

Please feel free to contact us if we can provide further information on these matters.

John W. White
212-474-1732
jwhite@cravath.com

C. Allen Parker
212-474-1765
aparker@cravath.com

Susan Webster
212-474-1660
swebster@cravath.com

LizabethAnn R. Eisen
212-474-1930
lizann.eisen@cravath.com

Eric W. Hilfers
212-474-1352
ehilfers@cravath.com

Alyssa K. Caples
212-474-1074
acaples@cravath.com

Jennifer S. Conway
212-474-1316
jconway@cravath.com

“Proxy statements are among the most significant communications between a company and its owners, and they also are central to the only process through which owners formally and regularly participate in the governance of the corporation.”

– Chairman Mary Schapiro,
July 1, 2009.

SEC Proposes Proxy Disclosure Enhancements

July 2, 2009

At an Open Meeting held on July 1, 2009,¹ the Securities and Exchange Commission proposed several new disclosure requirements designed to enhance the information included in proxy and information statements. The proposing release, which we expect to be available shortly on the SEC’s website at www.sec.gov, will be subject to a 60-day public comment period following its publication in the Federal Register. The proposal contemplates that the final rules will be applicable to proxy and information statements beginning in 2010. The following summary is based on the discussion at the Open Meeting.

PROPOSED RULES RELATED TO DISCLOSURE OF COMPENSATION MATTERS

The Commission voted to propose the following amendments to the proxy rules with respect to compensation disclosure:

- **An amendment to the Compensation Discussion and Analysis requirements of Item 402 of Regulation S-K that would require a company to discuss and analyze its broader compensation policies and overall compensation practices for employees generally, including non-executive officers, if the risks arising from these policies and practices may have a material effect on the company.**

During the Open Meeting, Meredith Cross, the Director of the SEC’s Division of Corporation Finance, clarified that the proposed amendments do not seek information about the overall risk management policies or overall compensation practices of a company. Rather, if a company determines that a compensation policy or practice may materially affect the company’s financial condition or results of operations, the company would be required to include targeted disclosure regarding such policy or practice. The SEC Staff noted that the situations requiring disclosure will vary depending on the particular company and its compensation policies. In addition, Director Cross observed that the proposed amendments do not alter existing disclosure requirements with regard to named executive officers, which already require companies to disclose the relationship between the compensation of their named executive officers and their risk management policies if risk is a material element of the compensation of such executive officers.

Companies may wish to review their compensation policies and practices at this time to identify and evaluate any associated material risks. If a company determines that it may be required to provide targeted disclosure, it may wish to consider what such disclosure might look like and whether modification of any of its compensation policies or practices ahead of next year’s proxy season is desirable.

¹ Also at the July 1, 2009 meeting, the SEC voted to propose clarifying amendments to rules relating to proxy solicitations and new rules relating to shareholder approval of executive compensation of Troubled Asset Relief Program recipients and approved an amendment to NYSE Rule 452, eliminating broker discretionary voting in uncontested director elections for all U.S. public companies other than those registered under the Investment Company Act. For more information on the amendment to NYSE Rule 452, please see our client memo entitled “SEC Approves Amendment to NYSE Rule 452, Eliminating Broker Discretionary Voting in Uncontested Director Elections”.

- **An amendment to the proxy rules requiring the disclosure of the fees and services provided by compensation consultants and their affiliates, if those consultants or affiliates provide consulting services related to executive or director compensation and also provide additional services to the company.**

The proposed amendment would require disclosure of (1) the additional services provided by the consultant or any of its affiliates to the company, (2) the aggregate fees paid for all such additional services and the aggregate fees paid for work related to executive and director compensation consulting, (3) whether the decision to engage the consultant for any other services was recommended or made by management and (4) whether the board, or the company's compensation committee, approved the other services.

Companies may wish to review their relationships with their compensation consultants at this time, paying special attention to any current or potential conflicts of interests. As part of this review, companies may wish to consider what new disclosure would be required and whether any modifications to such consultants' terms of service are desirable ahead of next year's proxy season.

