PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING
Unit 3601, Fortune Plaza Office Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2536 9933

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON
Brandywine Building
1000 N. West Street, Suite 1200
Wilmington, DC 19801
+1 302 655 4410

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SEC Adopts Changes to Corporate Governance Disclosure Requirements

On December 16, 2009, the SEC amended its rules to enhance disclosure regarding executive and director compensation, director and director nominee qualifications, certain corporate governance matters and the results of shareholder votes. Although the original proposal included certain revisions to the SEC's rules governing proxy solicitations, those proposals have been deferred so that they may be considered at the same time as the SEC's proxy access proposal, which will likely be taken up by the SEC early in 2010.

We highlight below the new requirements that relate to board structure, director and director nominee disclosure and other corporate governance issues. Our alert highlighting the changes related to executive and director compensation disclosure will be distributed separately and will also be available at www.paulweiss.com.

In summary, the corporate governance disclosure amendments will require:

- enhanced disclosure of a director or director nominee's background, including disclosure of the specific experience, qualifications, attributes or skills that led the board to the conclusion that the person should serve as a director;
- disclosure of public company directorships held during the past five years;
- disclosure of whether the board has a policy regarding the consideration of diversity in identifying director nominees, how the policy is implemented and how the board assesses the effectiveness of the policy;
- disclosure of legal proceedings involving directors, director nominees and executive officers during a 10-year period and under a more extensive definition of legal proceedings;
- disclosure about the company's board leadership structure (such as whether the same person serves as CEO and board chair) and why such structure is appropriate to the particular company;
- disclosure about the board's role in the oversight of risk;
- under certain circumstances, disclosure of the fees paid to compensation consultants and their affiliates for executive compensation consulting and other additional services; and
- disclosure of the results of shareholder votes on Form 8-K.

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Effective Date

The effective date for the new rules is February 28, 2010 (the "Effective Date"). The SEC recently released Compliance and Disclosure Interpretations that set forth interpretations of how the Effective Date applies to SEC filings at or around the time of the Effective Date. See http://www.sec.gov/divisions/corpfin/guidance/pdetinterp.htm.

A company with a 2009 fiscal year that ends on or after December 20, 2009 must comply with the new disclosure rules for Form 10-Ks and proxy statements filed on or after the Effective Date. If the company is required to file a preliminary proxy statement and expects to file its definitive proxy statement on or after the Effective Date, the preliminary proxy statement must comply with the new disclosure rules, even if the preliminary proxy statement is filed before the Effective Date. If the company files its 2009 Form 10-K before the Effective Date and its proxy statement on or after the Effective Date, the proxy statement must also comply with the new disclosure rules.

A company with a 2009 fiscal year that ends before December 20, 2009 is not required to comply with the new disclosure rules in respect of its 2009 Form 10-K or proxy statement, even if either is filed on or after the Effective Date. A company that is not required to comply with the new rules for its 2009 Form 10-K and proxy statement may voluntarily comply, but if it complies with the Summary Compensation Table and Director Compensation Table amendments, it must comply with all of the other amendments to Regulation S-K. The interpretations specify that a company may voluntarily comply with the new disclosure requirements (other than the changes to the Summary Compensation Table and Director Compensation Table amendments) without having to comply with all of the other new disclosure rules. Similarly, registration statements for a reporting company with a 2009 fiscal year that ends before December 20, 2009 will not need to comply with the new disclosure rules.

A new registrant that first files a registration statement on or after December 20, 2009 must comply with the new disclosure rules for any registration statement to be declared effective on or after the Effective Date.

The new Form 8-K filing requirement applies only to shareholder meetings that take place on or after the Effective Date.

Disclosure with Respect to Directors and Nominees

To ensure that shareholders are provided with the most relevant information to make informed voting decisions and to help give clarity to investors as to how particular individuals came to be nominated, the SEC approved amendments to Item 401 of Regulation S-K to require companies to provide enhanced disclosure about their directors and director nominees.

Experience, Qualifications, Attributes and Skills

The amendments require disclosure for each director and director nominee of the specific experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director for the company at the time that the disclosure is made, including information about the person's particular areas of expertise or other relevant qualifications, if material. This disclosure is required for all nominees (including those put forward by proponents other than the company) and for all directors regardless of whether directors are then up for re-election, and is to be made annually.

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The disclosure need not address experience, qualifications, attributes or skills to serve on a board committee (as had been proposed). However, if an individual was chosen as a director or nominee because of a particular qualification, attribute or experience related to a specific committee, this must be disclosed.

The new rules do not specify what information is to be disclosed. As part of this approach, the SEC deleted references in the final rules to "risk assessment skills." However, if particular skills, such as risk assessment skills or financial reporting expertise, were part of the broader experience, qualifications, skills or attributes that led the board or a proponent to conclude that an individual should serve as a director, this should be disclosed.

The SEC declined to eliminate the requirements of Item 407 of Regulation S-K that address the minimum qualifications that a nominating committee believes must be met by nominees.

Directorships

Under the new rules, for each director or nominee, any public company and registered investment company directorships held during the past five years must be disclosed. This expands the current requirement to disclose current positions only.

