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2009 ANNUAL DISCLOSURE DOCUMENTS

Topics for 2009 include the anticipated impact of credit and business risk factors in the present economic climate, executive compensation policies and practices in light of SEC Staff guidance, and the special limits on executive compensation for financial institutions receiving government funding under the bailout legislation. Other disclosure subjects discussed by the authors are the handling of shareholder proposals and electronic delivery of proxy materials.

By Mary J. Mullany and Ellen Jerrehian *

This article discusses the current trends and topics that may be of particular importance to public reporting companies as they begin to prepare their annual disclosure documents. Such documents include the annual report on Form 10-K for fiscal year 2008 and the proxy statement for the annual meeting in 2009. We focus on financial and risk factor disclosure and executive compensation disclosure issues in these documents, the impact on the disclosures of financial institutions of their participation in the federal "bailout" programs, current issues related to shareholder proposals, and the electronic delivery of proxy materials to investors.

FINANCIAL AND RISK FACTOR DISCLOSURE

Every public reporting company must consider the impact of current economic and financial market developments in drafting its annual disclosure documents, as such environments are significantly different from that of a year ago. This is particularly true in drafting the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") and Risk Factor sections of a Form 10-K. MD&A is intended to provide investors with a view of the financial and operational results of the company as seen through the eyes of management.[1] It is designed to stand alone and must include disclosure of any known trends or uncertainties that have had, or that the company reasonably expects will have, a material impact (favorable or unfavorable) on its financial condition and results of operations. MD&A should include forward-looking information to address the anticipated impact of such trends and uncertainties on the company's financial condition, including its liquidity

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[1] The requirements of MD&A are set forth in Item 303 of the SEC's Regulation S-K.

IN THIS ISSUE

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and capital resources. Some of the items that should be considered in drafting MD&A disclosure for this year include:

- The impact of reduced or limited availability of short-term credit on the company. Considerations might include a review of the company's current credit facility, including an assessment of how the company could be impacted if its current credit facility terminates or is reduced, or if the financial institution(s) providing such credit face financial difficulties of their own. A company should review its financial covenants, the term of its current credit facility, and the potential for difficulty in renewing a credit facility that may expire in the near term.

- The effect of a cash crisis on current programs or projects. For example, a life science company with multiple products in development might be forced to consider cutting back, slowing down, or eliminating discrete programs if funding sources are no longer available.

- The impact of stock price declines and/or fluctuations on the company's ability to access the capital markets, to use equity in its compensation programs, or to use equity as currency in acquisition transactions.

- Changing patterns in the business of the company's customers, suppliers, and competitors. Some areas of review might include an assessment of any changes in payment cycles from customers and how such changes may affect the company's cash flow and business plans, the availability of supplies from vendors, the supply and demand considerations where sole-source or limited-source suppliers exist, and the impact that changes in the business of competitors may have on the company's business results.

- The impact of the potential bankruptcy or insolvency of key customers and suppliers on the business of the company.

The same considerations should be addressed in drafting Risk Factor disclosure in 2009. Risk Factor disclosure should be specific to the company, should not be boilerplate, and should be written in plain English. It is helpful to craft a risk factor for each trend or uncertainty discussed in MD&A, and to look globally at the business disclosure and identify those elements that could negatively impact such disclosure.

EXECUTIVE COMPENSATION DISCLOSURE

In late 2006, the SEC adopted new executive compensation disclosure rules applicable to public reporting companies.[2] These rules represented a significant change to the executive compensation disclosure requirements for such companies. The executive compensation disclosure now must begin with a narrative, principles-based overview discussion, called Compensation Discussion and Analysis ("CD&A"), of the tabular disclosure that follows the CD&A and discloses the compensation paid to or earned by the Named Executive Officers ("NEOs") of the company. The NEOs include the chief executive officer, the chief financial officer, and the three other most highly compensated executive officers. The CD&A should provide an understanding of the principles that guide executive compensation, the company's view of total compensation, the elements of compensation, and the company's compensation policies and practices. The discussion must include:

- the objectives of the company's compensation program;

- what the compensation program is designed to reward;

- a description of each element of compensation;

- why the company chooses to pay each element;

- how the company determines the amount (and, if applicable, the formula) for each element; and

[2] Rel. 33-8723A (2006); Rel. 34-54302A (2006).

