



JONES DAY
COMMENTARY

SEC APPROVES ENHANCED PROXY DISCLOSURE RULES

Yesterday, the Securities and Exchange Commission, by a 4–1 vote, approved rule amendments that will require enhanced disclosure in proxy statements related to risk oversight, corporate governance, and executive compensation. These amendments were proposed by the Commission in July 2009¹ and will become effective on February 28, 2010.² Certain proposed amendments included in the proposing release related to proxy solicitations were deferred until the Commission considers the proposed proxy

access rules in 2010.³ The final rules include some significant changes in response to more than 130 comment letters received by the Commission. A summary of the adopted rules, based on the Commission's adopting release and open meeting, is set forth below:

COMPENSATION RISK ANALYSIS

The adopted rules will require companies to include a discussion of any compensation policies and practices for employees generally, including those not applicable to named executive officers, in circumstances where the risks arising from the policies are reasonably likely to have a material adverse effect on the company. This reflects a higher threshold than was originally proposed by the Commission. The adopted rules also set forth illustrative examples of

1 For more information regarding the proposed amendments, see the *Jones Day Alert* "SEC Approves Amendment to Eliminate Discretionary Voting by Brokers in Uncontested Elections of Directors and Proposes New Disclosure Rules," July 2009, available at http://www.jonesday.com/sec_approves_amendment/, as well as the *Jones Day Commentary* "Proposed Changes to Proxy Disclosure Regarding Executive Compensation and Corporate Governance," August 2009, available at <http://www.jonesday.com/proposedchanges/>.

2 While it is not clear in all circumstances, we expect that the new rules will apply to the next proxy statements by companies with a December 31, 2009, fiscal year end. In some circumstances, the new rules may apply to proxy statements filed by companies with a fiscal year ending before that date.

3 For more information about the Commission's proposals regarding proxy access, see the *Jones Day Commentary* "SEC Proposes New Rules Facilitating Shareholder Nominations of Directors," June 2009, available at http://www.jonesday.com/sec_proposes_new_rules/.

circumstances where a company's compensation policies and practices may trigger enhanced disclosure, as well as examples of issues that would be appropriate for a company to address in circumstances where the company determines its compensation policies or practices are reasonably likely to have a material adverse effect on the company. This disclosure requirement will not be a part of the CD&A and will not apply to smaller reporting companies.

COMPENSATION CONSULTANTS

Companies will be required to provide enhanced disclosure related to any consultant that provides both executive compensation and additional services if the fees for additional services exceeded \$120,000 during the company's last completed fiscal year. The enhanced disclosure must address the aggregate fees paid to the consultant and its affiliates for executive and director compensation services as well as the aggregate fees paid for additional services. If the consultant was engaged by the compensation committee, the company must also disclose whether management made or recommended the decision to engage the consultant or its affiliates for additional services, and whether the board or compensation committee approved the additional services. The new rules include an exception if the executive and director compensation services are limited to broad-based plans or providing general information, such as surveys, that is not tailored for the company or is based on parameters that are not developed by the consultant and about which the consultant does not provide advice.

REPORTING OF OPTIONS AND OTHER EQUITY AWARDS

Reporting of compensation awarded during the year related to stock and option awards in the Summary Compensation and Director Compensation Tables will now be based on the aggregate grant date fair value of the awards under FASB ASC Topic 718 (formerly FAS 123R). The prior rule required

disclosure based on the annual amount expensed under FASB ASC Topic 718. Companies with fiscal years ending on or after December 20, 2009, will also be required to recompute amounts included in the Summary Compensation Table for prior years based on the new standard. For performance-based awards, the amount reported will be based on the grant date estimate of compensation cost to be recognized over the service period, excluding the effect of forfeitures, and a footnote disclosure of the maximum value of the award will be required in the Summary Compensation and Director Compensation Tables.

DIRECTOR QUALIFICATIONS

The new rules require more detailed disclosure of a nominee or incumbent director's specific experience, qualifications, attributes, or skills that led the board to conclude that the nominee or incumbent director should be a member of the board, as well as any public company directorships held by the nominee or incumbent director during the past five years. In addition, the types of legal proceedings involving directors, executive officers, and nominees that must be disclosed have been expanded, and the required look-back period for disclosure of legal proceedings has been extended from five years to 10 years.

DIVERSITY DISCLOSURE

The Commission also approved disclosure requirements related to board diversity. The adopted rules do not provide a definition of "diversity" but rather rely on companies to make the determination. The new rules require a discussion of whether the nominating committee or board considers diversity in identifying director nominees and, if so, how diversity is considered. If the nominating committee or board has adopted a diversity policy, the new rules require a discussion of how the nominating committee or board implements and assesses the effectiveness of its diversity policy.

LEADERSHIP STRUCTURE

Companies are now required to disclose their board leadership structure and explain the reasoning behind that structure. Specifically, the rules require disclosure of whether and why a company combines or splits the chairman and CEO positions, the reasons why a company believes its board leadership structure is the most appropriate for the company, and whether the board of directors has an independent lead director and, if so, the role of the independent lead director.

RISK OVERSIGHT

The rules require a discussion of the manner in which a company's board of directors or a committee oversees and monitors risk. Companies must disclose whether the entire board or a designated committee monitors risk and, if so, how this monitoring is conducted, as well as the effect that monitoring has on the board's leadership structure.

VOTING RESULTS

Companies are now required to disclose the results of any shareholder vote on Form 8-K within four business days after the meeting. Previously, the disclosure was required in a company's Form 10-K or Form 10-Q for the period in which the vote occurred.

WHAT TO DO NOW

Companies should communicate the new rules to the board, and in particular the compensation committee, so that directors are prepared to consider these rules in making compensation and other decisions. Companies should also review their disclosure controls and procedures, including updating D&O questionnaires, and board policies in the context of these new disclosure requirements. In addition, those responsible for preparing proxy disclosure should budget additional time to address the new disclosure requirements.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Thomas C. Daniels
+1.216.586.7017
[tcdaniels@jonesday.com](mailto:tcDaniels@jonesday.com)

Charles T. Haag
+1.214.969.5148
chaag@jonesday.com

Christopher M. Kelly
+1.216.586.1238
+1.212.326.3438
ckelly@jonesday.com

Joel T. May
+1.312.269.4307
jtmay@jonesday.com

Timothy J. Melton
+1.312.269.4154
tmelton@jonesday.com

James E. O'Bannon
+1.214.969.3766
jeobannon@jonesday.com

Manan D. Shah
+1.212.326.3986
mdshah@jonesday.com

Lizanne Thomas
+1.404.581.8411
lthomas@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.