

# SEC Expands Required Compensation and Corporate Governance Disclosures

On December 16, 2009, the Securities and Exchange Commission (SEC) adopted new rules to expand the required disclosures in proxy statements regarding compensation and corporate governance and to require prompt reporting of annual meeting results in a Form 8 K filing. The SEC issued the text of the new rules and a 129-page adopting release on the same day the rules were adopted.

The new rules are effective February 28, 2010. The SEC's release does not provide much detail regarding how this effective date will be applied for the upcoming 2010 proxy season. Presumably the new rules will apply based on when a proxy statement is filed rather than when the meeting is held, but the SEC release did not address that point. Also uncertain is whether the filing of a preliminary proxy statement prior to the effective date for the new rules will mean that the new rules do not apply, even if the definitive proxy statement is filed after the effective date. Hopefully the SEC will provide further guidance before the start of the 2010 proxy season.

## Expanded Proxy Statement Disclosures

The SEC adopted the following changes to compensation and corporate governance disclosures in proxy statements:

- **Risk Disclosure.** The new rules require a company to provide narrative disclosure about how its compensation policies and practice relate to risk management, if such compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. The rule requires a company to analyze its compensation policies and practices for all employees generally, including employees who are not executive officers. The final rules only require disclosure if the company determines that its compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. Because this disclosure is not limited to the named executive officers on the summary compensation table, the SEC decided that the disclosure should not appear in the Compensation Disclosure and Analysis (CD&A) section, but instead in a separate section. The final rule contains a number of examples of issues that may need to be addressed in the risk disclosure. This risk disclosure is not required for smaller

### POSTED:

Dec 17, 2009

### RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

### RELATED PEOPLE:

[Benjamin G. Lombard](#)

<https://www.reinhartlaw.com/people/benjamin-lombard>

reporting companies.

- **Disclosure of Stock Awards on Summary Compensation Table.** The new rules revise the disclosure of stock awards on the Summary Compensation Table to be based on the aggregate grant date fair value of awards made during each fiscal year covered by the table. This would replace the current disclosure of the dollar amount recognized for financial reporting purposes for the fiscal year in accordance with FAS 123R (now codified in FASB Accounting Standards Codification Topic 718), which itself was a controversial change made by the SEC in December 2006. The SEC has recognized that the current approach, which aggregates the annual cost of prior awards made over a period of a number of years, does not correlate to the compensation decisions made during the fiscal years covered by the table. The new approach will reflect the cost to the company (and indirectly the benefit to the executive) of the awards granted during the fiscal years covered by the table. The SEC also added a note to clarify that the amount in the Summary Compensation Table for performance awards would be based on the probable outcome of the performance conditions, with footnote disclosure of the maximum level.
- **Enhanced Director Disclosure.** Proxy statements for annual meetings of shareholders will need to include disclosure detailing for each director and nominee for director the particular experience, qualifications, attributes or skills that qualify that person to serve as a director of the company. In addition, disclosure for each director must include other public company directorships for the past five years (rather than only current directorships) and the disclosure of legal proceedings for directors has been expanded from five years to ten years and now includes a number of additional types of proceedings including proceedings relating to mail or wire fraud, proceedings relating to violations of federal or state securities, commodities, banking or insurance laws and regulations, and disciplinary actions imposed by a stock exchange or other self-regulatory organization. Settlements of private civil proceedings do not need to be disclosed.
- **Board Diversity Disclosure.** The discussion required in proxy statements relating to the nominating committee will need to include disclosure of whether, and if so how, the nominating committee considers diversity in identifying nominees for director. Companies are allowed to define diversity flexibly in ways that they consider appropriate.
- **New Company Leadership Disclosure.** Proxy statements for annual meetings

of shareholders will need to include disclosure of the Board's leadership structure and why the Board has determined its leadership structure is appropriate given the specific characteristics and circumstances of the company. For example, the company would need to disclose whether and why it has chosen to combine or separate the positions of chief executive officer and chairman of the Board. Additional disclosure would also be required regarding the Board's role in the company's risk oversight process.

- **New Disclosure Regarding Compensation Consultants.** The SEC adopted new disclosure requirements relating to compensation consultants. Disclosure will be required in either of the following circumstances:
  1. If the compensation committee has engaged a compensation consultant and such consultant or any of its affiliates provides other compensation consulting services to the company, the aggregate fees paid to the consultant for services to the compensation committee and the aggregate fees paid to the consultant for the other compensation consulting services must be disclosed, if such fees for other compensation consulting services exceeded \$120,000 for the company's fiscal year. In addition, if the fees must be disclosed, there must also be disclosure of whether the decision to engage the consultant for nonexecutive compensation services was made, or recommended, by management, and whether the compensation committee approved such other services.
  2. Disclosure as in (1) above is also required if the compensation committee does not have a compensation consultant, but management received both executive compensation consulting services and non-executive compensation consulting services from a consultant and its affiliates, and the fees for the non-executive compensation consulting services exceeded \$120,000 for the company's fiscal year. Disclosure is not required if the compensation committee has engaged a consultant and management engages a different compensation consultant, including where management's compensation consultant also provides additional non-executive compensation consulting services. The disclosure requirement also does not cover consulting services relating to broad-based plans and provision of survey information that is not customized for a particular company or is customized based on parameters that are not developed by the consultant.



## Reporting of Voting Results on Form 8-K

Currently, voting results of shareholder meetings are reported in the Form 10-Q report for the quarter, in which the meeting occurs (or Form 10-K report in the case of a shareholder meeting held in the fourth quarter of the fiscal year). This can result in a period of over 90- days from the date of the meeting until the results are reported (e.g., the results from a meeting held in early April may not need to be reported until a Form 10-Q is filed in late July or early August for the quarter ending June 30). The SEC has amended Form 8-K to add a new Item 5.07 for the disclosure of voting results from shareholder meetings. The Form 8-K will be due four business days after the date of the meeting and replaces the previous disclosure requirement in Form 10-Q and Form 10-K. If final voting results are not available, the company can report preliminary voting results and file an amended report within four business days after the final results are known.

*These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.*