- how each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements.[3]

The Staff of the SEC has provided guidance regarding and clarification of the new disclosure rules through a number of sources. For example, in 2007 the SEC performed a targeted review of the executive compensation disclosures of 350 preselected public reporting companies and published some general guidance in "Observations in the Review of Executive Compensation Disclosure" ("Staff Observations").[4] That Staff Observations report, along with the Division of Corporation Finance's Compliance & Disclosure Interpretations on Regulation S-K ("C&DI"),[5] provide useful guidance on discrete issues of compensation disclosure. Finally, the Staff has made a number of public speeches and statements related to executive compensation disclosure. Two of the most helpful are speeches by John W. White, then-Director, Division of Corporation Finance, entitled "Where's the Analysis?" and "Executive Compensation Disclosure: Observations on Year Two and a Look Forward to the Changing Landscape for 2009" ("Year Two Observations"). All of these resources are available on the SEC's website.

Significant Executive Compensation Disclosure Issues

Significant executive compensation disclosure topics requiring focus in 2009 include the need for more analysis of the executive compensation paid and less process description, disclosure of performance targets, and the description of benchmarking practices. These and a few other disclosure topics emphasized by the Staff in C&DI, comment letters, speeches, and other public statements are discussed below.

Analysis of the compensation paid. The Staff has emphasized the need for disclosure of the "how and why" portion of the analysis of executive compensation. In his "Where's the Analysis" speech, White highlighted the need for companies to analyze why each item of compensation was paid and how each of the parts contributes to the whole, rather than focusing on the mechanics of the process. White stated that it may be helpful to ask the following questions when preparing the CD&A:

- What is material to investors as they examine the compensation disclosure and make voting and investment decisions?

- What material elements of individual and corporate performance are considered in setting executive compensation?

- What is the relationship between the objectives of the overall compensation program and the different elements of compensation?

- What are the material factors of a company's compensation decision-making process?

In Year Two Observations, White noted that lack of analysis continued to be the number one concern addressed in Staff reviews of executive compensation.

Disclosure of performance targets. This topic has received a great deal of attention since the effectiveness of the new rules and was frequently addressed by the Staff in 2007 comment letters. The tension lies between disclosure of individual and corporate performance targets affecting the compensation paid, and the need of the company to limit disclosure, where appropriate, of confidential or competitive information. As set forth in speeches and in the C&DI, the analysis that should be followed is:[6]

- First, is the performance target (individual or corporate) material to understanding the compensation disclosure? If not, there is no disclosure obligation.

- If the performance target is material, does it involve confidential trade secrets or commercial or financial information that would be harmful to the company if disclosed? The standard of review is the same for confidential treatment requests for other filings with the SEC.[7]

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[3] Regulation S-K, Item 402(b)(1).

[4] SEC Staff Observations in the Review of Executive Compensation Disclosure (Oct. 9, 2007), *available at* http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm.

[5] SEC Compliance & Disclosure Interpretations on Regulation S-K (last updated July 3, 2008), *available at* http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

[6] This analysis is based on Instruction 4 to Regulation S-K, Item 402(b). *See also supra* note 5, at Question 118.04.

[7] *See* Securities Act Rule 406, Exchange Act Rule 24b-2, Staff Legal Bulletin No. 1 (February 28, 1997), and Staff Legal

- If the performance target is material and the company has determined to exclude it under the second step of the analysis, the company's CD&A disclosure needs to include a discussion of the level of difficulty of achieving the target.