Diversity

The SEC also adopted a new requirement under Item 407 of Regulation S-K for companies to disclose whether, and if so, how, a nominating committee considers diversity in identifying director nominees. In addition, if the nominating committee (or the full board) has a policy with regard to the consideration of diversity in identifying director nominees, disclosure will be required as to how the policy is implemented and how the nominating committee (or the full board) assesses the effectiveness of such policy.

In recognition of the fact that companies may have differing definitions of diversity, the SEC did not provide a definition or guidance on what it considers "diversity" for the purposes of this requirement. However, the SEC does note that some companies may conceptualize diversity to include differences of viewpoint, professional experience, education, skill and other qualities or attributes, while other companies may use concepts such as race, gender or national origin.

Legal Proceedings

The SEC has expanded the required period of disclosure for legal proceedings involving directors, director nominees and executive officers from five to 10 years and expanded the definition of "legal proceedings" to include any judicial or administrative proceedings resulting from involvement in (i) mail and wire fraud or fraud in connection with any business entity, (ii) violations of federal or state banking or insurance laws and regulations and any settlements with respect to such actions and (iii) any disciplinary actions or sanctions imposed by stock, commodities or derivative exchanges or other self regulatory bodies. Pursuant to an instruction in the new rule, settlements of civil proceedings among private litigants do not need to be disclosed.

Board Leadership Structure and Role in Risk Oversight

The SEC adopted amendments to Item 407 of Regulation S-K to require companies to disclose their board leadership structures and their boards' role in the oversight of risk.

With respect to leadership structure, the amendments require companies:

- to briefly describe the leadership structure of their board, such as whether the same person serves as both CEO and board chair or whether two persons serve in those positions separately, including why the company believes this structure is the most appropriate structure for the company at the time of filing; and
- if the company combines the CEO and board chair positions, to disclose whether the company has a lead independent director and what specific role the lead independent director plays in the leadership of the board.

In the adopting release, the SEC reiterates that these amendments are not meant to influence a company's board leadership structure, but are rather to increase transparency of how the board functions.

The SEC has also added a requirement that companies describe the role of the board in the oversight of risk. Similar to disclosures about the leadership structure of a company, disclosure regarding board involvement in risk oversight is intended to provide investors with information as to how a company perceives the role of the board and the relationship between senior management and the board in managing the material risks faced by the company. Where relevant, companies may wish to address whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board or to a committee or how the board or committee otherwise receives information from such individuals.

Compensation Consultants

To increase the transparency of potential conflicts of interest involving compensation consultants, the SEC adopted amendments to Item 407 of Regulation S-K to enhance the disclosure regarding fees paid to consultants (or their affiliates) who provide executive and director compensation consulting services as well as other additional services to the company.

Under the new rules, if a company's board or compensation committee engages a compensation consultant to provide advise or recommendations on the amount or form of executive and director compensation and such consultant or its affiliates provide other additional services to the company and the fees for such additional services exceed $120,000 during the fiscal year, then the company must disclose the aggregate fees paid for the executive and director compensation consulting services and the aggregate fees paid for such additional services. The company must also disclose whether management recommended the decision to engage the compensation consultant for additional services and whether the compensation committee or the board had approved the additional services provided.

Likewise, if a consultant provides executive compensation consulting services and additional services to the company and the fees for such additional services exceed $120,000 during the fiscal year, the company is required to disclose the same fee information as discussed above.

As adopted, such additional services do not include consulting on any broad-based employee benefit plans that does not discriminate in favor of executive officers or directors and that is generally available to all salaried employees or providing information that is not customized for a particular company.

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Reporting of Voting Results on Form 8-K

In order to effect more timely disclosure of voting results from shareholders meetings, the SEC also transferred the requirement to disclose voting results to Form 8-K. Under new Item 5.07 of Form 8-K, companies must disclose the results of a shareholder vote and certain other specified information within four business days after the end of the meeting at which the vote was held. If a final result is not available at the time of filing, the company may disclose preliminary vote results and file an amended Form 8-K within four business days after obtaining the final results. The corresponding disclosures in Form 10-K and 10-Q are no longer required.

Implications

Although these amendments will not be effective until late February, given the relatively short timeframe, it is important that companies that have not already done so (based on the remarks of the SEC chairman last summer and the proposing release issued in July) consider the scope of the additional information that will now be required. In some cases, the information will be purely factual and easy to gather through modifications to annual director questionnaires. In other cases, directors will need to think through and discuss some of the more philosophical topics covered by new disclosure rules whose ultimate purpose is to better enable investors to evaluate the leadership of public companies.

These amendments come at a time of increased shareholder activism in respect of corporate governance matters and Congressional focus on a range of corporate governance matters, including say on pay, shareholder access to the proxy process, annual election of directors and majority vote requirements. Although the SEC does not have the power to impose substantive corporate governance requirements, and the SEC has in fact made a point of disclaiming any intention of influencing board decisions, the disclosure requirements do impose a burden on companies to justify board determinations in terms of who has been, or is being, nominated to serve as a director, the leadership structure adopted by the company and how the risk oversight function is handled at the board level.

To the extent that a board wishes to make any changes in light of the upcoming disclosure requirements that would be effective in time for its 2010 proxy statement, it will need to take action promptly.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman (+44-207-367-1601), Raphael M. Russo (212-373-3309), Lawrence I. Witdorchic (212-373-3237) or Frances F. Mi (212- 373-3185).