

**OUTLINE OF PROPOSED RULE: PROXY DISCLOSURE AND  
SOLICITATION ENHANCEMENTS  
U.S. SECURITIES AND EXCHANGE COMMISSION**

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September 14, 2009

**I. General Information**

- A. Release Number: 33-9052; 34-60280; IC-28817
- B. File No.: S7-13-09
- C. Published: July 10, 2009
- D. Comment Period: Ends on September 15, 2009
- E. Highlights:
  - 1. Requires enhanced disclosures regarding risk management and risk taking, and its impact on executive compensation; director and director nominee qualifications; compensation consultant interests and relationships; and company leadership structure.
  - 2. Accelerates the timing for the disclosure of shareholder meeting results by making such disclosure a Form 8-K requirement.
  - 3. Includes clarifying amendments to Rules 14a-2, 14a-4 and 14a-12 regarding solicitation of proxies by non-management soliciting persons.

**II. Enhanced Compensation and Governance Disclosures**

- A. Compensation Discussion and Analysis (CD&A) disclosures
  - 1. Expands CD&A disclosures to include a description of broader compensation policies and arrangements, not just those applicable to named executive officers (NEOs).
    - a. Requires a discussion of how such overall compensation policies create incentives that can affect the company's risk and management of that risk.

- b. Company will need to discuss and analyze the level of risk that employees are encouraged to take.
  - i. Large financial institutions and the mismatch between the company's long-term interests and the executive compensation incentives are mentioned as an example for these enhanced disclosures.
- 2. The Commission identified certain situations and events that could trigger such discussion and analysis:
  - a. at a business unit of the company that carries a significant portion of the company's risk profile;
  - b. at a business unit with compensation structured significantly differently than other units within the company;
  - c. at business units that are significantly more profitable than others within the company;
  - d. at business units where the compensation expense is a significant percentage of the unit's revenues; or
  - e. that vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.
- 3. Disclosure of these risk-related issues are only required where the materiality threshold is triggered.
- 4. The Commission provided some non-exclusive examples of the types of disclosure that might be material to the company:
  - a. the general design philosophy of the company's compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as such policies relate to or affect risk-taking by those employees on behalf of the company, and the manner of its implementation;
  - b. the company's risk assessment or incentive considerations, if any, in structuring its compensation policies or in awarding and paying compensation;

- c. how the company's compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw backs or imposing holding periods;
- d. the company's policies regarding adjustments to its compensation policies to address changes in its risk profile;
- e. material adjustments the company has made to its compensation policies or practices as a result of changes in its risk profile; and
- f. the extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.

B. Summary Compensation Table

**1. Requires, for stock options and other stock-based awards, the full grant date fair value of the awards made during the covered fiscal year, determined in accordance with FAS 123(R).**

- a. Replaces the rule which provided for disclosure of the aggregate FAS 123(R) value for all existing awards outstanding during the covered fiscal year.
- b. Change is designed to provide more useful information to investors (the grant date fair value of the award) as compared to the financial statements recognition measure, as the latter can be impacted by many things, including retirement status and gains and losses in stock price.
- c. May assist in better aligning the NEOs for whom compensation is reported with the overall compensation decisions for the covered fiscal year.
- d. Still have the concern about over-reporting of compensation based on full grant date value of awards that are earned over multiple years, but, on balance, the Commission believes this is more useful disclosure.
- e. This would make the requirement for providing the full grant date value applicable to smaller reporting companies as well.

2. Other Amendments to the Compensation Tables

- a. Rescinds the requirement to include the full grant date fair value of equity awards in the Grant of Plan-Based Awards Table and the corresponding footnote disclosure to the Director Compensation Table.
- b. Instruction 2 to the salary and bonus columns to the Summary Compensation Table is amended to remove the requirement to report any salary or bonus foregone by the NEO, and to add a requirement that any non-cash awards received by that NEO in replacement for such foregone salary and bonus be included in the applicable equity award column for that fiscal year.

