulation S-K)*

As proposed, a company would be required to disclose the following with regard to its leadership structure and its risk management process:

- Whether the company has chosen to combine or split the principal executive officer and chairman positions;
- Why the company’s principal executive officer/chairman structure is best for the company;
- If the same person serves as the company’s principal executive officer and chairman, whether the company has a lead independent director and, if so, the specific role the lead independent director plays in the company’s leadership structure; and
- The board’s role in the company’s risk management process and the effect that this role has, if any, on the manner in which the company has organized its leadership structure.

With regard to the requested disclosure regarding risk management, the Commission has indicated that it is seeking disclosure regarding “how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.” Further, it has provided the following specific examples of the information it is seeking:

- Whether the board implements and manages its risk management function through the board as a whole or through a committee, such as the audit committee;
- Whether the persons who oversee risk management report directly to the board as whole or to a standing committee of the board (and, if it reports to a standing committee, which committee); and
- Whether and how the board, or board committee, monitors risk.

A more detailed summary of the proposal is available in Exhibit C.

D. New Disclosure Regarding Compensation Consultants (Item 407 of Regulation S-K)

If a compensation consultant plays a role in determining or recommending the amount or form of executive or director compensation and that compensation consultant or any of its affiliates performs additional services (such as human resources or benefit plan consulting) for the company or any of its affiliates, the company would be required to describe the nature and extent of the additional services, the fees for the executive or director compensation engagement and the aggregate fees for all the additional services, whether the decision to engage the consultant for the additional services was made or recommended by management, and whether the additional engagement had been approved by the compensation committee or the board.

A more detailed summary of the proposal is available in Exhibit D.

E. Reporting of Voting Results on Form 8-K (New Item 5.07 to Form 8-K)

As proposed, a company would be required to disclose on a Form 8-K the voting results of any matter submitted to a shareholder vote within four business days after the end of the meeting at which the vote was held. If the vote relates to a contested election of directors and the voting results are not definitively determined at the end of the meeting, the company would be required to file a Form 8-K with the preliminary voting results within four business days after the preliminary voting results are determined. The company would then file an amended Form 8-K — with the final voting results — within four business days after certification of the final voting results.

A more detailed summary of the proposal is available in Exhibit E.

F. Proxy Solicitation Process

As proposed, the following proxy rules governing the proxy solicitation process would be amended:

- Exchange Act Rule 14a-2(b)(1) — to provide that an unmarked copy of management’s proxy card that is requested to be returned directly to management is not a “form of revocation”;
- Exchange Act Rule 14a-2(b)(1)(ix) — to clarify that a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited to disqualify the person from relying on the exemption in Exchange Act Rule 14a-2(b)(1);
- Exchange Act Rule 14a-4(d)(4) — to permit a person soliciting in support of nominees who, if elected, would constitute a minority of the board to seek authority to vote for another soliciting person’s nominees in addition to or instead of the company’s nominees in order to round out its short slate;
- Exchange Act Rule 14a-4(e) — to provide that reasonable specified conditions under

which the shares represented by a proxy will not be voted must be objectively determinable; and

- Exchange Act Rule 14a-12(a)(1)(i) — to require that participant information be filed under cover of Schedule 14A in a proxy statement or other soliciting materials no later than the time the first soliciting communication is made.

A more detailed summary of the proposal is available in Exhibit F.

G. Additional Items

In addition to the above proposals, the Commission has requested comment on a number of other compensation-related disclosure issues, including whether compensation disclosures in a company's proxy statement should cover all of the company's executive officers (not just the named executive officers), eliminating the instruction that provides that performance targets may be excluded based on the potential for competitive harm and/or requiring disclosure of the targets after the related performance period has ended, requiring that compensation committee reports be "filed" rather than merely "furnished," requiring disclosure of whether a member of the compensation committee has expertise in compensation matters and whether the committee has the resources to hire its own independent counsel, enhanced disclosures regarding stock holding requirements and claw back provisions, and whether internal pay equity should be addressed (*e.g.*, by requiring a comparison of executive compensation levels or executive to average non-executive compensation levels). While the Commission has not yet proposed any new rules with respect to these items, it is clear the Commission is taking a fresh and wide-sweeping look at its compensation disclosure requirements.

