LEGAL UPDATES PUBLISHED: JANUARY 27, 2010

SEC Expands Disclosure Requirements for Fund Proxy and Registration Statements

Professionals

STEVEN F. CARMAN
KANSAS CITY:
816.983.8153
STEVE.CARMAN@
HUSCHBLACKWELL.COM

DAVID E. GARDELS
OMAHA:
402.964.5027
DAVID.GARDELS@
HUSCHBLACKWELL.COM

KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

MARK D. WELKER
KANSAS CITY:
816.983.8148
MARK.WELKER@
HUSCHBLACKWELL.COM

On December 16, 2009, the Securities and Exchange Commission (SEC) adopted amendments to Schedule 14A and Forms N-1A, N-2 and N-3 that expand the current corporate governance disclosure requirements for fund proxy and registration statements. The new rules are effective February 28, 2010.

Changes Effected by the Final Amendments

The SEC's final amendments include the following modifications and additional disclosure requirements for management investment companies (Funds) that are registered under the Investment Company Act of 1940, as amended (the 1940 Act).

Additional Disclosure Describing Specific Qualifications of Directors, Nominees and Executive Officers

The amendments expand the director[1] and officer biographical information required to be disclosed in proxy statements and statements of additional information in the registration statements of Funds in the following respects:

requiring disclosure of the particular experience, qualifications, attributes or skills of each director and any director nominee that led the board to conclude that each such person should serve on the Fund's board of directors as of the time of the filing, in light of the Fund's business and structure (if material, this disclosure should cover more than the past five years);

requiring directors or director nominees to disclose any positions they have held as a director of public companies, or of any other registered investment

company, at any time during the past five years (as opposed to the existing requirement to disclose only current directorships); and

extending the period in which directors, director nominees and executive officers would be required to disclose their involvement in certain legal proceedings from five years to 10 years, and adding involvement in the following additional types of proceedings to the required disclosures:
any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity;
any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking or insurance laws and regulations, or any settlement to such actions; and
any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

The final rule was revised to focus on attributes that led the board to conclude that each director "should serve," as opposed to the proposed language, which focused on a director being "qualified to serve." The revision was adopted to avoid confusion with a related requirement that a company disclose the minimum qualifications that its nominating committee believes must be met by director candidates, which the SEC decided to retain. The final rules abandoned the SEC's proposed requirement that the disclosure include a discussion of the rationale behind the board's decision to appoint a director or nominee to a particular board committee because many companies rotate directors' committee assignments to broaden their oversight perspectives.

New Disclosure Concerning Diversity Considerations in the Director Nomination Process

The SEC's original proposals also requested comment on whether the proxy rules should be further amended to require the disclosure of additional factors considered by a company's nominating committee in selecting directors, such as board diversity. In response to the comments it received, the SEC amended Item 407 of Regulation S-K to require disclosure of whether, and if so how, a company's nominating committee considers diversity in identifying nominees for director. Additionally, if either the nominating committee or the full board has a policy that addresses diversity considerations in identifying director nominees, the proxy statement must disclose how the policy is implemented and how the nominating committee (or board) assesses the effectiveness of its policy. Recognizing that there are a variety of ways in which Funds may approach the issue, the SEC did not attempt to define "diversity" for purposes of these disclosures.

New Disclosure Describing the Fund's Leadership Structure and the Board's Role in Risk Oversight

The amendments add new governance disclosure requirements, concerning:

the Fund's board leadership structure, including whether the board chair is an "interested person" of the Fund, as defined in Section 2(a)(19) of the 1940 Act;

where the board chair is an "interested person," the Fund must disclose if it has designated a lead independent director, and the specific role the lead independent director plays in the Fund's leadership; and

why the Fund believes its board leadership structure is most appropriate for the Fund at the time of the filing.

Further emphasizing the SEC's view that information concerning a company's risk management functions is important to investors, the amendments also require additional disclosure about the board's role in risk oversight for the Fund. The SEC changed the terminology used in its original proposal to more accurately reflect the difference between managing the material risks (such as credit risks, liquidity risks and operational risks, among others), which is a function of the Fund's internal management team, and the board's role in overseeing that process. The new disclosure requirement focuses on informing investors of how the board exercises its oversight function by providing information such as:

how the board implements and manages its risk oversight function (e.g., through the board as a whole or through a committee, such as the audit committee or a separate risk oversight committee);

whether the individuals who oversee the Fund's day-to-day risk management functions report directly to the board as a whole, to a committee (such as the audit committee or risk oversight committee), or to one of the other standing committees of the board;

if relevant, how the board, or the designated board committee, otherwise receives information concerning the Fund's risk management functions; and

how a Fund perceives the role of its board and the relationship between the board and its advisor in managing material risks facing the Fund.

Effective Date

The new proxy disclosures are effective February 28, 2010, for Funds with a fiscal year ending on or after December 20, 2009, and filing a definitive proxy on or after February 28, 2010. Funds with a fiscal year ending before December 20, 2009, are not required to include the new disclosures until after the end of the Fund's 2010 fiscal year.

The new registration statement disclosures are required immediately for all new Funds that will be declared effective on or after February 28, 2010. Funds with a fiscal year ending on or after December 20, 2009, are required to include the new disclosures for all post-effective amendments filed on or after February 28, 2010.

What This Means to You
The amendments will impact Funds on several fronts, the most significant of which include the need to:

conduct an analysis of how the nominating committee and/or the board of directors will develop the "conclusions" required to be disclosed regarding the experience, qualifications and other attributes that make each individual director or nominee suitable for the Fund's current board, including setting aside time for the committee or the board to conduct such analysis; and

determining how the board and/or the nominating committee will formally assess the board's leadership structure and evaluate whether, and to what extent, the board should have a formal policy concerning diversity in the selection of directors, including an initial assessment of the effectiveness of any such policy pursuant to the SEC's new rules.

Contact Info
For more information regarding other matters related to your asset management business, please contact your Husch Blackwell attorney.

[1] Directors, trustees and members of boards of managers are referred to as "directors."