- **An amendment revising the disclosure of stock and option awards in the Summary Compensation Table and the Director Compensation Table to require inclusion of the full grant-date fair value, as computed under Statement of Financial Accounting Standards No. 123R ("FAS 123R"), of such awards.**

The proposed amendment would replace the current requirement, which was adopted in a controversial action taken by the SEC in December 2006, to disclose only the dollar amount recognized for financial reporting purposes under FAS 123R (*i.e.*, the amount determined by amortizing the grant-date fair value of awards over their vesting periods) in lieu of the full grant-date fair value in the year of the grant. This change may affect the composition of the group of officers who are identified as the company's named executive officers (for both the proxy rules and Section 162(m) of the Internal Revenue Code).

Companies should consider identifying at this time any persons who may become named executive officers as a result of the proposed change and begin collecting and tracking their relevant compensation information. The rule change also raises a number of transition issues, particularly with respect to previously granted awards and comparative disclosure for prior years, that we anticipate the SEC will address in the proposing release.

PROPOSED RULES RELATED TO THE DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES

The Commission voted to propose the following amendments to the proxy rules regarding corporate governance disclosure:

- **An amendment to Item 401 of Regulation S-K requiring companies to disclose for each director and director nominee (whether nominated by the company or another proponent) 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 on which the person serves or is chosen to serve, in light of the company's business.**

The SEC also proposed amendments to (1) require the disclosure of any public company directorships held by a director or nominee at any time during the last five years (the existing rules only require disclosure of current directorships) and (2) lengthen the look-back period for disclosure of legal proceedings involving the director or nominee from five to ten years. In addition, Commissioner Aguilar noted that the SEC will seek comments concerning disclosures related to board diversity, including whether companies should be required to disclose if diversity is a factor their nominating committee considers when selecting a board candidate and provide additional or different disclosure related to diversity.

At this time, companies may wish to gather, to the extent available, the relevant information that may be subject to disclosure and consider what their additional disclosure might look like. Given the SEC's recent focus on risk management, companies may wish to highlight any risk management expertise of their directors and nominees in such disclosure. In addition, companies may also wish to review the composition of their various board committees with these additional disclosure requirements in mind.

- **Amendments to Item 407 of Regulation S-K and Schedule 14A requiring disclosure of a company's leadership structure and a discussion of why the company believes its leadership structure is the best structure for the company.**

A company would be required to disclose whether and why it combines or separates the positions of chief executive officer and chairman of the board and whether it has a lead independent director. A company also would be required to disclose the role of its board in the company's risk management process, and the effect, if any, this role has on the organization of its leadership structure.

Companies may wish to analyze their board and management structures and consider the scope of the proposed disclosure rules and whether any changes to those structures are advisable ahead of next year's proxy season.

PROPOSED RULE FOR EARLY REPORTING OF PROXY VOTING RESULTS

The Commission also voted to propose the following rule regarding the disclosure of the outcome of shareholder votes:

- **Creation of a new item under Form 8-K requiring companies to disclose the results of shareholder votes within four business days after the end of the meeting at which the vote was held.**

This proposed change would significantly accelerate the timing for reporting voting results, which previously were only required to be disclosed in the company's Form 10-Q, or Form 10-K, following the vote. Neither the SEC Staff nor the Commissioners discussed how the proposed rule would address shareholder votes that are not certified within four business days of the meeting.

CONCLUSION

These proposed amendments are an important step forward in advancing the SEC's agenda to increase corporate transparency through additional disclosure requirements. Chairman Schapiro, however, has noted that "disclosure only takes us so far" and that the ability of shareholders to exercise their legal rights to nominate directors should also be enhanced. As part of this effort, the SEC proposed rules in May 2009 expanding shareholder access to company proxy statements, thereby making it easier and less expensive for shareholders to nominate and elect directors.² Public companies should expect these recent trends to continue.

This memorandum relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

New York
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
212.474.1000

London
CityPoint
One Ropemaker Street
London EC2Y 9HR
+44.20.7453.1000

www.cravath.com

² For more information on these "proxy access" rules, please see our memo entitled "SEC Proposes New Rule to Expand Shareholder Access to Corporate Proxies".