Enhanced Compensation Disclosure

Compensation Discussion and Analysis Disclosure

The current rule: Currently, Item 402 of Regulation S-K requires companies to provide a “Compensation Discussion and Analysis” that provides an overview of a company’s compensation program for its named executive officers, and that provides an analysis of the material elements of the company’s compensation program for these named executive officers.

Proposed expansion of the rule: In light of concerns that compensation arrangements in some cases may inadvertently create incentives for management and other employees to make decisions that significantly increase the company’s risk without adequate recognition of that risk, thereby creating a disconnect between the interests of these individuals and the long-term well-being of the company, the Commission has proposed amending Item of 402 of Regulation S-K to require a new section of the Compensation Discussion and Analysis that would discuss and analyze the company’s compensation policies and practices for its employees generally, including non-executive officers, if risks arising from those compensation policies and practices could have a material effect on the company.

The situations that would require discussion in this new section will vary depending on the company and its compensation programs. The Commission notes that the disclosure and analysis under this requirement could be triggered by compensation policies and practices: at a business unit of the company that carries a significant portion of the company’s risk profile; at a business unit with compensation structured significantly differently than other units within the company; at business units that are significantly more profitable than others within the company; at business units where compensation expense is a significant percentage of the unit’s revenues; or for those that vary 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.

While stressing that the types of disclosure and level of detail required will depend on the company’s particular facts and circumstances, the Commission provides the following list of examples of issues that a company may need to address in its disclosure:

- The company’s risk assessment and incentive considerations, its general compensation design philosophy (as it relates to or affects risk taking) for employees whose behavior would be most impacted by the compensation arrangements, and the manner in which that philosophy is implemented.
- How the company’s compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw backs or imposing holding periods.
- The company’s policies regarding adjustments to its compensation policies to address

changes in its risk profile, as well as any material adjustments the company has made to its compensation policies or practices as a result of changes in its risk profile.

- The extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.

We anticipate that the foundation for many disclosures will be a focus on claw back policies and holding periods (if any) as well as whether there is a “balanced” mix of compensation (*e.g.*, base salary, annual bonus, and long-term incentives) and, as applicable, the types of awards (*e.g.*, stock options, restricted stock or units, performance shares, etc.).

Comment request: The following items are among those listed in the Commission’s request for comment on this proposal:

- Whether the proposed disclosure will provide meaningful disclosures to investors, and whether it should be limited in application (*e.g.*, to specific groups of employees such as executive officers, to companies of a particular size, and/or to particular industries).
- Whether the listed examples of situations where compensation policies may induce risk-taking behavior are appropriate and whether specific examples should be added or removed.
- Whether the listed examples of issues that would be appropriate for a company to discuss and analyze are appropriate and whether the list should be a set of requirements rather than a list of examples.
- Whether there are certain risks that are more clearly aligned with compensation practices the disclosure of which would be important to investors.
- Whether, if a company determines that disclosure is not required under this proposal, it should be required to affirmatively state in its Compensation Discussion and Analysis that it has determined that the risks arising from its broader compensation policies are not reasonably expected to have a material effect on the company.

Revisions to the Summary Compensation Table

The current rule: Currently, Item 402 of Regulation S-K requires that the Summary Compensation Table report for each named executive officer the dollar amount recognized for financial statement reporting purposes for the fiscal year with respect to equity-based awards granted to that officer (whether such award was granted during that fiscal year or in a prior fiscal year). Similar rules apply to the reporting of equity-based awards for non-employee directors in the Director Compensation Table.

