

LET THE 2010 PROXY SEASON BEGIN!

Last year was a busy year. The Securities and Exchange Commission (SEC) adopted comprehensive rule revisions intended to improve the disclosure provided to shareholders of public companies regarding compensation and corporate governance matters. It also approved the New York Stock Exchange's amendment to NYSE Rule 452, "Giving Proxies by Member Organizations," which eliminated broker discretionary voting for all elections of directors, whether or not contested, except for companies registered under the Investment Company Act of 1940. These changes will dramatically impact this year's proxy season.

In addition to the changes discussed in this Alert, among others, companies should be mindful of certain amendments to the Delaware General Corporation Law relating to determination of record date for stockholder meetings, stockholder access to proxy materials and proxy expense reimbursement and the requirement for an annual, non-binding resolution with respect to executive compensation, also known as "say on pay", which applies to institutions receiving TARP funds.

SEC ADOPTS ENHANCED DISCLOSURE ABOUT RISK, COMPENSATION AND CORPORATE GOVERNANCE

Effective February 28, 2010, and thus, effective for the upcoming Form 10-Ks and proxy statements for calendar year companies, the SEC adopted amendments that will require:

- To the extent that risks arising from a company's compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company, discussion of the company's compensation policies or practices as they relate to risk management and risk-taking incentives that can affect the company's risk and management of that risk;





- Reporting of the aggregate grant date fair value of stock awards and option awards granted in the fiscal year in the Summary Compensation Table and Director Compensation Table to be computed in accordance with Financial Accounting Standards Board Accounting Standards Codification Topic 718, Compensation — Stock Compensation, rather than the dollar amount recognized for financial statement purposes for the fiscal year, with a special instruction for awards subject to performance conditions;
- New disclosure of the qualifications of directors and nominees for director, and the reasons why that person should serve as a director of the company at the time at which the relevant filing is made with the Commission; the same information would be required in the proxy materials prepared with respect to nominees for director nominated by others;
- Additional disclosure of any directorships held by each director and nominee at any time during the past five years at any public company or registered investment company;
- New disclosure regarding the consideration of diversity in the process by which candidates for director are considered for nomination by a company's nominating committee;
- Additional disclosure of other legal actions involving a company's executive officers, directors, and nominees for director, and lengthening the time during which such disclosure is required from five to ten years;
- New disclosure about a company's board leadership structure and the board's role in the oversight of risk; and
- New disclosure about the fees paid to compensation consultants and their affiliates under certain circumstances.

REPORTING OF VOTING RESULTS ON FORM 8-K

Further, the SEC has transferred the requirement to disclose shareholder vote results from Forms 10-Q and 10-K to Form 8-K. Under the amendments, a new Item 5.07 will be added to Form 8-K to require a company to disclose on the Form 8-K the results of a shareholder vote, and such information must be filed with the Commission within four business days after the end of the meeting at which the vote was held.



PRACTICAL CONCERNS FOR THE 2010 PROXY SEASON

Importantly, the amendments will require that companies:

- Amend their forms of D&O questionnaires or circulate a supplement that addresses the new disclosure.
- In many cases, include a significant amount of new disclosure in their Form 10-K and proxy statement. Companies should be sure to modify their timetable and responsibility checklist from last year's Form 10-K and proxy statement process.
- Further, many boards may want to revisit certain aspects of their company's governance philosophy and structure in light of the new governance-related disclosure items.

FAR REACHING IMPLICATIONS OF NYSE RULE 452: BROKER DISCRETIONARY VOTING IN DIRECTOR ELECTIONS ELIMINATED

In 2009, the SEC approved the New York Stock Exchange's amendment to NYSE Rule 452, which eliminated broker discretionary voting for all elections of directors, whether or not contested, except for companies registered under the Investment Company Act of 1940.

Prior to the rule change, Rule 452 and corresponding Listed Company Manual Section 402.08 permitted brokers to vote on "routine" proposals, including uncontested elections of directors, if the beneficial owner of the stock had not provided specific voting instructions to the broker at least 10 days before a scheduled meeting.

The uncontested election of directors will no longer be considered "routine". Therefore, shares held in street name will not be voted by a broker in an election of directors unless the holders specifically instruct their broker how to vote.

The amendment to Rule 452 is applicable to proxy voting for shareholder meetings held on or after January 1, 2010. However, the amendment does not apply to the extent that a meeting was originally scheduled to be held in 2009, if that meeting was properly adjourned to a date on or after January 1, 2010.

The number of beneficial owners holding securities in street name has been increasing significantly over the past several decades, and, as a result, brokers and other securities intermediaries, on behalf of beneficial owners, now hold a substantial majority of exchange traded securities. The practical impact has been that broker votes in director elections have represented a significant percentage of the total vote, so the amendment to Rule 452 has potentially far-reaching consequences for annual shareholder meetings.

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Significantly, Rule 452 applies to *all* brokers who are registered with the NYSE, so this amendment to Rule 452 impacts *all* publicly traded companies, regardless of the exchange upon which their securities are traded.

PRACTICAL CONCERNS FOR THE 2010 PROXY SEASON

In the past, broker votes of uninstructed shares have often been very useful in establishing a quorum at shareholder meetings. If broker votes of uninstructed shares are not permitted for a meeting because there are no “routine” matters, there may be difficulty reaching a quorum, or a quorum may not be attained until closer to the meeting. Companies may find it useful, if they do not already do so, to include in the agenda for their annual meetings a matter that remains “routine” under amended Rule 452, e.g., ratifying the company’s independent accountants for the current fiscal year, in order to ensure that the necessary quorum is obtained.

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