

MAYER • BROWN

Preparing for 2011 Proxy Season

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Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

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2010 Proxy Precedent and SEC Comments

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Compensation Risk Disclosure

Varying Approaches

- Part of Risk Oversight section
- Part of CD&A
- Part of Compensation Committee section

Compensation Risk Disclosure—Description as part of Risk Oversight

Verizon

- As part of its oversight of the Company's executive compensation program, the Human Resources Committee considers the impact of the Company's executive compensation program, and the incentives created by the compensation awards that it administers, on the Company's risk profile. In addition, the Company reviews all of its compensation policies and procedures, including the incentives that they create and factors that may reduce the likelihood of excessive risk taking, to determine whether they present a significant risk to the Company. Based on this review, the Company has concluded that its compensation policies and procedures are not reasonably likely to have a material adverse effect on the Company.

Compensation Risk as Part of CD&A

CVS Caremark

Risk Assessment

The Committee oversaw the performance of a risk assessment of the Company's executive compensation programs to ascertain any potential material risks that may be created by the compensation program. Because performance-based incentives play a large role in our executive compensation program, it is important to ensure that these incentives do not result in our NEOs taking actions that may conflict with the Company's long-term interests. The Committee considered the findings of the assessment conducted internally and concluded that the Company's compensation programs are designed and administered with the appropriate balance of risk and reward in relation to its overall business strategy and do not encourage executives to take unnecessary or excessive risks. The Committee considered the following attributes of the program:

- the balance between short- and long-term incentives;

Compensation Risk as Part of CD&A Cont'd.

- consideration of qualitative as well as quantitative performance factors in determining compensation payouts, including minimum and maximum performance thresholds, funding that is based on actual results measured against pre-approved financial and operational goals and metrics that are clearly defined in all plans;
- the use of different types of equity compensation awards that provide a balance of incentives;
- incentive compensation with a large stock component where value is best realized through long-term appreciation of shareholder value;
- incentive compensation components that are paid or vest over an extended period;
- stock ownership guidelines that are reasonable and align executives' interests with those of shareholders; and
- a recoupment policy that allows the Company to recover compensation paid in situations of fraud or material financial misconduct.

Compensation Risk as Part of CD&A Cont'd.

IBM

Section 2: Additional Information Compensation Program as it Relates to Risk

IBM management, the Committee and the Committee's outside consultant review IBM's compensation policies and practices, with a focus on incentive programs, to ensure that they do not encourage excessive risk taking. Specifically, this review includes the annual cash incentive program that covers 80% of IBM executives and the LTIP that covers all executives. This year the review was expanded to include the incentive plans that cover the remaining 20% of IBM's executives. These plans are designed to drive financial results at specific client accounts or groups of client accounts. Based on this comprehensive review, we concluded that our compensation program does not encourage excessive risk taking for the following reasons:

- The proxy statement then provides seven bullet points of reasons

Compensation Risk as Part of Compensation Committee Section

Exxon Mobil

The Compensation Committee determines whether ExxonMobil's compensation policies and practices could result in inappropriate risk-taking. Based on its assessment, the Committee does not believe that ExxonMobil's compensation policies and practices create any material adverse risks for the Company for the following reasons:

- ***Inappropriate risk-taking is discouraged*** by requiring senior executives to hold a substantial portion of their equity incentive award for their entire career and beyond retirement. These lengthy holding periods are tailored to our business model. The Compensation Committee requires that these equity grants with long holding periods comprise 50 to 70 percent of total compensation for Named Executive Officers as depicted on page 37 of the "Compensation Discussion and Analysis," whereas the annual bonus award was only about 10 percent of total annual compensation in 2009.

Exxon Mobil Compensation Risk Cont'd.

- Payout of 50 percent of the annual bonus is delayed and subject to risk of forfeiture, which is a unique feature of the annual bonus program relative to many comparator companies and further discourages inappropriate risk-taking; the timing of the delayed payout is determined by earnings performance.
- Executives below the Named Executive Officers participate in the same plans which are also reviewed by the Compensation Committee; therefore, inappropriate risk-taking is discouraged at all levels of the Company through similar compensation design features and allocation of awards.
- Finally, it should also be noted that a large percentage of career compensation for all executives and employees is in the form of a defined benefit pension which requires many years of dedicated service to the Company to have material value and is based on a standard retirement age of 65, with early retirement eligibility at age 55 with a minimum of 15 years of service. This is another dimension of total compensation that discourages inappropriate risk-taking; instead, it encourages executives to take a long-term view when making business decisions and to focus on achieving sustainable growth for shareholders.