Proposed modification of the rule: The Commission has proposed amending Item 402 of Regulation S-K to require the company to disclose the aggregate grant date fair value of equity-

based awards granted during the fiscal year to named executive officers and directors (as computed in accordance with FAS 123R), rather than reporting the dollar amount recognized for financial statement reporting purposes for the fiscal year with respect to all awards granted to such individuals. In its 2006 amendments to Item 402, the Commission originally adopted the grant date value approach for reporting named executive officer compensation related to equity-based awards, but the Commission reversed that approach in favor of the FAS 123R recognition approach in a last-minute change in December 2006. The Commission has indicated that, based on its experience and comments received to date, it believes going back to the grant date value approach will provide investors with clearer, more meaningful disclosure of executive compensation.

While the Commission has not yet provided details for the transition to the new rule, the Commission is considering whether to require companies to recompute the equity-based award amounts for each fiscal year required to be reported in the Summary Compensation Table (*e.g.*, a calendar year company would be required to recompute the equity-based award amounts for 2007 and 2008 as to the named executive officers included in the table for 2009, in addition to implementing the Commission's proposal in reporting 2009 compensation). The Commission has indicated it would not require companies to include different named executive officers for any preceding fiscal year based on the recomputation of total compensation for those years.

In connection with these changes, the requirement to report the grant date fair value of equity-based awards granted during the fiscal year in the Grants of Plan-Based Awards Table under Item 402 would be eliminated. In addition, companies would no longer be required to include in the salary or bonus column of the Summary Compensation Table any amount of salary or bonus forgone at the election of a named executive officer in exchange for stock, equity-based or other forms of non-cash compensation. Rather, the receipt of any such form of non-cash compensation instead of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Summary Compensation Table corresponding to that fiscal year (*e.g.*, the stock awards column, option awards column or all other compensation column), or, if made pursuant to a non-equity incentive plan and therefore not reportable in the Summary Compensation Table when granted, a footnote must be added to the salary or bonus column referring to the Grants of Plan-Based Awards Table where the award is reported.

Comment request: The following items are among those listed in the Commission's request for comment on this proposal:

- Whether the proposed reporting of equity awards is a better approach for providing investors clear, meaningful, and comparable executive compensation disclosure than the current reporting requirements.
- Whether, rather than reporting the grant date fair value of equity awards granted during the fiscal year, the Summary Compensation Table should report the grant date fair value of equity awards granted for services in the fiscal year, even if the awards were granted after fiscal year-end.
- Whether disclosure in the Grants of Plan-Based Awards Table of the grant date fair value of each individual award should be retained (rather than rescinded as proposed), and

whether the Grants of Plan-Based Awards Table should continue to disclose the incremental fair value with respect to individual awards that were repriced or otherwise materially modified during the fiscal year.

- Whether the proposal would discourage companies from tying equity awards to performance conditions, and whether any disclosure other than that already currently required is needed to clarify that the amount of compensation ultimately realized under a performance-based equity award may be different from the grant date fair value.
- What transition rules would be appropriate if the proposal is adopted.

Enhanced Director and Nominee Disclosure

The current rule: Companies must include a brief biographical information about directors and nominees that provides information for the most recent five years (Item 401 of Regulation S-K) and a discussion of any specific minimum qualifications that a nominating committee believes must be met by a nominee for a position on the company's board (Item 407 of Regulation S-K).

Proposed expansion of the disclosure requirements: The Commission has proposed to require disclosure detailing for each director and nominee for director the particular experience, qualifications, attributes, or skills that qualify that person to serve as a director of the company and as a member of any committee that the person serves on or is chosen to serve on (if known), in light of the company's business and structure. The proposed expansion of the required disclosure is intended to provide investors with "more specific discussions of the background and skills of individual directors."

As proposed, companies would be required to disclose, for each director or nominee, the specific experience, qualifications, attributes, or skills that qualify that person to serve as a director and committee member. The types of information that may be disclosed include, for example:

- Information about a director's or nominee's risk assessment skills and any specific past experience that would be useful to the company;
- Information about a director's or nominee's particular area of expertise; and
- Why the director's or nominee's service as a director would currently benefit the company.

