

Alerts & Publications

SEC Proposes Significant Proxy Rule Amendments

January 1, 0001



Introduction

On July 1, 2009, the U.S. Securities and Exchange Commission, by a 5-0 vote, approved the proposal of substantial revisions to its proxy rules. The proposals will now be subject to a comment period. The proposals, which are described below, relate to the following:

- the required “say-on-pay” vote for companies that received assistance under the Troubled Asset Relief Program;
- disclosure in the company’s proxy statement regarding overall compensation policies and practices and their effect on the company’s risk profile;
- the manner in which equity compensation is calculated for inclusion in the company’s Summary Compensation Table and Director Compensation Table;
- disclosure regarding the qualifications of director nominees;
- disclosure regarding Board leadership structure and the Board’s role in the company’s risk management structure;
- disclosure regarding the fees paid to, and services provided by, any compensation consultants;
- disclosure of voting results from shareholder meetings on Form 8-K; and
- the operation of the proxy rules in certain solicitations.

The Commission also approved the New York Stock Exchange’s amendment of Rule 452, the “broker vote” rule. Those amendments are discussed in a separate [Client Alert](#).

Proposed Say-On-Pay for TARP Participants

The Commission’s first proposal would implement Section 111(e) of the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, by requiring an advisory “say-on-pay” vote for shareholders as required under this Act.[1] If adopted, this vote would provide shareholders at subject companies with a non-binding vote on the compensation of named executive officers, as described pursuant to Item 402 of Regulation S-K. Specifically, the proposal would create new Rule 14a-20 and amend Item 20 of Schedule 14A, as follows:

- New Rule 14a-20 would require certain registrants to provide shareholders an advisory vote to approve the compensation of NEOs. While Rule 14a-20 would not alter the substantive disclosure requirements of Item 402, it would:
 - Apply only to companies that received assistance under TARP;

- Apply only to solicitations by a TARP recipient during the period in which the recipient's financial obligations under TARP remain outstanding;
- Require a non-binding shareholder vote only at a meeting for which proxies are solicited for the election of directors; and
- Require the vote to be a non-binding vote to approve the compensation of NEOs, as described in the company's proxy statement pursuant to Item 402.
- Amendment to Item 20 of Schedule 14A.
 - The proposed amendment to Item 20 would apply to TARP recipients that are required to provide an advisory vote on executive compensation. It would require these companies to disclose in their proxy statements that they are providing the advisory vote on executive compensation pursuant to the requirements of EESA and briefly explain the general effect of the vote.

Proxy Disclosure Enhancements

The Commission proposed amendments to the proxy disclosure standards to require enhanced disclosure regarding the following:

- Compensation and Compensation Discussion and Analysis.
 - The CD&A would be required to include the company's overall policies and actual practices regarding compensation -- beyond merely compensation of NEOs -- if the risks arising from those policies and practices may have a material effect on the company. In this regard, the disclosure would be required to address policies and practices that could affect the company's financial condition or results of operations; and
 - The Summary Compensation Table and Director Compensation Table would be required to reflect equity grants at the full FAS 123R grant-date value, rather than the current standard that requires disclosure of the incremental value booked for that year.
- Director Nominees. The proposal would amend Item 401 of Regulation S-K to require disclosure of the following:
 - 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/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.
 - Any subject 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 legal proceedings for the past 5 years.
- Board Leadership Structure. The proposal would amend Item 407 of Regulation S-K to require disclosure of the following:
 - The company's board leadership structure and why that structure is best for the company.
 - Whether the company has chosen to combine or split the CEO and Chairman positions and why that choice is best for the company.
 - Whether the company has a lead independent director.

- 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.
- Compensation Consultants.
 - The proposal would amend Item 402 to require additional disclosure regarding the fees paid to, and services provided by, any compensation consultant that provides services relating to executive compensation and director compensation. This required additional disclosure would include any additional services provided by the compensation consultant, the aggregate fees paid to that compensation consultant for the additional services, the executive officer and director compensation consulting services provided, and whether the engagement of the consultant for additional services was recommended by management and approved by the Board or Compensation Committee of the Board.
- Voting Results of Shareholder Meetings.
 - The proposals would delete the requirement that results of voting at a meeting of shareholders be included in the next Form 10-Q or Form 10-K and move that requirement to Form 8-K.
 - The new Item in Form 8-K would require the results of the shareholder votes to be filed within 4 business days of the meeting at which the vote was held.

Proxy Solicitation Enhancements

The Commission proposed amendments relating to the following Rules:

- Rule 14a-2(b) -- the proposed amendments would clarify that an un-marked copy of management's card requested to be returned directly to management is not a form of revocation that would make the exemption under Rule 14a-2(b) unavailable. The proposed amendments also would clarify that a "substantial interest" in the subject matter, which would make the Rule 14a-2(b) exemption unavailable, may be present even if the soliciting person is not a shareholder.
- Rule 14a-4(d) -- the proposed amendments would codify the staff's no-action letters to Icahn Associates Corp. and Eastbourne Capital, L.L.C., and provide in the Commission's short slate rule that a soliciting person may "round out" a short slate of nominees with non-management nominees in the same manner that a short slate can be rounded out by the company's nominees named in the proxy statement. See our earlier [Client Alert](#) regarding the staff's no-action letters.
- Rule 14a-4(e) -- the proposed amendments would require that any condition specified by a soliciting party as to when it cannot vote shares for which it has received proxy authority must be "objectively determinable."
- Rule 14a-12 -- the proposed amendments would require that the identity and interests of participants in a proxy solicitation be available and on file with the Commission no later than when shareholders are first solicited.

[1] EESA Section 111(e) requires any TARP recipient to "permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission," during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

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