Other Compensation Risk Disclosure Approaches

- A statement that there was no materially adverse risk stemming from compensation

- **General Electric**

- Other Significant Compensation Matters**

- In connection with setting 2009 compensation and the incentive compensation we provide to our named executives, the MDCC considered the risk profile of our compensation programs, policies and practices and confirmed that our incentive compensation does not encourage unnecessary and excessive risks. Our CRO assisted the MDCC in connection with this evaluation by participating in and reviewing the design of compensation programs, performance measures and goals affecting our named executives, including the 2010 LTPA, PSU and annual bonus awards.

- This was the last of 5 bullet points in the heading
 - Part of CD&A

- No disclosure

- Because there was no materially adverse risk from compensation

Comments Where No Compensation Risk Disclosure

- **SEC Comment to Amazon:** We note that you have not included any disclosure in response to Item 402(s) of Regulation S-K. Please advise us of the basis for your conclusion that disclosure is not necessary and describe the process you undertook to reach that conclusion.
- **Amazon Response:** For the 2010 Proxy Statement, the Company determined that disclosure in response to Item 402(s) of Regulation S-K was not required. Members of the Company's Legal and HR departments first reviewed and considered the Company's compensation programs and determined that, for most employees, including senior management (with the exception of the founder and CEO as noted below), compensation consists of base salaries, restricted stock unit ("RSU") grants, and, for certain new hires, fixed cash bonuses that are paid based on continued employment. The Legal and HR teams concluded that these programs were not reasonably likely to have a material adverse effect on the Company, in part because employees are rewarded through their RSU grants which help to incent the building of long-term shareholder value. In addition, the Legal and HR teams reviewed and considered the fact that the founder and CEO receives a salary, which is low compared to his peers, and security benefits, but has never accepted bonuses or equity-based compensation.

Comments Where No Compensation Risk Disclosure Cont'd.

- **Amazon Response Cont'd.:** The Legal and HR teams also reviewed and considered programs that differ, or are in addition to, the programs described above, which are primarily cash incentive programs to certain employee groups based on the achievement of certain metrics such as order fulfillment, customer service or sales. The Legal and HR teams concluded that these programs were not reasonably likely to have a material adverse effect on the Company based on factors regarding the nature and design of these programs, including, in the case of the cash incentive programs, the fact that the Company's officers did not participate.
- See also Colgate Palmolive, Dun & Bradstreet, Oneida Financial, Allegheny Technologies, Weight Watchers

Comments on Negative Compensation Risk Disclosure

- **SEC Comment to Autoliv:** We note that you have elected to provide negative disclosure in response to Item 402(s) of Regulation S-K. In future filings, if you continue to provide this disclosure please follow the standards provided in the Item. For example, you discuss whether the “design and operation of your incentive compensation arrangements” “might encourage inappropriate risk-taking that could have a material adverse effect on the company.” Item 402(s) contemplates a different analysis, discussing the extent that risks arising from a registrant’s compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the registrant.
- **SEC Comment to Titan International:** We note your disclosure in response to Item 402(s) of Regulation S-K. Please supplementally describe the process you undertook to reach the conclusion that the risks relating to the company’s compensation policies and practices are not reasonably likely to have a material adverse effect on the company.

Comments on Negative Compensation Risk Disclosure Cont'd.