C. Enhanced Director and Director-Nominee Disclosure

1. Amends Item 401 of Regulation S-K to require disclosure, for each director or director-nominee, describing his or her particular experience, qualifications, attributes or skills that qualify that person to be a director of that company at that time, and as a member of any committee on which he or she does, or may, serve.
  - a. Supplements the more general disclosures under Item 407 of Regulation S-K (corporate governance) with disclosures specific to the individual directors.
2. Also need to provide five-year history of other public company directorships; not just current directorships, and lengthen the disclosure of identified types of legal proceedings involvement from five years to ten years.
  - a. The types of legal proceedings, as set forth in Item 401 of Regulation S-K, include matters such as bankruptcy filings, criminal convictions, securities trading suspensions, etc.
3. Applies to any director nominees, no matter who the proponent (i.e., even if shareholder nominated).
4. May want to include items such as risk assessment skills, particular industry expertise, knowledge of the company, area of specialty and why this particular individual benefits the company at the time of the filing.
5. For operating companies, this disclosure will apply in Proxy Statements and Information Statements, Annual Reports on Form 10-K, registration on Form 10 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and registration

statements under the Securities Act of 1933, as amended (the “Securities Act”).

6. For investment companies, this disclosure will apply to Proxy Statements and Information Statements and Forms N-1A, N-2 and N-3 under the Investment Company Act.

D. Company Leadership Structure and the Board’s Role in Risk Management Process

1. Amends Item 407 of Regulation S-K (and Item 7 of Schedule 14A) to require a disclosure of the company’s leadership structure and why that is best for the company at the time of the filing.
  - a. Can include discussion of such items as separation (or not) of the CEO and Chairman roles, the presence (or absence) of a Lead Independent Director, and the responsibilities of the Lead Independent Director.
2. Requires disclosure of the Board’s role in the company’s risk management process.
  - a. Discussion could include items such as whether the Board (as a whole) monitors risk issues, or whether it is delegated to one or more committees, and how such risk monitoring occurs.
3. These requirements are applicable to investment companies as well.

E. Compensation Consultant Disclosures

1. Current disclosure requirements: disclose any role played by compensation consultant in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether they are engaged directly by the compensation committee or any other person, the nature and scope of the assignment, and the direction given to such compensation consultant (Item 407 of Regulation S-K).
2. Proposed amendments would add requirements, **for compensation consultants that provide other services to the company (directly or through affiliates), and that also play a role in determining or recommending the amount or form of executive and director compensation, to:**

- a. disclose the fees paid to compensation consultant and its affiliates for the compensation-related work and for all other work;
  - b. disclose the nature and extent of all additional services provided during the last fiscal year by the compensation consultant or its affiliates to the company, the committee, the Board or management;
  - c. describe whether the decision to engage the compensation consultant or any affiliate for such services was made, recommended, subject to screening or reviewed by management; and
  - d. whether the Board or the compensation committee approves the use of other services from the compensation consultant or its affiliates.
3. Disclosures described above would not apply if the compensation consultants role is related **only** to broad-based plans that do not discriminate in favor of executive officers or directors (e.g., 401(k) plans or health plans).

### **III. Reporting Voting Results on Form 8-K**

- A. Current requirements: A company is required to report on Form 10-Q or Form 10-K the results of any shareholder meeting that occurred in the period covered by the report.
  1. Criticism is that it can delay report of election results and other shareholder action by as much as six months.
- B. Proposed change: Adds a new Item 5.07 to Current Report on Form 8-K to require disclosure of shareholder meeting results (for both annual and special meetings) within four business days after the date on which the meeting ends.
  1. For contested election of directors, the results might not be available within four business days – the new rule includes an instruction to file the Form 8-K with preliminary voting results within four business days after the preliminary voting results are determined, and file an amended Form 8-K when the final voting results are certified.

