

LEGAL UPDATES

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What's New for the 2009 Proxy and Annual Report Season

As we begin 2009, public companies with December 31, 2008 year-ends should be planning their annual reports on Form 10-K and their proxy statements. Described below are some issues to consider when preparing these annual disclosures.

Risk Factors: The severe economic and market changes that have occurred over the last half of 2008 make it important for public companies to review the risk factors section of their annual reports on Form 10-K to determine whether existing risk factors should be expanded or changed, or if entirely new risk factors should be added to reflect current conditions. Possible risks to consider adding or updating include:

the negative effect of market and economic conditions on stock price, liquidity and financial condition;

the possibility of triggering an event of default or collateral call under a loan agreement;

the need to find new or additional sources of funding as a result of the credit crunch; and

the implications and uncertainties of increased government regulations.

Management's Discussion and Analysis: In addition, the impact of different economic and market conditions should be discussed in the Management's Discussion and Analysis section of Form 10-K. Topics that may need to be addressed in the context of MD&A include:

the extent to which the company's access to short term credit has been limited, and what alternatives are available to the company to obtain funds from other sources;

the extent to which the company's banking arrangements may be impacted by financial viability issues of its lender and consolidation in the banking industry;

whether the company's current lender has ceased lending to the company or otherwise changed its lending practices toward the company;

whether a material decline in revenues is expected from reduced orders, payment delays or other factors caused by economic problems of customers; and

the extent of exposures to institutions that have gone into bankruptcy or whose financial strength is in question.

Executive Compensation: Executive compensation continues to receive close attention from regulators and shareholders. To the extent that current market developments, such as requirements associated with funding received by a company under federal government bailout programs and/or falling stock prices, have influenced executive compensation, this should be addressed in compensation disclosures in upcoming proxy statements, particularly in the Compensation Discussion and Analysis section.

Director Independence Tests: The NYSE and NASDAQ have each increased their director compensation bright line independence tests set forth in Section 303A.02(b)(ii) of the NYSE Listed Company Manual and Rule 4200(a)(15)(B) of the NASDAQ Marketplace Rules, respectively. Previously, these rules barred a determination that a director was independent if the director or any immediate family member received, during any 12-month period within the last three years, more than \$100,000 in compensation from the listed company, other than director and board committee fees and pension or other forms of deferred compensation for prior service that is not contingent on continued service. This dollar threshold has been increased to \$120,000 so it is consistent with the threshold for related person transactions that need to be disclosed under Item 404 of Regulation S-K.

The NYSE also amended the auditor test set forth in Section 303A.02(b)(iii) of the NYSE Listed Company Manual as it applies to immediate family members of directors. Under the old rule, the bright line test barred a determination that a director was independent if the director had an immediate family member who was a current employee of the listed company's internal or external auditor, even if the family member has had no involvement with the listed company's audit. Under the new bright line rule, a director is barred from being considered independent as a result of an immediate family member's employment only if the immediate family member:

is a current partner of the listed company's internal or external auditor;

is a current employee of such a firm and personally works on the listed company's audit; or

was within the last three years a partner or employee of such firm and personally worked on the listed company's audit within that time.

This modification to the NYSE director independence test related to relationships with a listed company's internal or external auditor brings the NYSE independence requirement in closer alignment with the NASDAQ and AMEX tests for director independence.

As a result of these revisions, companies that use bright line tests of independence for directors should adopt corresponding amendments prior to making independence determinations so that they do not impose more stringent requirements than are necessary under NYSE and NASDAQ rules. Annual D&O questionnaires should also be updated to reflect the revised independence standards.

Audit Committee Report: The SEC has made a technical amendment to the requirements for the audit committee report that appears in proxy statements by updating the reference to the appropriate auditing standards. In accordance with amended Item 407(d)(3)(i) of Regulation S-K, the audit committee report must now refer to "applicable requirements for the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence." This new language replaces the previous reference to "Independence Standards Board Standard No. 1 (Independence Standards Board No. 1, Independence Discussions with Audit Committee), as adopted by the Public Company Accounting Oversight Board Rule 3600T." Companies should also review their audit committee charters to determine whether this revision is necessary within the language of their charter.

E-Proxy: For their 2009 annual meetings, reporting companies need to determine if they want to use the new method of Internet availability of proxy materials (called the "notice and access model" or e-proxy), the traditional method of mailing a complete set of proxy materials or some combination of the two. Regardless of which delivery method is selected, new rules requiring the posting of all public company proxy materials on the Internet became effective January 1, 2008 for all large accelerated filers and on January 1, 2009 for all other persons.

Under Rule 14a-16 under the Exchange Act, an issuer relying on the notice and access model for delivery of proxy materials must send to shareholders a Notice of Internet Availability of Proxy Materials (the "Notice") at least 40 calendar days in advance of the shareholder meeting (or the date that consents may be used to effect a corporate action). No other information may accompany the Notice except for the notice of a shareholders' meeting that is required under state law. A proxy card may only be sent to shareholders 10 or more calendar days after sending the Notice. If the proxy

statement and annual report do not accompany the proxy card, another copy of the Notice must accompany the proxy card. An issuer may use the notice and access model for delivery of proxy materials for some, all or none of its shareholders' meetings, but the notice and access model may not be used in connection with business combination transactions. Additionally, an issuer may use the new notice and access model for delivery of some proxy materials to some shareholders (such as small holders of less than a specified number of shares) but not to those with larger holdings, to reduce potential impacts on shareholder participation. All proxy materials to be furnished through the notice and access model, other than additional soliciting materials, must be posted on the Internet by the time the issuer sends the Notice to shareholders. Additional soliciting materials must be posted no later than the day on which those materials are first sent or given to shareholders.

The web site used to post proxy materials, whether maintained by the issuer or a third-party vendor, must not log, track or analyze data about viewers and users of the online documents. This means that the web site may not require "cookies" or any other software to be installed that might collect information about shareholders accessing the web site. Do not assume that internal web programmers, third-party hosting providers and web design consultants are aware of the new "notice and access" privacy requirements. It is recommended that issuers review the final online version of proxy documents and confirm that they are being hosted cookie-free.

Reliance solely on e-proxy for delivery may save printing costs, but it also accelerates the time frame for completing and posting the proxy materials. Thus, advance preparation for e-proxy solicitation is critical. Issuers should note that statistics have shown that e-proxy solicitation may lead to less participation by retail shareholders. If an issuer uses the traditional method and is a listed company subject to the U.S. proxy rules, it is no longer required under Rule 203.01 of the NYSE Listed Company Manual to post the undertaking on its website providing all holders the ability to receive a hard copy of the audited financial statements upon request or issue the press release stating that the filing is available and reiterating that all shareholders have the ability to receive a hard copy upon request.

If you have any questions about upcoming proxy statements or annual reports, please contact one of the your Husch Blackwell Sanders attorney.

Husch Blackwell Sanders LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.

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