In performing the analysis, the type of target, *i.e.*, financial (*e.g.,* earnings per share) vs. operational (*e.g.*, growth of a product line revenues) vs. individual (*e.g.,* completing and implementing a marketing plan for a new product line), should be considered. Generally it is easier to articulate the competitive harm from disclosure of an operational or individual target, particularly a target tailored to a specific named executive officer, and harder to do the same for standard financial targets, such as earnings per share. The Staff has declined to give specific bright line guidance in this area; this is a facts and circumstances analysis for each disclosure item. Disclosure of individual performance goals continues to be a challenge. While CD&A is not intended to include a performance review for each NEO, the categories or focus of individual goals material to the compensation decisions may need to be included. Finally, it is important to perform the assessment as to the disclosure of performance targets when the disclosure is drafted, not at some point in the future when a comment letter is received.

Benchmarking. If a company uses information from other companies in determining its own compensation levels, it may be benchmarking and may need to disclose such information.[8] The key here is to analyze whether the company is benchmarking or not. If it uses compensation information from other companies as a source of information, or uses survey results as a double-check, but does not specifically use the information in setting compensation levels, then it may not be benchmarking. If it uses such information from other companies as a principal method of establishing a particular component of compensation, then it will need to disclose that it is benchmarking, and include benchmarking information in CD&A. Some items to consider are:

- If the company benchmarks to different peer groups for different items of compensation, it needs to provide information about each peer group.
- The entire peer group needs to be disclosed – larger groups can be placed in an appendix.
- Any changes to the peer group should be disclosed. Disclosure of changes from past years may be required if material to an understanding of the disclosure. This may become particularly important with the departure of companies through acquisition, insolvency, or bankruptcy. If a company's business focus changes, it may become necessary to change the peer group entirely, and disclosure of the reasons for such change is appropriate.

Other Issues. Some other compensation-related guidance provided by the SEC includes:

- *Differences in compensation policies and decisions* – The Staff has indicated that where there are significant material differences in compensation policies and decisions for individual NEOs (such as the chief executive officer), such differences should be described and analyzed.[9]
- *Use of an executive summary* – Some companies have used an executive summary, similar to that used in MD&A, to set the tone for the CD&A and to place the most important information up front. The use of a summary may depend on the complexity of the company's compensation programs.
- *Description of the roles of others in the compensation process* –A common theme in many of the Staff comments was that companies should provide more information about the role of others, such as the chief executive officer, the Human Resources director, and compensation consultants, in the compensation process. Such participants may be involved in different aspects of the process, and such involvement should be described.
- *Post-employment compensation* – Many companies comply with the post-employment compensation disclosure requirements by providing tabular disclosure, which has been well received by the Staff as long as the disclosure is complete. The Staff is encouraging the addition of total compensation to such tables to give a clearer view of the amounts received in various termination events.[10] In the Staff Observations, the Staff noted

footnote continued from previous page…

Bulletin No. 1A (July 11, 2001) for a discussion of confidential treatment requests.

[8] Regulation S-K, Item 402(b)(2)(xiv).

[9] *See* Staff Observations, *supra* note 4, at "Differences in compensation policies and decisions."

[10] *See* Staff Observations, *supra* note 4 at "Format."

that the CD&A should include a discussion of how post-termination payments, including change-in-control payments, fit into the compensation objectives and influence decisions regarding other compensation elements.

SPECIAL ISSUES FOR FINANCIAL INSTITUTIONS

In October 2008, the President signed into law the Emergency Economic Stabilization Act of 2008 ("EESA").[11] The principal purpose of EESA was to authorize the U.S. Treasury to establish programs under which the Treasury could purchase "troubled assets," such as residential or commercial mortgages and any related securities, obligations, or other instruments that were issued or originated from financial institutions. Under EESA, the Treasury has developed a number of programs for the purchase of troubled assets. To date, the program used to make investments has been the Capital Purchase Program ("CPP"), pursuant to which the Treasury has or will invest in the purchase of preferred stock and warrants of financial institutions, both publicly traded and privately held. This discussion focuses on financial institutions participating in the CPP, but such provisions will be applicable to other companies that receive funds under an EESA program.

