

**SEC IMPOSES ADDITIONAL CORPORATE GOVERNANCE
AND COMPENSATION DISCLOSURE REQUIREMENTS**

The Securities and Exchange Commission (the “SEC”) recently approved final rules imposing additional disclosure requirements in connection with the upcoming 2010 proxy season.¹ The amendments focus on corporate governance matters, such as director and nominee qualifications and legal proceedings, diversity and director nominations, board leadership structure, the board’s role in risk oversight and accelerated disclosure of shareholder voting results. The amendments also impose additional compensation-related disclosure requirements, including disclosure regarding policies that present material risks to the company, equity awards and compensation consultants. For a summary of these compensation disclosure requirements, please see our previous client memorandum, “SEC Finalizes Amendments to Executive Compensation Disclosure Rules.”² Companies should ensure that the director and officer questionnaires they use in connection with preparing their annual reports and proxy statements are updated to reflect these new requirements.

The effective date of these enhanced disclosure requirements is February 28, 2010, although early voluntary compliance is encouraged. If a company expects to file its definitive proxy statement on or after February 28, 2010, it must comply with these requirements in its preliminary proxy statement, even if the preliminary proxy statement is filed prior to such date. For a summary of the recent SEC Compliance and Disclosure Interpretations regarding these transition rules, please see our previous client memorandum, “SEC Issues Guidance on the Effective Dates of the New Executive Compensation Disclosure Rules.”³

Director and Nominee Background and Qualifications

Revised Item 401 of Regulation S-K requires the annual disclosure, for each director and nominee for director, of the specific experience, qualifications, attributes or skills that led the registrant’s board to conclude that the individual should serve on the board of directors. While the SEC did not enumerate particular skills that should be considered in reaching this conclusion, to the extent specific skills (such as risk assessment or financial reporting expertise) factored into the decision, such skills should be disclosed. Disclosure is required even for directors whose seats are not up for re-election in a particular year, but, unlike the initially proposed rules, the

¹ See SEC Release Nos. 33-9089 and 34-61175 available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

² This client memorandum is available at http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/3166/SEC%20Finalizes%20Amendments%20To%20Executive%20Compensation%20Rules.pdf.

³ This client memorandum is available at http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/3178/SEC%20Issues%20Guidance%20On%20The%20Effective%20Dates.pdf.

final rules do not require disclosure of factors considered regarding board committee qualifications. Disclosure of specific minimum qualifications used by the nominating committee in considering board nominees continues to be required under Item 407(c)(2)(v) under Regulation S-K. The amended rules require disclosure of any directorships held by a director or nominee within the previous *five* years at either a public company or a registered investment company, in contrast to the current rules, which require such disclosure of only currently held directorships.

Directors, Officers and Nominees - Legal Matters

The amendments to Item 401 also expand the categories of legal proceedings involving directors, nominees and executive officers that a registrant must disclose, while extending the time for which disclosure is required from five to ten years. Amended Item 401 requires a company to disclose judicial or administrative orders, judgments or findings relating to an alleged violation of federal or state securities, commodities, banking or insurance laws and regulations or laws or regulations prohibiting mail, wire or other fraud. Registrants must also disclose any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization. An instruction to the rule clarifies that settlements of civil proceedings among private litigants are not required to be disclosed pursuant to this Item.

- In the adopting release, the SEC noted that Item 401 still contains the qualification that information pertaining to legal proceedings involving directors and director nominees need *not* be disclosed if such information is not material to an evaluation of the ability or integrity of the director or nominee.

Diversity and the Director Nomination Process

Amended Item 407 requires that a company disclose whether and how its nominating committee considers diversity in identifying and evaluating nominees for director, including shareholder nominees. If the nominating committee (or the board) has a policy regarding the consideration of diversity, the company must disclose how this policy is implemented and how the nominating committee (or the board) assesses the effectiveness of the policy. The SEC, however, did not define diversity, instead allowing registrants to craft their own definition as they deem appropriate. For example, as the adopting release states, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin.