Companies also would be required to disclose:

- Any directorships held by each director and nominee at any time during the past five years at public companies — this proposal would expand the current requirement to disclose current directorships; and
- Specified legal proceedings during the most recent 10 years — while this proposal would not alter the current list of legal proceedings to be reported, it would expand the current requirement to disclose legal proceedings during the most recent 5 years.

Comment request: The following items are among those listed in the Commission's request for comment on this proposal:

- Whether there is additional disclosure that should be required regarding director and nominee qualifications.

- Whether there is additional disclosure that should be required with regard to factors that a company's nominating committee considers when selecting someone for a position on the board, such as diversity.
- Whether the Commission's rules should require additional or different disclosure related to board diversity.
- Whether the Commission should require director qualification disclosure for all of a company's board committees, or whether that disclosure should be focused on membership of certain key committees, such as the audit, compensation and nominating/governance committees.
- Whether the Commission should require companies to disclose whether the board (or a committee) periodically conducts an evaluation of the performance of the board as a whole, the committees of the board, and each individual director.
- Whether requiring additional director and nominee qualification disclosure could hinder a company's ability to find potential candidates for the board and, if so, how.
- Whether it would be more appropriate to require disclosure of legal proceedings for longer periods with respect to certain types of legal proceedings – for example, criminal fraud convictions, civil or administrative actions based on fraud involving securities, commodities, financial institutions, insurance companies, or other businesses.
- Whether the Commission should continue (as proposed) or cease to permit companies to exclude disclosure of director, director nominee or executive officer legal proceedings when the registrant concludes that the information would not be material to an evaluation of the ability or integrity of the director, director nominee or executive officer.

New Disclosure about Company Leadership Structure and the Board’s Role in the Risk Management Process

The current requirement: There is not a current disclosure requirement in this regard.

Proposed new disclosure requirement: The Commission has proposed rule amendments to Item 407(h) of Regulation S-K that would require a company’s proxy statement to include disclosure about the company’s “leadership structure” and the role of the board in the company’s risk management process.

Leadership Structure — A company would be required to describe its “leadership structure.” For purposes of the proposed disclosure requirement, this term refers to “whether the same person serves as both principal executive officer and chairman of the board, or whether two individuals serve in those positions.” For those companies where the same person fills the roles of principal executive officer and chairman of the board, disclosure would be required as to whether the company has a “lead independent director” and, if so, what specific role the lead independent director plays in the leadership of the company.

The proposal also would require the company to disclose “why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances.” In discussing this proposal, the Commission notes that a non-exclusive list of factors that may influence different leadership structures would include:

- the size of the company,
- the nature of the company’s business, and
- internal control considerations.

Given the inclusion of this list in the proposal, it is likely that disclosure in response to this requirement would need to address these items.

Risk Management — The Commission’s proposal would require additional disclosure in proxy and information statements about the board’s role in the company’s risk management process — with those risks including credit risk, liquidity risk, and operational risk. The Commission has indicated that it is seeking disclosure regarding “how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.” The Commission has provided the following specific examples of the information it is seeking:

- Whether the board implements and manages its risk management function through the board as a whole or through a committee, such as the audit committee;

- Whether the persons who oversee risk management report directly to the board as whole or to a standing committee of the board (and, if it reports to a standing committee, which committee); and
- Whether and how the board, or board committee, monitors risk.

Comment request: The following items are among those listed in the Commission’s request for comment on this proposal:

- Whether the required disclosure should include the specific duties performed by the board’s chair or independent lead director.
- Whether the required disclosure should include additional board structure matters, such as the manner in which the company determines the number of independent directors to have on its board and the size of the board.
- Whether the level of detail about the company’s risk management structure and function present competitive or proprietary concerns that should be addressed in the disclosure rule.
- Whether it is sufficient to require this disclosure in proxy statements only, or whether other disclosure items — such as the MD&A or market risk disclosure requirements — also should be revised to require additional risk management disclosure in annual or quarterly reports.