Executive Compensation Limitations under EESA

EESA includes some significant executive compensation limitations applicable to financial institutions participating in the CPP. These provisions are designed to limit and discourage financial institutions that participate in the CPP from paying excessive compensation, particularly severance, to identified executive officers. For public reporting companies, those officers are the NEOs described above. Privately held financial institutions participating in the CPP must apply the SEC rules to a determination of the senior executive officers subject to such limitations. The executive compensation limitations are as follows:

- A financial institution participating in the CPP must meet appropriate standards for executive compensation and corporate governance. This requires the financial institution to identify, revise, or eliminate any incentive compensation program or plan that encourages the executive officers to take "unnecessary and excessive risks that threaten the value of the financial institution."

- The financial institution must establish a process for recouping any bonus or other incentive compensation that has been paid to an executive officer based on statements of earnings, gains, or other financial criteria that are later proven to be materially inaccurate (commonly referred to as a "clawback" requirement). Prior to passage of EESA, the only federally mandated clawback provision was found in the Sarbanes-Oxley Act of 2002 ("SOX").[12] There are significant differences between the SOX clawback provision and the EESA clawback provision. Under SOX, a company is required to recoup specified incentive compensation paid to its chief executive officer or chief financial officer if a material restatement of its financial statements is required based on fraud. Under EESA, the need for a clawback: (a) may arise if the performance metric(s) on which the incentive compensation was based turns out to be materially inaccurate, even if a restatement of the financial statements is not required; (b) applies to all NEOs, not just the chief executive officer and chief financial officer; and (c) does not include a limit on the potential time period for which incentive compensation should be recouped.

- The financial institution cannot pay excessive severance compensation to the NEOs upon a separation from service, including in an involuntary severance, a change-in-control event, or in connection with the bankruptcy, liquidation, or receivership of the employer. Excessive compensation means the payment of any amount that would be considered a golden parachute under Sections 280G and 4999 of the Internal Revenue Code. In general, these sections define a golden parachute payment as one in excess of three times the average W-2 income paid to the executive officer over the last five years.

- EESA also makes two important changes to Section 162(m) of the Code. It prohibits a participating financial institution from deducting any compensation paid to NEOs in excess of a cap of $500,000 per year (reduced from $1,000,000) and it eliminates the exception from the cap for performance-based compensation.

The foregoing executive compensation limitations must remain in effect for as long as the Treasury retains its debt or equity position in the financial institution.

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[11] Pub. L. 110-343, 12 Stat. 3765 (2008).

[12] Sarbanes-Oxley Act of 2002, Section 304(a).

On February 4, 2009, the Treasury issued new guidance on executive compensation limitations for institutions participating in an EESA program. These limitations include: (1) limitation on NEO compensation to $500,000 per year, except for restricted stock awards; (2) a mandate for a participating institution to submit its NEO compensation structure and rationale to a nonbinding "say on pay" shareholder resolution; (3) an expansion of the clawback provisions to the top 20 senior officers of the company if they knowingly engage in deceptive financial practices; (4) no golden parachute payments to the top 10 senior officers, and no golden parachute severance payment in excess of one year's compensation for the next 25 senior executives; and (5) the Board of Directors must adopt a "luxury expenses" policy describing expense reimbursement or perquisites for things such as airplane use or entertainment for senior executives. More legislation and administrative guidance with respect to EESA and executive compensation limitations is expected as the new administration revises the bailout programs and implements the recently passed stimulus legislation.

SEC Guidance

In Year Two Observations, White shared his preliminary views on the SEC reporting obligations for financial institutions that are or will participate in an EESA program, most notably the financial institutions that will become subject to executive compensation limitations as a result of participation in the CPP. White noted that all large financial institutions will be subject to the SEC review process during 2009, and made the following recommendations with respect to executive compensation determinations and disclosure:

- the Compensation Committee should meet annually with senior risk officers of the company to ensure that incentive compensation meets the appropriate EESA standards;

- the Compensation Committee Report must certify that EESA requirements are being met;[13] and

- the CD&A should include a discussion of the executive compensation limitations and restrictions imposed on the company by the EESA standards and limitations.