#### **IV. Proxy Solicitation Process by Non-Management Soliciting Persons**

- A. Proposed rules are designed to address uncertainties and inconsistencies with use or application of existing Exchange Act Rules 14a-2(b)(1), 14a-4(d)(4), 14a-4(e), and 14a-12(a)(1)(i) as follows:
1. an unmarked copy of management’s proxy card that is requested to be returned directly to management is not a “form of revocation” under Rule 14a-2(b)(1) so that a person who furnishes such a duplicate proxy card is not disqualified from relying on the exemption provided by that rule;
  2. a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited for Rule 14a-2(b)(1)(ix) to disqualify the person from relying on the Rule 14a-2(b)(1) exemption;
  3. a person soliciting in support of nominees who, if elected, would constitute a minority of the board may seek authority to vote for another soliciting person’s nominees in addition to or instead of the issuer’s nominees to round out its short slate consistent with Rule 14a-4(d)(4)’s limitations on proxy authority;
  4. the “reasonable specified conditions” under which the shares represented by a proxy will not be voted under Rule 14a-4(e) must be objectively determinable; and
  5. the participant information required by Rule 14a-12(a)(1)(i) must be filed under cover of Schedule 14A in a proxy statement or other soliciting materials no later than the time the first soliciting communication is made.
- B. Rule 14a-2(b)(1)
1. This rule exempts a shareholder or other non-management person from the disclosure, filing and other proxy solicitation requirements of these rules if the person is (a) not seeking proxy authority and (b) does not have a substantial interest in the transaction.
  2. The proposed amendment would clarify that, in the SEC’s view, if such person sends a copy of management’s proxy, unmarked, and asks the shareholder to submit that proxy to the company with the proxy completed in a manner proposed by such person, that such action is not soliciting a “form of revocation” making the exemption unavailable, even if the effect of such communication is an actual revocation of a prior proxy submitted to the company.

C. Rule 14a-2(b)(1)(ix)

1. This rule provides that the Rule 14a-2(b)(1) exemption is not available to “[a]ny person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person’s employment with the registrant.”
2. The proposed amendment would clarify that the “substantial interest” test is **not** narrowly applied only in situations where the soliciting person is a member of the class of securities being solicited, and such interest relates to that holding – the Commission’s view is that the substantial interest test is broader and relates to having an interest in the matter, not just in being a shareholder of that class.

D. Rule 14a-4(d)(4)

1. This rule provides, to non-management soliciting persons who are seeking minority board representation, an exemption from the Rule 14a-4(d)(1) requirement that any director nominee for whom votes are solicited must have consented to be named in the soliciting person’s proxy statement. It is commonly used in the “short slate” setting to allow the soliciting person to round out his, her or its short slate with nominees named in management’s proxy statement.
2. The proposed amendment would expand the exemption to allow such non-management soliciting persons to round out his, her or its short slate with other nominees named in either management’s proxy statement, or in a proxy statement submitted by another non-management person.
  - a. The exemption is not available in a change in control context (no change from current).
  - b. The amended exemption would not be available for use for nominees in another soliciting person’s proxy statement if there is any relationship between the non-management soliciting persons, or they are acting together. In such situations, the Section 13 rules would apply.
3. The non-management soliciting person would be required to explicitly certify in his, her or its proxy statement that it is not a participant in any non-management person’s solicitation (to guard against application of Instruction 3(a)(vi) of Schedule 14A).

E. Rule 14a-4(e)

1. This rule provides certainty to the solicited shareholder that if he, she or it gives a proxy to the soliciting person, that soliciting person will vote the shares as directed, subject only to “reasonable specified conditions” in which the shares would not be voted.
2. The amendment provides that such “reasonable specified conditions” must be objectively determinable, i.e., cannot be subjective and cannot rise to the level of granting any discretionary authority to the soliciting person not to vote the shares.

F. Rule 14a-12(a)(1)(i)

1. This rule allows a soliciting person to make a solicitation before furnishing a proxy statement if, among other things, the written communication contains information about the identity and interests of the person(s) participating in the solicitation. The participant identifying information can be provided directly in the written communication or by use of a legend telling shareholders where they can obtain the information.
2. The proposed amendment clarifies that if the legend approach is used, the required soliciting person participant information must be available and filed as Schedule 14A soliciting material by the first time the written communication is used – it cannot be provided later.

**V. Transition**

- A. The Commission proposes that these disclosure changes will be applicable in the 2010 proxy season.