New Disclosure Regarding Compensation Consultants

The current rule: Currently, Item 407 of Regulation S-K requires disclosure of (among other things) any role played by compensation consultants in determining or recommending the amount or form of executive and director compensation, identification of any such consultants, and a discussion of who engaged the consultants, the nature and scope of their assignment, and the material elements of any instructions or directions given to them.

Proposed expansion of the rule: In light of concerns that compensation consultants may not be “objective” if they have significant other engagements with the company, the Commission has proposed amending Item 407 of Regulation S-K to require the company to disclose the following as to any compensation consultant which played a role in determining or recommending the amount or form of executive or director compensation if the compensation consultant or any of its affiliates also provided additional services to the company or any of its affiliates during the prior fiscal year:

- The nature and the extent of all additional services provided.
- The aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services.
- Whether the decision to engage the compensation consultant or their affiliates for the additional services was made or recommended by management.
- Whether the compensation committee or the board approved the engagement of the consultant to perform the additional services.

Typical “additional” services that will trigger this disclosure include (without limitation) human resources consulting and benefit plan consulting. Note that while additional services may include benefit plan consulting, the Commission proposal clarifies that disclosure will not be required under Item 407 of Regulation S-K if a consultant is engaged to provide consulting on a broad-based non-discriminatory plan (such as a 401(k) plan or typical health insurance plan) but does not provide any other services in determining the amount or form of executive or director compensation (*i.e.*, the incidental effect on executive compensation in these services will not, in and of itself, trigger the Item 407 disclosures).

We expect companies that engage compensation consultants who do not perform any such additional services to include an affirmative statement to that effect in their Item 407 disclosures.

Comment request: The following items are among those listed in the Commission’s request for comment on this proposal:

- Whether there are competitive or proprietary concerns that the proposed disclosure requirements should account for.
- Whether disclosure of any “currently contemplated” additional services should be required in addition to disclosure for the prior year.
- Whether there should be a threshold below which fees for additional services need not be disclosed.
- Whether a company should be required to break out (by project) the fees for the additional services rather than report them on an aggregate basis.
- Whether fee disclosure (of any type) is necessary to illustrate any potential conflicts of interest on the part of compensation consultants and their affiliates.

Reporting of Voting Results on Form 8-K

The current rule: Currently, Item 4 in Part II of Form 10-Q and Item 4 in Form 10-K require a company to disclose the voting results with regard to any matter that was submitted to a vote of shareholders during the fiscal quarter covered by either the Form 10-Q or, with respect to any matter that was submitted during the fourth fiscal quarter, the Form 10-K.

Proposed modification of the rule: The proposal would add new Item 5.07 to Form 8-K. This new Item would require a company to file a Form 8-K to disclose the results of any matter submitted to a vote of shareholders. As a general rule, a company would be required to report the results on a Form 8-K that is filed within four business days after the end of the meeting at which the vote was held. The proposal also would delete the existing requirement to include this disclosure in a Form 10-Q and Form 10-K.

If a matter voted on at a shareholder meeting relates to a contested election and the voting results are not definitively determined at the end of the meeting, a company would be required to file a Form 8-K to disclose the preliminary voting results within four business days after the preliminary voting results are determined, and, within four business days after the final voting results are determined, file an amended Form 8-K to report those final voting results.

Comment request: The following items are among those listed in the Commission's request for comment on this proposal:

- Whether there would be any possible adverse consequences to requiring the disclosure of preliminary voting results in a contested election when the outcome is not final, such as affecting the final outcome of the vote.
- Whether the filing period under Form 8-K for the reporting of voting results should be longer than four business days.
- Whether there are situations — other than contested elections — that might warrant a longer filing period.
- Whether the proposed disclosure requirement would impose any significant costs or difficulties on companies and, if so, the types and amounts of costs and whether those costs would be short-term or one-time costs to adjust a company's reporting procedures, or long-term, ongoing costs.
- Whether the accuracy of disclosure of voting results would be affected as a result of a Form 8-K filing requirement.
- Whether the failure to timely file a Form 8-K to report the results of a shareholder vote should be added to the list of Form 8-K items for which the failure to timely file a Form 8-K would not result in the loss of S-3 eligibility.