White added that, while EESA's requirements only currently affect direct program participants, other public reporting companies should:

- discuss the ease or difficulty with which executives are able to meet established targets and incentives, and what risks executives may be encouraged to take as a result;

- analyze whether market events affect the company's compensation decisions, and discuss such analysis in the CD&A; and

- disclose the impact of recent events, if any, on the company's compensation programs.

SHAREHOLDER PROPOSALS

- Rule 14a-8 under the Exchange Act addresses when a company must include a shareholder's proposal in its proxy statement. The number of shareholder proposals submitted to public reporting companies and the sophistication of such proposals have increased dramatically over the past several years. Common topics for such proposals have focused on corporate governance (such as majority voting for the election of directors and elimination of a classified board of directors) and executive compensation (such as "say on pay" votes by shareholders, implementation of clawback policies, limits or caps on executive compensation, elimination of gross-up payments, reduction of post-employment compensation arrangements, and internal pay equity). In order for a proposal to be included in a company's proxy statement, a shareholder must comply with certain eligibility and procedural requirements. If a company wishes to exclude a shareholder's proposal, it must submit a request for no action to the SEC. The timeframe for responding to a shareholder proposal or requesting no action can be short, so it is helpful to be familiar with the deadlines for submitting a proposal and the process for dealing with a proposal before one is received.

- The SEC has issued several Staff Legal Bulletins on this topic that address issues commonly arising

[13] The interim final rule promulgated by the U.S. Treasury Department provides an example for such a Compensation Committee Report: "The compensation committee certifies that it has reviewed with senior risk officers the NEO incentive compensation arrangements and has made reasonable efforts to ensure that such arrangements do not encourage NEOs to take unnecessary and excessive risks that threaten the value of the financial institution." Interim Final Rule under the TARP Capital Purchase Program, 31 C.F.R. pt. 30 (2008).

under Rule 14a-8.[14] These Staff Legal Bulletins provide helpful guidance on the process for evaluating shareholder proposals, for determining any procedural deficiencies in a shareholder proposal, and for navigating the no-action process. Some of the important parts of the process are:

- Know when proposals are due to be submitted by shareholders, and build such deadlines into your annual reporting process. (Question 3 in Staff Legal Bulletin No. 14).

- Understand the procedures that the shareholder must follow (Rule 14a-8(b)) and make an initial determination whether to exclude the proposal on procedural grounds. Do not lose out by failing to follow the proper procedures. Staff Legal Bulletin No. 14C gives examples of issues that arise on the procedural front. For example, if a company's records indicate that a shareholder has not owned the minimum amount of securities for the requisite period of time and it intends to exclude the shareholder's proposal on that basis, the company must send the shareholder a notice of defect because the shareholder may be able to provide proof of ownership of shares held through a broker or bank that are not reflected in the company's records. If the shareholder responds in a timely manner with the requested information, the proposal cannot be excluded on such procedural grounds.

- The company can communicate with the shareholder making the proposal and attempt to work with the shareholder to withdraw the proposal. If such efforts are not successful and the company determines that it has grounds to exclude the proposal under Rule 14a-8, it must submit its no-action request to the SEC at least 80 days prior to the anticipated date of first mailing of its proxy materials. No-action requests are always submitted by the company (not the shareholder) and can be submitted by mail, facsimile, or e-mail to the SEC (shareholderproposals@sec.gov). The company must provide a copy of its no-action request to the shareholder as well. The SEC now publishes all no-action requests it receives on a special location on its website, which may be helpful to a company that receives a shareholder proposal that is similar (or identical) to a shareholder proposal for which another company has requested no action. It is important to do a separate no-action letter for each proposal received, even if multiple similar proposals are submitted. The principal reason for this is so that if a shareholder proposal is withdrawn, the company can withdraw the no-action request with respect to that shareholder proposal.

- Rule 14a-8 provides the various reasons a company can use to justify its request to exclude a shareholder proposal from its proxy materials. It is important to include all reasons (both procedural and substantive) in the no-action request, as the company will not have another opportunity to make additional arguments. However, do not argue in the alternative where the alternatives are inconsistent (for example, do not argue that the company does not have the legal authority to implement the proposal under state law, and then argue in the alternative that the proposal can be excluded because it has been substantially implemented by the company).