- **SEC comment to Dresser Rand:** We note that your Compensation Committee undertook a review of your compensation policies and practices as they relate to your risk management practices and risk-taking initiatives and to determine whether such policies and practices create risks that are reasonably likely to have a material adverse effect on the company. Please advise us of the conclusion reached as a result of the review and describe the process you undertook to reach that conclusion.
- **SEC Comment to Dover:** We note your disclosure under the caption “Risk Assessment” on page 25 of your proxy statement incorporated by reference into your Form 10-K that your compensation committee asked Mercer to assess the risk associated with your executive compensation programs. Please advise us in greater detail of the process you undertook to reach the conclusion that disclosure under Item 402(s) of Regulation S-K is not necessary.
- See also Corning, nVidia, Qwest Communications, Equifax

Board Leadership Disclosure

- Two types of substantive disclosures under 407(h)
 - Single CEO/Chairman or separate CEO/Chairman
 - Board's role in risk oversight
- Location of disclosures
 - Separate subsection/paragraph under Corporate Governance
 - General Information about Board of Directors/Board Operations

Single CEO/Chairman

- Verizon Communications

...The Board believes that Verizon and its shareholders are best served by having a Chairman who has a wide-ranging, in-depth knowledge of Verizon's business operations and the competitive landscape and who can best identify the strategic issues to be considered by the Board. Based on his extensive experience and knowledge of Verizon's competitive challenges and opportunities, the Board has determined that at this time the Chief Executive Officer is the Director best qualified to serve in the role of Chairman. At the same time, in order to maintain an appropriate level of independent checks and balances in its governance, the independent members of the Board have elected a Presiding Director who has the authority to review and approve the information provided to the Board and to provide independent leadership, including in the evaluation and compensation of the CEO ...

- The proxy statement then details the duties of the Chairman and the duties of the Presiding Director.

Single CEO/Chairman Cont'd.

- General Electric

... We believe that this structure is appropriate for the company because it allows one person to speak for and lead the company and the Board, while also providing for effective oversight by an independent board through an independent presiding director. For a company as large and diverse as GE, we believe the CEO is in the best position to focus the independent directors' attention on the issues of greatest importance to the company and its shareowners ...

Single CEO/Chairman Cont'd.

- Exxon Mobil

The current CEO possesses an in-depth knowledge of the Company, its integrated, multinational operations, the evolving energy industry supply and demand, and the array of challenges to be faced, gained through over 34 years of successful experience in progressively more senior positions, including domestic and international responsibilities.

The Board believes that these experiences and other insights put the CEO in the best position to provide broad leadership for the Board as it considers strategy and as it exercises its fiduciary responsibilities to its shareholders.

Further, the Board has demonstrated its commitment and ability to provide independent oversight of management.

Separate Chairman/CEO

- American International Group

AIG's current policy, as reflected in its By-laws, is that the role of the Chairman should be separate from that of the CEO and that the Chairman should be an independent director. AIG believes that this structure is optimal in AIG's current situation because it permits the Chairman to deal with AIG's various stakeholders while permitting the CEO to focus more on AIG's business.

- Bank of America

... The current structure is appropriate in response to our stockholders vote in April 2009 to approve a Bylaw amendment providing for an independent Chairman of the Board. After that, the Board, upon the recommendation of the Corporate Governance Committee, appointed independent director Dr. Massey to serve as the Chairman of the Board.

Risk Oversight

- JPMorgan Chase

Board's role in risk oversight

... The Board of Directors exercises its oversight of risk management principally through the Board's Risk Policy Committee and Audit Committee. The Risk Policy Committee oversees senior management risk-related responsibilities, including reviewing management policies and performance against these policies and related benchmarks. The Audit Committee reviews with management the system of internal controls and financial reporting that is relied upon to provide reasonable assurance of compliance with the Firm's operational risk management processes. In addition, the Compensation Committee is responsible for reviewing the Firm's compensation practices and the relationship among risk, risk management and compensation in light of the Firm's objectives. Each of the committees oversees reputation risk issues within their scope of responsibility. The Board of Directors also reviews selected risk topics directly as circumstances warrant.

Risk Oversight Cont'd.

- Chevron

...The Board exercises its role of risk oversight in a variety of ways, including the following:

- The proxy statement continues with separate paragraphs describing the Board's risk annual risk review activities and the risk review activities of each of the Audit Committee, the Board Nominating and Governance Committee, the Public Policy Committee and the Management Compensation Committee

- IBM

... The Board's role in risk oversight of the Company is consistent with the Company's leadership structure, with the CEO and other members of senior management having responsibility for assessing and managing the Company's risk exposure, and the Board and its committees providing oversight in connection with those efforts.