Proxy Solicitation Process

The Commission has proposed amendments to the following proxy rules governing the proxy solicitation process:

- Exchange Act Rule 14a-2(b)(1)
- Exchange Act Rule 14a-2(b)(1)(ix)
- Exchange Act Rule 14a-4(d)(4)
- Exchange Act Rule 14a-4(e)
- Exchange Act Rule 14a-12(a)(1)(i)

Amendments to Clarify Existing Exemptions from the Proxy Solicitation Rules

Exchange Act Rule 14a-2(b)(1)

The current rule: Existing Exchange Act Rule 14a-2(b)(1) exempts certain solicitations of a company's shareholders from the federal proxy rules governing disclosure, filing and other specified requirements¹ as long as the person making the solicitation does not seek, on its own or another's behalf, the power to act as proxy for the shareholder and does not furnish or request from the shareholder a *form of revocation*, abstention, consent or authorization.

The staff of the Division of Corporation Finance has informally advised on a number of occasions since the Commission adopted this exemption in 1992 that a "form of revocation" for purposes of the exemption does not include an unmarked copy of management's proxy card that the soliciting shareholder requests be returned directly to management. However, the U.S. Court of Appeals for the Second Circuit came to a contrary conclusion in 2004 when it determined that a duplicate of management's proxy card relating to a proposal to authorize a proposed merger was a form of revocation under Rule 14a-2(b)(1) when included in a mailing opposing the proposed merger.²

Proposed amendment of the rule: The amendment now proposed by the Commission would codify the staff's informal position, and effectively overturn the Second Circuit decision, by adding an express instruction to Rule 14a-2(b)(1) that a "form of revocation" does not include an unmarked copy of management's proxy card that the soliciting shareholder requests be returned directly to management. The proposed amendment would eliminate uncertainty that has existed since the Commission's initial adoption of the exemption in 1992 and would create yet another

¹ Generally, if the conditions of Exchange Act Rule 14a-2(b)(1) are met, the person making the solicitation would be exempt from the requirement to file with the Commission and furnish to the shareholders solicited a proxy statement and annual report (if it relates to an annual meeting), as well as the related requirements governing the content of such materials and the process for providing them to shareholders. The specific proxy rules that would not apply to the person making the solicitation are Exchange Act Rules 14a-3 to 14a-6 (other than paragraphs 14a-6(g)), 14a-8 and 14a-10 to 14a-15.

² See Mony Group, Inc. v. Highfields Capital Mgmt. L.P., 368 F. 3d 138 (May 13, 2004).

weapon in the arsenal for investor activists. If the proposed amendment is adopted, these activists would have clear authority, including as part of a “just vote no” campaign, to mail a duplicate unmarked copy of management’s proxy card to shareholders, request that shareholders vote against the board’s recommendation on one or more specified proposals and ask that shareholders return their completed proxy cards directly to management — all “without having to incur the costs and efforts of conducting a fully-regulated proxy solicitation.” In combination with the recent amendment of NYSE Rule 452 to eliminate broker discretionary voting in director elections, the proposed amendment could have a significant impact on the number of “just vote no” campaigns during next year’s proxy season and increase the likelihood of their success.

Comment request: The following items are among those listed in the Commission’s request for comment on this proposal:

- Whether providing an unmarked copy of management’s proxy card and asking that it be returned directly to management should be treated as a form of revocation and whether it should make a difference if the proxy card is returned directly to the soliciting party instead of management.
- Whether a soliciting person providing an unmarked copy of management’s proxy card should be required to file a Notice of Exempt Solicitation even if the person does not meet the thresholds for filing the notice under Exchange Act Rule 14a-6(g) or should otherwise be required to provide to the shareholders solicited and file with the Commission certain information about itself.
- Whether the proposed amendment raises concerns under state law.