Board Leadership Structure; Board Role in Risk Oversight

Under the amendments, registrants must disclose whether and why they have chosen to combine or separate the positions of principal executive officer and chairman of the board. If these positions have been combined, a company must disclose whether it has a lead independent director and what specific role such director plays in the board leadership. Amended Item 407

also requires the disclosure of why the company believes this structure is appropriate, taking into account the company's "specific characteristics or circumstances." Amended Item 407 further requires companies to describe the board's role in risk oversight, including how the board administers its oversight function and the effect this has on the board's leadership structure. Similar disclosure is required for investment companies regarding the chairman of the board and an "interested person" of the registrant as defined in the Investment Company Act.

- In imposing this new requirement -- and the related disclosure requirements as to how compensation practices impact risk -- the SEC is recognizing that risk oversight is a key function of the board. Disclosure of the board's oversight of risk, whether credit risk, liquidity risk or operational risk, is thus important information for investors to understand.
- Here also, the SEC notes that this disclosure requirement is designed to give companies the flexibility to describe how the board administers its risk oversight function, whether through the whole board or through a separate risk committee or the audit committee. The SEC suggests that, where relevant, companies address whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from these individuals.

Reporting of Shareholder Voting Results

Finally, the SEC's amendments add new Item 5.07 to Form 8-K to require reporting entities to disclose the results of a shareholder vote within four business days after the shareholder meeting at which the vote took place, rather than on its next Form 10-Q and Form 10-K as currently required. If final results are not available by this deadline, preliminary results must be reported, with the final results reported on an amended Form 8-K within four business days after they are known. If only preliminary results are reported, appropriate cautionary disclosure should be included in the initial filing.

Related Changes to NYSE Listed Company Manual

These amendments to the disclosure requirements followed the SEC's approval in November 2009 of changes to the Listed Company Manual of the New York Stock Exchange (the "NYSE").⁴ These changes to the Listed Company Manual, which became effective on January 1, 2010, conform the disclosures required for NYSE-listed companies under Section 303A of the Listed Company Manual to Item 407 of Regulation S-K. These revisions eliminate parallel disclosure requirements regarding independent directors, require that listed-company CEOs

⁴ For the SEC order approving the changes, see [http://apps.nyse.com/commdata/pub19b4.nsf/docs/E8D7E6DFCFFCC4B98525767F0053EF9E/\\$FILE/NYSE-2009-89%20\(SEC%20%20Release%2034-61067\).pdf](http://apps.nyse.com/commdata/pub19b4.nsf/docs/E8D7E6DFCFFCC4B98525767F0053EF9E/$FILE/NYSE-2009-89%20(SEC%20%20Release%2034-61067).pdf).

notify the NYSE immediately after any executive officer becomes aware of *any* noncompliance with NYSE rules (*i.e.*, not only material noncompliance as under the previous rules), allow companies to have regular meetings of independent directors only (as opposed to the previous requirement for meetings of all non-management directors), require that NYSE-listed companies disclose in their proxy statements or annual reports a company website address for posting their board committee charters, ethics codes and other corporate governance guidelines and permit certain other disclosures to be made on a company's website (rather than in its proxy statement or annual report). The NYSE also updated the Listed Company Manual to require that companies disclose any waiver granted to an executive officer or director from its code of business conduct through either the filing of a Form 8-K, a press release or a website posting made within four business days of the waiver, similar to the timing requirement under the Form 8-K rules. The amended rules require foreign private issuers to disclose in their annual report on Form 20-F any significant differences in corporate governance practices from those required for domestic companies under the NYSE listing rules and also provide transition rules for foreign private issuers that no longer qualify as such.

* * * * *

If you have any questions regarding these new disclosure requirements, please contact David K. Boston (212-728-8625, dboston@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

January 13, 2010

Copyright © 2010 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.