Comments on Leadership Structure

- **SEC comment to Mueller Industries:** With a view toward disclosure in future filings, please explain to us the reasons you determined that your leadership structure (i.e., separating the roles of chairman and chief executive officer) is appropriate given your specific characteristics or circumstances. In addition, please describe the services your chairman provides and the role he performs in his position as an employee with the company. . . . please state whether you have a lead independent director and, if so, describe the specific role the lead independent director performs in the leadership structure of the board. See Item 407(h) of Regulation S-K.
- **SEC comment to CenturyLink:** We note your disclosure related to the board's leadership structure and risk oversight in response to Item 407(h) of Regulation S-K. In future filings, please also discuss the effect that the board's role in the risk oversight of the company has on the board's leadership structure.

Director Qualifications

- Alternatives
 - Included in biography section
 - Included in a nominations section, separate from biographies
 - Hybrid approach
- Cannot be a group disclosure
- Not sufficient to disclose simply that a person should serve as a director because he or she is an audit committee financial expert

Specific Qualifications Included in Biography Section

- Ford Motor Company proxy statement

- Each biography contains five separately captioned sections:

- Age
- Principal occupation
- Recent business experience
- Current Directorships
- Reasons for Nomination

- Example of Ford's Reasons for Nomination subsection:

The Board believes Mr. Butler's extensive experience in the accounting profession, both in the United States and internationally, as well as his executive experience as Chairman and CEO of KPMG for several years, provides Ford with financial expertise that has been instrumental in guiding the Company through its restructuring. As Chair of the Audit Committee and its designated financial expert, Mr. Butler continues to add significant value to the goal of improving our balance sheet while fulfilling our financial reporting obligations accurately and transparently.

Separate Section for Specific Qualifications

- Citigroup proxy statement

- Describes 11 types of qualifications with a paragraph for each
- Categories are: international business, financial services industry, risk management, regulatory compliance, consumer business, corporate business, corporate affairs, financial reporting, compensation, corporate governance and legal matters
- Paragraph for each director identifying which of the above qualifications apply and how such experience was obtained
- Section appears before biographies

- IBM proxy statement

- Each director is listed with several bullet points explaining type and source of qualification
- Section appears after the biographies

Hybrid Approach

- General Electric proxy statement

- Descriptions of 7 key qualifications immediately before biographies
- Categories are: leadership experience, finance experience, industry experience, marketing experience, government experience, technology and education experience and global experience
- Each biography concludes with a “Director Qualifications” caption with bullet points for each relevant qualification and a brief explanation:

Director Qualifications:

- Leadership and Global experience—current CEO of multinational Canadian company
- Industry and Finance experience—current deputy chairman of large financial services company; director of leading global bank; chairman of leading media company

Comments on Director Qualifications

- **SEC comment to Young Innovations:** In connection with our review of your Part III information, we note the reference in the second paragraph on page 3 of your proxy statement under “Election of Directors” to “a description of the specific experience, qualifications, attributes or skills that led the Board to conclude that such person should serve as a director,” however, it appears that you included only the general disclosure in the second paragraph about each director on page 3 in response to Item 401(e) of the Regulation S-K. In future filings, be more specific in describing the specific experience, qualifications, attributes or skills that led the Board to conclude that such person should serve as a director.
- **SEC comment to Frontier Oil:** In future filings, please disclose for all nominees and directors, even those not up for re-election in a particular year, the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as your director at the time that the disclosure is made, in light of your business and structure.

Comments on Director Qualifications Cont'd.

- **SEC Comment to Verizon:** We note your disclosure that outlines the “experience, qualifications, attributes and skills” the Board considered in nominating these individuals as directors of Verizon Communications. However, your disclosure identifies the principal occupations and employment of each of your directors and the skills of only some of the individuals. In addition, we note that you describe the relevant skills and experiences of your Board members as a whole, with more specific parenthetical references to individual directors. In future filings, please expand your disclosure with respect to each director to specifically discuss what aspects of the individual’s experience led the board to conclude that the person should serve as a director for the Company, as well as any other relevant qualifications, attributes or skills that were considered by the board. See Item 401(e) of Regulation S-K.