Exchange Act Rule 14a-2(b)(1)(ix)

The current rule: Pursuant to Exchange Act Rule 14a-2(b)(1)(ix), the exemption described above in Rule 14a-2(b)(1) is not available to a “person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all holders of the same class of securities, other than a benefit arising from the person’s employment with the registrant.”

Proposed amendment of the rule: In response to confusion about the intended scope of this exception, the Commission has proposed to amend Rule 14a-2(b)(1)(ix) to clarify that the Rule 14a-2(b)(1) exemption would be unavailable even if the soliciting person is not a shareholder and even if the benefit received from a successful solicitation is not related to or derived from ownership of the company’s securities.

Comment request: The Commission has requested comment on the following items related to this proposal:

- Whether the proposed amendment clearly specifies when the Rule 14a-2(b)(1) exemption would be unavailable and whether additional detail is necessary to understand when the

exemption would be unavailable.

- Whether the proposed amendment would inappropriately narrow or broaden the scope of the Rule 14a-1(b)(1) exemption and, if so, how.

Amendment of “Short Slate” Rule in Exchange Act Rule 14a-4(d)(4)

The current rule: Exchange Act Rule 14a-4(d)(4) is an exception to the *bona fide* nominee rule³ that permits a person soliciting support for nominees who, if elected, would constitute a minority of the board of directors to round out its “short slate” of director nominees with nominees named in the company’s proxy statement. As currently written, Rule 14a-4(d)(4) does not permit a soliciting person to round out its short slate with persons other than the nominees named in the company’s proxy statement. However, in March 2009, the staff of the Division of Corporation Finance granted identical no-action letters to each of Icahn Associates Corp. and Eastbourne Capital, L.L.C. that permitted Icahn and Eastbourne to round out their short slates of director nominees for election to the board of directors of Amylin Pharmaceuticals, Inc. by using nominees named in either Amylin’s proxy statement or in the other non-management shareholder’s proxy statement.

Proposed amendment of the rule: The Commission now proposes to amend Rule 14a-4(d)(4) to codify this no-action position and expressly permit a non-management soliciting person to round out its short slate by seeking authority to vote for nominees named in the company’s *or* any other persons’ proxy statements.

The expanded exception proposed by the Commission would be available to a non-management person seeking to round out its short slate using nominees named in the proxy statement of another non-management person only if:

- the non-management person or its proxy solicitor does not actively recommend nominees for election in addition to those whom the non-management person expressly solicits supports;
- the non-management person represents in its proxy statement that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a group for purposes of Section 13(d) and Regulation 13D-G with the other non-management person; and
- the non-management person represents in its proxy statement that it is not a participant (as defined in Instruction 3(a)(vi) of Item 4 of Schedule 14A) in the other non-management person’s solicitation.

As proposed, the conditions above that require that specified representations be included in the soliciting person’s proxy statement would not apply if the soliciting person rounds out its short slate by seeking authority to vote for nominees named in the company’s proxy statement (even if

³ The *bona fide* nominee rule is found in Exchange Act Rule 14a-4(d)(1) and provides that a proxy cannot confer authority to vote for the election of any person to office if that person has not consented to being named in the soliciting person’s proxy statement and to serve if elected.

the company includes non-management nominees in its proxy statement, which it may be required to do if the Commission's pending proxy access rules are approved).

Permitting a soliciting person to round out its short slate by seeking authority to vote for nominees named in another non-management person's proxy statement would significantly increase the usefulness of short slates as a means for shareholders to influence the composition of the boards of directors of public companies. If adopted, the proposed amendment would also have the following potential effects:

- side-by-side short slates could result in a change of control, as the combined slates could result in a majority of the company's incumbent directors not being re-elected — companies should consider whether they need to revise their poison pill or default change of control provisions to contemplate this possibility; and
- the proposed amendment contemplates the use of side-by-side proxy cards — it is unclear whether a later-dated proxy card would continue to control in a situation where the proxy cards do not conflict.

