



**THOMPSON
HINE**

July 2009

PUBLIC COMPANY UPDATE

SEC Proposes Amendments to Compensation and Corporate Governance Disclosures and Proxy Solicitation Rules

On July 10, 2009, the Securities and Exchange Commission (SEC) proposed amendments to compensation and corporate governance disclosure rules applicable to proxy statements. You can find the text of the proposed amendments at <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>. Comments to the SEC on the proposed amendments are due on September 15, 2009. The proposed amendments fall in the following five categories:

Relationship of Overall Compensation Policies to Risk

- Broaden the scope of the Compensation Discussion and Analysis (CD&A) to include information about how a company's overall compensation policies for employees, including non-executive officers, can affect the company's risk and its management of risk.
- As proposed, disclosure is required only if a company determines that the risks arising from those compensation policies or practices may have a "material effect" on the company. Therefore, the need to disclose this information will vary depending on the particular company and its compensation programs.
- The SEC provides several examples of issues a company may need to address. Perhaps more importantly, the SEC requests comments on whether this disclosure should be limited to top executives, certain large companies or particular industries, such as financial services. We anticipate that the SEC will receive a significant number of comments on this proposal and that the final rule could differ, perhaps significantly, from the proposal.
- The SEC also emphasized that, under current rules, companies must continue to provide similar disclosure for their named executive officers, to the extent that risk considerations are a material aspect of the company's compensation policies or decisions.

Reporting of Equity Awards

- Require disclosure of the aggregate grant date fair value of stock awards and option awards in the Summary Compensation Table and the Director Compensation Table, rather than the amount recognized for financial statement reporting purposes during the relevant year. If adopted, this rule could impact the identification of named executive officers.
- The SEC seems open to considering other suggested alternatives for disclosing equity awards and has not yet determined a transition method if it adopts this amendment or another alternative to the current method.

© 2009 THOMPSON HINE LLP. ALL RIGHTS RESERVED.



Enhanced Disclosure of Director and Nominee Qualifications

- Require disclosure for each director and nominee of the particular experience, qualifications, attributes or skills that qualify that person to serve as a director of the company at the time the filing is made, and as a member of any committee that person serves on or is chosen to serve on (if known), in light of the company's business and structure.
- Practical tip – these changes would require companies to revise their current form of D&O questionnaire used to capture information for use in the proxy statement.

Company Leadership Structure

- Require disclosure of a company's leadership structure and why the company believes it is the best structure, including whether and why the company has decided to combine or separate the principal executive officer and board chair positions and 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 company.
- Require additional disclosure about the board's role in the company's risk management process, including how the board implements and manages its risk management function, whether the persons who oversee risk management report directly to the board as a whole, and whether and how the board monitors risk.

Potential Conflicts of Interest – Compensation Consultant

- Require disclosure about the fees paid to compensation consultants and their affiliates who play any role in determining or recommending the amount or form of executive or director compensation if they also provide other services to the company.
- The enhanced disclosure would also include:
 - the nature and extent of all additional services provided to the company or its affiliates during the last fiscal year by the compensation consultant and any of its affiliates;
 - the aggregate fees paid for all additional services and the aggregate fees paid for work related to determining or recommending the amount or form of executive and director compensation;
 - whether the decision to engage the compensation consultant or its affiliates for non-executive compensation services was made, recommended, subject to screening or reviewed by management; and
 - whether the board of directors or the compensation committee has approved all of these services in addition to executive compensation services.



What's Next?

The SEC's goal is to have these proposals, if adopted, in place for the 2010 proxy season. In addition, the SEC specifically noted that it continues to look for other ways to improve proxy statement disclosure. Examples identified by the SEC include:

- disclosure of compensation paid to all executive officers;
- eliminating the competitive harm exemption from disclosure of performance targets in the CD&A;
- disclosure of "hold to retirement" or "claw back" policies;
- discussion of a company's internal pay ratios;
- enhanced disclosure of compensation plans;
- quantification of "tax gross-up" arrangements; and
- diversity in the boardroom.

Companies should consider these issues now when making compensation and governance decisions that could be impacted by these proposals as soon as next year's proxy statement. This will be particularly important given the pending "say on pay" legislation that could affect all companies in the 2010 proxy season.

The SEC also proposed, in addition to the proposals discussed above in this bulletin, amendments to require disclosure of shareholder voting results on a Form 8-K, so that the information is available within four business days after the end of the meeting, and to clarify and address certain technical issues that have arisen in the proxy solicitation process.

FOR MORE INFORMATION

Please contact **Thomas A. Aldrich, David A. Neuhardt, J. Shane Starkey** or any member of our **Corporate Transactions & Securities** practice group for more information.

If you do not wish to receive future communications by email, please reply to this email with "unsubscribe" in the subject line.

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2009 THOMPSON HINE LLP. ALL RIGHTS RESERVED.