Diversity Disclosure Alternatives

Varying Approaches

- Considered but no formal policy
- Formal policy
 - How defined
 - How assessed
- Not considered

Diversity Disclosure—Considered, No Formal Policy

- **American Internal Group: *Diversity Consideration*.** The Nominating and Corporate Governance Committee does not have a specific diversity policy. Rather, the Nominating and Corporate Governance Committee considers diversity in terms of minority status and sex as factors in evaluating director candidates and also considers diversity in the broader sense of how a candidate's experience and skills could assist the Board in light of the Board's then composition.
- **Chevron:** The Committee uses a skills and qualifications matrix to ensure that the overall Board maintains a balance of knowledge and experience. The Committee carefully reviews all Director candidates, including current Directors, in light of these qualifications based on the context of the current and anticipated composition of the Board, the current and anticipated operating requirements of the Company, and the long-term interests of stockholders. In conducting this assessment, the Committee considers diversity, education, experience, length of service and such other factors as it deems appropriate given the current and anticipated needs of the Board and the Company. The Committee and Board define diversity broadly to include diversity of professional experience (policy, business, government, education, technology or public interest), geographical location and viewpoint, as well as diversity of race, gender, nationality and ethnicity.

Diversity—Formal Policy

- **Bank of America:** The attributes that the Board and every director should possess are in the director nomination standards set forth in our Corporate Governance Guidelines. Specifically:

Candidates should represent a diversity of viewpoints, backgrounds, experiences and other demographics;

- The Corporate Governance Committee regularly reviews Board composition in light of our company's business and structure; the changing needs of our company as a result of the business environment; our operations, financial conditions and complexity; its assessment of the Board's performance; and input from stockholders and other key constituencies. As part of this review, the Corporate Governance Committee evaluates the effectiveness of the Board's director nomination standards—including its criteria related to diversity—as set forth in the Corporate Governance Guidelines.
- Diversity is one of 8 standards identified

Diversity—Not Considered

- Berkshire Hathaway:

Director Nominations

Berkshire does not have a policy regarding the consideration of diversity in identifying nominees for director. In identifying director nominees, the Governance, Compensation and Nominating Committee does not seek diversity, however defined. Instead, as previously discussed, the Governance, Compensation and Nominating Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company. With respect to the selection of director nominees at the 2010 Annual Meeting of Shareholders, the Governance, Compensation and Nominating Committee recommends the Board nominate each of the twelve directors currently serving on the Board.

- This is not a common approach

Comments on Diversity

- **SEC comment to Frontier Oil:** We note your disclosure that diversity is considered by the committee and the board in selecting candidates for recommendation to your shareholders. Please also tell us and disclose in future filings how the committee (or the board) assesses the effectiveness of your policy of seeking a diverse group of candidates. See Item 407(c)(2)(vi) of Regulation S-K.
- **SEC Comment to Arrow Electronics:** From your disclosure on page 5 of your definitive proxy statement that diversity "can" be an important factor to consider in evaluating candidates, it is unclear whether your corporate governance committee or board actually considers diversity in identifying nominees. In future filings, please disclose clearly whether, and if so how, your corporate governance committee and board considers diversity in identifying nominees for directors.
- **SEC Comment to Robert Half:** Although we note your reference to diversity on the top of page 28, it is not very clear how the Committee considers diversity in identifying director nominees. Please provide additional detail in future filings to fully comply with Item 407(c)(2)(vi) of Regulation S-K.

Compensation Consultant Disclosure

Varying Approaches

- Compensation consultant works only for Compensation Committee
- Compensation consultant performs additional services for the Company

Consultant—Compensation Committee Only

- **Citigroup:**

Use of compensation consultants. The committee charter provides that its compensation determinations regarding the CEO and other members of senior management should reflect the advice of an independent compensation consultant. The committee retained ICCA starting in 2006 as part of its effort to ensure the independence of the advice it receives. ICCA advises the committee on its compensation decisions regarding executive compensation and other compensation matters as requested by the committee. ICCA performs no work for Citi other than its assignments from the committee, and received total fees of \$23,900 in respect of all its services for the 2009 compensation year ...

- **Verizon:**

The Committee's policy does not permit its Consultant to do any work for the Company while that firm is acting as the Committee's consultant. In compliance with the terms of this policy, neither Pearl Meyer & Partners nor its affiliates have performed any work for the Company or any Company affiliate since the date it was retained by the Committee in 2006.