- Remember to communicate any changes, such as the withdrawal of the proposal, to the SEC, and to share any communications to the SEC, including supporting documents, with the shareholder. Under Rule 14a-8, the shareholder is required to do the same with respect to any materials submitted by the shareholder to the SEC in response to the no-action request. The SEC recommends that the company and the shareholder transmit such materials to each other in the same manner and at the same time that correspondence is submitted to the SEC.

- Do not attempt to put the SEC staff in the middle between the company and the shareholder. The SEC will not act or comment on the substance of the proposal and will not act to resolve any dispute between the company and the shareholder.

One final note relates to proposals regarding amendments to bylaws to establish a process for including shareholder nominees for a director position in the company's proxy statement. In December 2007, the SEC adopted an amendment to Rule 14a-8(i)(8), which permits exclusion from proxy materials of certain shareholder proposals related to the election of directors, to clarify its meaning in light of a then-recent court decision that was inconsistent with the SEC's interpretation.[15] In *American Federation of State, County and Municipal Employees, Employees Pension*

[14] Staff Legal Bulletin No. 14A (July 12, 2002); Staff Legal Bulletin No. 14B (Sept. 15, 2004); Staff Legal Bulletin No. 14C (June 28, 2005); and Staff Legal Bulletin No. 14D (Nov. 7, 2008).

[15] Rel. No. 34-56914 (2008).

Plan v. American International Group, Inc.,[16] the Second Circuit held that AIG could not rely on Rule 14a-8(i)(8) (the election exclusion) to exclude a shareholder proposal seeking to amend the company's bylaws to establish a procedure under which the company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials. The Second Circuit's decision was based on a 1976 statement by the SEC, which rejected the interpretation that the election exclusion applied to shareholder proposals that would institute procedures making such election contests more likely.

In the release adopting the amendment to Rule 14a-8(i)(8), the SEC describes the longstanding Staff interpretation that a shareholder proposal that may result in a contested election falls within the election exclusion.[17] The amendment clarifies that this includes a proposal that would result in an immediate election contest or one that would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholder nominees for director in the company's proxy materials. The SEC expressed concern that an interpretation of Rule 14a-8(i)(8) that resulted in it being used as a means to include shareholder nominees in company proxy materials would, in effect, circumvent other proxy rules applicable to proxy contests designed to assure that shareholders receive adequate disclosure and benefit from the full protection of the antifraud provisions of the securities laws.

ELECTRONIC DELIVERY OF PROXY MATERIALS

In July 2007, the SEC adopted amendments to the proxy rules under the Exchange Act to require companies to make proxy materials available on an Internet website.[18] Large accelerated filers, as defined in Exchange Act Rule 12b-2, not including registered investment companies, were required to comply with the amendments commencing on or after January 1, 2008. Registered investment companies, persons other than reporting companies, and reporting companies that are not large accelerated filers are required to comply with the amendments commencing on or after January 1, 2009; so the new rules apply for the current proxy season.[19]

Under the amendments, a company needs to determine whether it will provide materials only via an Internet posting (the notice-only option) or whether it will provide paper copies of its proxy materials to shareholders in addition to posting materials on an Internet website (the full-set delivery option). In either case, all proxy materials, including any supporting materials and the annual report, if required, must be posted on the website on or before the day on which the materials are first sent to shareholders. The website used for such posting cannot be a link to the SEC's EDGAR website, and must be publicly accessible, free of charge, and maintained in a manner that does not infringe on the anonymity of a person accessing it (*e.g.*, be "cookie-free"). A company is not precluded from using its own website, but the "cookie-free" requirement makes such use impractical in most cases. The proxy materials must be presented on the website in a format that is convenient for reading online and printing.

