

SEC Acts on Proxy Disclosure and Voting Issues

Overview

On July 1, 2009, the Securities and Exchange Commission (SEC) took actions which may have a significant impact on proxy disclosure and voting. In particular, the commissioners voted to:

- issue for comment proposed amendments to the SEC proxy rules to implement the requirements of Section 111(e) of the Emergency Economic Stabilization Act of 2008, that requires all recipients of financial assistance under the Troubled Asset Relief Program (TARP) to permit an advisory shareholder vote on executive compensation;
- issue for comment proposed amendments to the SEC disclosure rules that would require enhanced or more timely disclosure by registrants with respect to (1) executive compensation, (2) director qualifications, (3) board leadership structure, (4) compensation consultants, and (5) the results of shareholder votes; and
- approve a proposal by the New York Stock Exchange (NYSE) to eliminate broker discretionary voting in an uncontested election of directors, except for companies registered under the Investment Company Act of 1940.

These SEC actions were expected based on prior comments made by Chairman Schapiro and are consistent with the Obama administration's recently stated general principles related to compensation, as discussed in our [Alert](#) dated June 19, 2009.

Proposal 1: Shareholder Vote on Executive Compensation for TARP Recipients

The SEC unanimously voted in favor of proposing amendments to the federal proxy rules designed to clarify the responsibilities of all U.S. registrants who have received and not yet repaid TARP funds. Pursuant to Section 111(e) of the Emergency Economic Stabilization Act, U.S. registrants that have received and not yet repaid financial assistance under TARP are required to implement an annual non-binding advisory vote on executive compensation. The proposed amendments, which are contained in Proposing Release No. 34-60218, would mandate that a registrant who is a TARP recipient take such a non-binding, advisory vote in connection with the company's annual meeting (or any special meeting held in lieu of the annual meeting) for which proxies will be solicited for the election of directors. In its proxy statement, the registrant must propose the action and briefly explain the general effect of the vote, including the fact that the vote is non-binding. This proposed amendment does not change the compensation disclosure required under Regulation S-K Item 402. The Proposing Release requests comment on a number of issues, including (1) whether to impose more specific requirements regarding the manner in which the vote should be presented to shareholders (i.e., should the language of the resolution be specified in the rule), (2) whether a TARP recipient should make additional disclosure in its CD&A or under Item 402 of Regulation S-K, and (3) whether Rule 14a-6(a) should be amended so that registrants that are TARP recipients are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on executive compensation. The commissioners expressed their hope that this amendment would increase shareholder confidence in the fairness of executive compensation to TARP recipients.

Proposal 2: Increased Proxy Disclosure Requirements

The SEC unanimously voted to propose a series of rule revisions to enhance the disclosures that registrants are required to make about compensation and other corporate governance matters, and to clarify certain rules governing proxy solicitation. The proposed amendments include:

1. **Executive Compensation:** Item 402 of Regulation S-K would be amended to require enhanced disclosure about the company's compensation policies and practices, including disclosure for non-executive officers, if such policies have a material impact on the company's risk profile. We expect that the amendment will require that the full grant date fair value of equity awards be reported in the relevant tables in the proxy statement.
2. **Director Qualifications:** Item 401 of Regulation S-K would be revised to require enhanced disclosure about the experience, skills and attributes that qualify each nominee to serve as a board member. Additionally, the regulation would require disclosure of all nominees' board memberships over the past five years and extend the time period for required disclosure of legal proceedings to which any director has been subject from 5 to 10 years.
3. **Leadership Structure:** The proposed amendment would require enhanced disclosure around the company's leadership structure, including the decision to combine or separate the CEO and Chairman positions.
4. **Compensation Consultants:** The proposed amendment would require enhanced disclosure of the services and compensation of any consultants hired to advise on the compensation of executives, including whether the board or the compensation committee was responsible for approving such services and compensation. If the compensation consultant provides other services to the company, a company would be required to disclose the fees paid for such services.
5. **Voting Results:** To expedite the disclosure of results of shareholder votes (including any non-binding vote on executive compensation), the proposed amendment would require that such results be reported on a Form 8-K. The Form 8-K would be due within four business days of the meeting.

Public comments on Proposals 1 and 2 must be received by the SEC within 60 days after their publication in the Federal Register.

Proposal 3: Elimination of Broker Discretionary Voting for Election of Directors

The SEC voted 3-2 in favor of approving a proposed rule change by the NYSE to amend NYSE Rule 452 and corresponding Listed Company Manual Section 402.08 to eliminate broker discretionary voting in an uncontested election of directors, except for companies registered under the Investment Company Act of 1940, and to codify two previously published interpretations that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company.

The amendments to NYSE Rule 452 and Listed Company Manual Section 402.08 will no longer treat as "routine" the election of directors, thereby prohibiting NYSE brokers from voting securities held in client accounts without receiving instructions from the beneficial holders. Importantly, most brokers who are NYSE brokers are also NASDAQ brokers. Accordingly, this prohibition will apply even in the case of NASDAQ listed companies. This prohibition will not apply in the case of companies registered under the Investment Company Act of 1940.

The amendments will be applicable to proxy voting for shareholder meetings held on or after January 1, 2010.



Contact Information

This document contains an overview of the recently enacted amendments. If you would like to learn more about the NYSE amendments or the proposed amendments to the proxy rules, please contact your usual legal advisor at Ropes & Gray.

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