

Akerman Practice Update

CORPORATE

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SEC Adopts Final Rules Amending Proxy Disclosure Rules

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On December 16, 2009, the Securities and Exchange Commission adopted final amendments to its proxy disclosure rules in the areas of executive compensation and corporate governance. The principal aspects of the amendments are summarized below.

The amended rules are effective February 28, 2010, for issuers with a fiscal year ending on or after December 20, 2009, and will apply to Form 10-Ks and proxy statements filed after the effective date. If a preliminary proxy statement is required to be filed (e.g., because of the inclusion of non-routine business in an annual meeting proxy statement), and the final proxy statement is expected to be filed after February 28, 2010, the preliminary proxy statement must comply with the new rules even if it is filed before February 28, 2010.

Enhanced Proxy Disclosure Requirements

Compensation Disclosure

Under the final rules, if an issuer's compensation practices create risks that are "reasonably likely to have a material adverse effect" on the issuer, the issuer will be required to discuss its policies and practices for compensating employees as they relate to risk management practices and risk taking incentives. In response to comments on the proposed rules issued in July 2009, the Commission has determined that this disclosure, which covers both executive and non-executive employees, will be presented outside the issuer's Compensation Discussion and Analysis. The amended rules recognize that situations requiring disclosure will vary from issuer to issuer but identify, as circumstances that may trigger disclosure,

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compensation policies and practices:

- at a business unit of the issuer that carries a significant portion of the issuer's risk profile;
- at a business unit with compensation structured significantly differently than other units within the issuer;
- at a business unit that is significantly more profitable than others within the issuer;
- at a business unit where compensation expense is a significant percentage of the unit's revenues; and
- that vary significantly from the overall risk and reward structure of the issuer, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the issuer from the task extend over a significantly longer period of time.

If an issuer determines that its compensation practices do not create risks that are reasonably likely to have a material adverse effect on the issuer, and that disclosure is therefore not required, the issuer is not required to affirmatively state that it has made such a determination. The amended rules include examples of topics that an issuer may need to address if the issuer determines that disclosure is required, including:

- the general design philosophy of the issuer's compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices, as such policies and practices relate to or affect risk taking by employees on behalf of the issuer, and the manner of their implementation;
- the issuer's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;
- how the issuer's compensation policies and practices 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;
- the issuer's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;
- material adjustments the issuer has made to its compensation policies and practices as a result of changes in its risk profile; and
- the extent to which the issuer monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees.

The final rules also modify the reporting of stock and option awards, consistent with the July 2009 proposal, so that the grant date fair value of such awards determined in accordance with FASB ASC Topic 718 (formerly FAS 123R), as opposed to the current disclosure based on the expense recorded in the financial statements, will be required in the Summary Compensation Table and the Director Compensation Table. This change in methodology will necessarily be taken into account for purposes of determining the executive officers required to be included in an issuer's Summary Compensation Table and will require issuers to recalculate the equity award and total compensation amounts shown in the Summary Compensation Table for prior years with respect to those executive officers who are included in the table and were also included in prior filings. If an executive officer is included in the Summary Compensation Table with respect to 2009 and was previously included in the Summary Compensation Table for 2007 but not 2008, the executive officer's recalculated equity award and total compensation amounts for 2008 will have to be included in the Summary Compensation Table included in the 2010 proxy. However, issuers are not required to amend prior year Form 10-Ks or proxies or, except as described in the previous sentence, to revisit determinations of the executive officers who were required to be included in the Summary Compensation Table for prior years.

The final rules include an instruction for performance-based awards requiring reporting of accounting values based on the "probable outcome" of the performance condition, rather than the maximum value as proposed in the July 2009 release. However, the maximum value based on the highest level of performance will be required to be disclosed in a footnote. The Commission believes this reporting methodology will better reflect how compensation committees take performance-contingent vesting conditions into account in granting performance-based awards.

Compensation Consultants

If a compensation consultant played a role in determining the amount or form of compensation for an issuer's executives or directors (other than with respect to broad-based plans or by providing information, without any accompanying advice, that is either non-customized or customized based on parameters not developed by the consultant), the issuer will be required to identify the compensation consultant, state whether the consultant was engaged directly by the compensation committee and describe the scope of the consultant's assignment and the material instructions given to the consultant. If the consultant or its affiliates also provided other services to the issuer for which aggregate compensation exceeded \$120,000 during the fiscal year, then the issuer will be

required to disclose:

- the aggregate fees received by the consultant and its affiliates for executive- and director-compensation-related services;
- the aggregate fees received by the consultant and its affiliates for such other services (but not the nature or extent of the other services, as proposed in the July 2009 release); and
- whether the decision to engage the compensation consultant for such other services was recommended by management and whether the issuer's compensation committee or Board approved the consultant's provision of such other services.

Director Qualifications and Experience

The amended rules require enhanced disclosure (essentially as proposed in July 2009) regarding the qualifications and experience of directors and director nominees and a discussion of the specific experiences and skills relevant to service as a director. Public company directorships held during the previous five years (rather than only currently held directorships as required under current rules) and involvement in certain legal proceedings during the previous 10 years (rather than the previous five years as required under current rules) will be required. The revisions are intended to provide investors with more information regarding whether a particular director and the entire Board composition is an appropriate choice for the issuer. The Commission did not adopt a proposal to disclose qualifications for Board committee membership, but if a director nominee is selected for Board membership because of a particular qualification, attribute or skill relevant to service on a particular committee, that information should be disclosed as part of the nominee's qualifications to serve on the Board.

Board Diversity

The amended rules will require disclosure regarding whether and how a Board or nominating committee considers diversity in the selection of Board nominees. "Diversity" is not defined in the rules, and the adopting release makes it clear that issuers may consider diversity from a variety of perspectives. If the Board or nominating committee has a diversity policy, disclosure is required as to how the policy is implemented and how the Board or nominating committee assesses the effectiveness of the policy.

Board Leadership Structure

The amended rules require disclosure of the issuer's Board leadership structure, including why that structure is the most appropriate for the company. The required

disclosure includes whether and why the principal executive officer and board chair positions are combined, and, if they are combined, whether the issuer has a lead independent director and a description of the role of the lead independent director.

The amended rules also require discussion of the Board's role in risk oversight, such as how this function is administered (e.g., through the Board as a whole or through a committee, such as the audit committee) and the effect this has on the Board's leadership structure. In the final rule release, the Commission reiterated its view that disclosure about the Board's role in overseeing the risk management process should give investors insight into how the issuer perceives the role of its Board and the relationship between the Board and management in managing risk.

Current Reporting of Voting Results

The adopting release also amended Form 8-K, substantially as proposed, to require that the results of any action taken at a shareholder meeting be reported within four business days from the end of the meeting (rather than in the issuer's next report on Form 10-K or 10-Q as is currently required). If voting results are not definitively determined at the end of the meeting, the issuer will be required to report the preliminary voting results within four business days after the end of the meeting and to file an amended report within four business days after the final voting results are known. Actions taken by written consent are deemed equivalent to actions taken at a meeting for purposes of the current reporting rules.

The summary set forth herein is intended to be general in nature and does not constitute legal advice with respect to any particular situation. No legal or business decision should be based solely on its contents. If you would like further information or help in assessing how the proposed rules might affect your company, please contact your principal lawyer at the firm or one of the Akerman shareholders listed below:

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