Comment request: The following items are among those listed in the Commission's request for comment on this proposal:

- Whether other conditions or limitations on the availability of the proposed amendment should be imposed (*e.g.*, limiting the ability to seek authority to vote for nominees of other non-management persons only if those persons are seeking minority representation on the board or requiring that a soliciting person use its proxy authority to vote for at least a specified number of the company's nominees or at least the number of management nominees that would constitute a majority).
- The concerns, if any, about the possible effects of a change in a majority of the board that could result if a soliciting person is permitted to round out its short slate with other persons' nominees, including the triggering of takeover defensive measures, such as poison pills, and other change in control provisions, such as those found in loan agreements, leases and employment agreements and the issues, if any, under the standards of any national securities exchange or national securities association to which the company is subject.
- Whether the proposed amendment would encourage shareholders to run more short slates.
- Because it is possible that non-management nominees could be named in the company's proxy statement (*e.g.*, if the Commission adopts its pending rule proposals relating to proxy access), whether the soliciting person also should be required to provide representations about its group and participant status if the nominees named in the company's proxy statement that the soliciting person uses to round out its short slate are non-management nominees.

Amendment of Exchange Act Rule 14a-4(e) to Provide that Conditions for Voting Shares Must be Objectively Determinable

The current rule: Exchange Act Rule 14a-4(e) currently requires that the proxy statement or form of proxy used in connection with the solicitation of proxies must indicate that, *subject to reasonable specified conditions*, the shares represented by the proxy will be voted.

Proposed amendment of the rule: The Commission now proposes to amend Rule 14a-4(e) in order to clarify that the reasonable specified conditions that would permit a proxy holder not to vote the shares represented by the proxy must be *objectively determinable*.

Under this standard, the Commission has indicated that a condition providing that shares represented by a proxy would be voted only if a third party had filed, within a specified number of days prior to the meeting for which the proxy was solicited, a Schedule TO for a tender offer for over half of the company's securities would be considered to be objectively determinable and therefore permissible. However, a condition that would give a proxy holder discretion not to vote shares represented by a proxy if he or she determined that it was not advisable to vote the shares would not be considered to be objectively determinable and therefore not permissible.

Comment request: The following item is among those listed in the Commission's request for comment on this proposal:

- Whether specifying that reasonable specified conditions must be objectively determinable has any harmful effect on proxy solicitation practices.

Amendment of Exchange Act Rule 14a-12(a)(1)(i) to Require Disclosure of Participant Information on a Current Basis

The current rule: Exchange Act Rule 14a-12(a)(1)(i) currently requires that any solicitation of shareholders prior to furnishing them with a proxy statement must include information about the identity of the participants in the solicitation and a description of their direct or indirect interests or a legend advising shareholders where such information can be obtained. Companies and other soliciting persons often attempt to satisfy the legend requirement by referring shareholders to a document that has not yet been filed (for example, by indicating that the participant information will be included in the definitive proxy statement when it is filed with the Commission).

Proposed amendment of the rule: In response to concerns that the required participant information too often is not available to shareholders when the soliciting person uses the soliciting material, the Commission has proposed to amend Rule 14a-12(a)(1)(i) to clarify that the required participant information must be filed under cover of Schedule 14A as part of a proxy statement or other soliciting material no later than the time the first soliciting communication is made.

If the proposed amendment to Rule 14a-12(a)(1)(i) is adopted, soliciting parties will still be permitted to use a legend to refer to the location of the required participant information in lieu of including it directly in all soliciting materials provided prior to furnishing shareholders with a

proxy statement. However, soliciting persons will now be required to provide that participant information under cover of a separate Schedule 14A filed with the Commission prior to or concurrent with distribution of the soliciting material.

Comment request: The following item is among those listed in the Commission's request for comment on this proposal:

- Whether the requirement to have participant information on file no later than when the written material containing the legend is first provided to shareholders creates practical difficulties for the soliciting persons.