Notice-Only Option

A company using the notice-only option must send each shareholder a notice of the internet availability of its proxy materials at least 40 calendar days prior to the date of the meeting. All such materials, including a copy of the Proxy Statement, a copy of the annual report if required, and a form of proxy, must be posted on the website at the time the notice is first sent.[20] The notice must include:

- a prominent legend, in bold-face type, describing why the notice is being sent and encouraging shareholders to access and review the company's proxy materials, providing the website address for access to the proxy materials, and providing information as to how a shareholder can obtain paper copies of the proxy materials;
- the date, time, and location of meeting;
- clear and impartial identification of each matter to be acted on and the company's recommendation on each matter;
- a list of the materials available on the website;

[16] 462 F.3d 121 (2d Cir. 2006).

[17] *See supra* note 15.

[18] Rel. No. 34-56135 (2007).

[19] No issuer is required to comply with the amendments if it is not permitted to do so under the laws of its state of incorporation. (Rule 14a-3(a)(3)(ii)).

[20] Rule 14a-16(a)(1); Rule 14a-16(b)(1).

- a toll-free telephone number, an e-mail address, and a website that shareholders can use to request copies of the proxy materials; and

- information about attending the annual meeting and voting in person.

The notice may not include any supporting statement regarding any matter to be acted on or any other information, except as required by state law, and must be filed with the SEC no later than the date on which it is sent to shareholders. The instructions on how to access the form of proxy must not allow access to the form of proxy without access to the proxy statement and, if required, the annual report. While the form of proxy must be available on the website when the notice is sent, a proxy may only be mailed to shareholders if at least 10 calendar days have passed since the notice was first sent and the proxy must be accompanied by another copy of the notice. Copies of proxy materials must be available to be sent by first class mail or e-mail, as applicable, within three business days after receipt of any request received from a shareholder prior to the meeting.

Full-Set Delivery Option

A company using the full-set delivery option may comply with the amendments by sending a full set of proxy materials to its shareholders. Such materials must include a notice of internet availability of the proxy materials, and the proxy materials must be posted on the cookie-free website on the date of first mailing. There is no requirement that the notice or proxy materials be provided at least 40 calendar days prior to the date of the meeting. The notice does not have to include the portions of the legend in bold describing why the notice is being sent, encouraging shareholders to access and review proxy materials, and providing information as to how to obtain paper copies of the proxy materials, the toll-free telephone number, e-mail address, and website that shareholders can use to request copies of the proxy materials, or instructions on how to access the form of proxy. After the full set of proxy materials, including the notice, have been sent, additional proxies may be sent to shareholders at any time and are not required to be accompanied by a copy of the notice.

Other Soliciting Persons

Persons other than reporting companies who solicit proxies must also do so using the notice-only option or the full-set delivery option.[21] Such other soliciting persons must send their notice by the later of 40 calendar days prior to the date of the meeting or 10 calendar days after the date that the company first sends its notice or proxy statement to shareholders. Other soliciting persons are not required to solicit proxies from every shareholder and are only required to provide copies of their proxy materials to shareholders to whom they have sent a notice.

If the other soliciting person is not aware of all matters on the agenda for the meeting at the time that it sends its notice, the notice must include a clear statement indicating that there may be additional agenda items of which the other soliciting person is not aware and that shareholders cannot direct a vote with respect to those items on the other soliciting person's proxy. If the form of proxy does not contain all matters to be acted on, the notice must state whether execution of the other soliciting person's proxy will invalidate a shareholder's prior vote on matters not contained on such proxy (*e.g.*, invalidate the proxy provided by the company and previously submitted by the shareholder).

Other Considerations

It is important for companies to determine which option to use early on because the notice-only option adds significant time to the process, requiring proxy materials to be finalized more than 40 days prior to the meeting date. A company may use different options for different groups of its shareholders. For example, it may use the notice-only option for institutional shareholders and the full-set delivery option for retail shareholders, but it must comply with all time requirements for the options selected. One impact of the use of the notice-only option by companies in 2008 was a significant reduction in the vote received from retail shareholders, so that should be considered by a company with a large retail shareholder base.

The amendments relate to the electronic delivery of proxy materials; they do not mandate or require electronic or internet voting. State law governs the sole use of electronic or internet voting.■

[21] Rule 14a-16(l).

The Review of Securities & Commodities Regulation