Compensation Consultant—Additional Services

- **CVS Caremark:**

The Committee has retained Mercer, a wholly-owned subsidiary of Marsh & McLennan Companies, Inc. (“MMC”), to assist the Committee with its responsibilities related to the Company’s executive compensation programs. Mercer’s fees for executive compensation consulting to the Committee in fiscal year 2009 were \$255,424.

During the fiscal year, the Company decided to retain Mercer and its MMC affiliates to provide services, unrelated to executive compensation, which have been reviewed and approved by the Committee. For example, CVS Caremark’s human resources division utilized Mercer on occasion for general human resources and compensation consulting. In 2009, the Company engaged Mercer to collect and organize competitive market data for key non-executive positions. The Company also used other MMC affiliates for services unrelated to executive compensation, including property and casualty insurance brokering and related consulting services, risk management services and bonding services.

Compensation Consultant—Additional Services

- CVS Caremark Cont'd.

These other MMC affiliates are separate operating companies of MMC, and the Company has separate relationships with the service teams at each of these operating companies. The aggregate fees paid in 2009 to Mercer and its MMC affiliates for all services unrelated to executive compensation were approximately \$2,981,310. With respect to executive compensation services, Mercer has been retained by and answers to the Committee; relationships with the other MMC affiliates are overseen by various management employees of the Company.

The Committee believes that the advice it receives from Mercer is objective and not influenced by the relationship that Mercer and the MMC affiliates might otherwise have with the Company. The Committee and Mercer have policies and procedures in place to preserve the objectivity and integrity of the executive compensation consulting advice, including:

- The proxy statement then provides 6 bullet point descriptions of such policies and procedures

SEC Comments on Compensation Consultants

- **SEC Comment to Dresser Rand:** In your future filings, as applicable, please disclose whether the decision to engage the compensation consultant or its affiliates for the additional services you mention was made or recommended by your management. See Item 407(e)(3)(iii) of Regulation S-K.
- **SEC Comment to Home Depot:** We note your disclosure that your finance department engaged Tillinghast, an affiliate of your compensation consultant Towers Perrin, to provide actuarial services in exchange for fees of \$139,190. We further note that “[i]n accordance with the Committee’s policy, the Committee reviewed a written report from Towers Perrin identifying the amount of fees paid to Tillinghast and Towers Perrin and confirming Towers Perrin’s independence under the policy.” With a view towards future disclosure, please tell us whether the compensation committee or the board approved the finance department’s engagement of Tillinghast. Please refer to Item 407(e)(3)(iii)(A) of Regulation S-K.

SEC Comments on Compensation Consultants Cont'd.

- **SEC Comment to Raytheon:** In future filings, please describe the material elements of the instructions or directions given to the compensation consultant and clearly discuss any other services, in addition to advising you on the amount or form of executive compensation, that the compensation consultant provided to you. Also, in future filings, please disclose whether the compensation consultant provided additional services to the company in an amount in excess of \$120,000, and, if so, disclose the aggregate fees the consultant received for recommending the amount or form of executive compensation and the aggregate fees the consultant received for additional services. Refer to Item 407(e)(3)(iii)(A) of Regulation S-K.
- **SEC Comment to Questar:** We also note the related disclosure at page 21 indicating that Hewitt participated in the risk management assessment you describe. To the extent that this or any other such additional services would require disclosure pursuant to Item 407(e)(3)(iii)(A) of Regulation S-K, provide all the necessary disclosure.

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Proxy-related Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act

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Leadership Structure

- New Section 14B of the Exchange Act
- Requires every public company to disclose the reasons why the company has chosen the same person to serve as chairman and CEO or has chosen different individuals to serve in those roles
- SEC adopted new Rule 407(h) of Regulation S-K on December 16, 2009

Three New Disclosure Requirements

- Pay for Performance
- New subsection 14(i) of the Exchange Act
- Requires every public company to provide a clear description of any required compensation disclosure
- Must include a discussion of the relationship between executive compensation actually paid and the financial performance of the company, taking into account any change in stock price and dividends

Three New Disclosure Requirements (cont.)

- Internal Pay Comparison
- Requires every public company to disclose the median of the annual total compensation of all employees of the company, except the CEO, the annual total compensation of the CEO and the ratio of the two
- Total compensation is to be determined in accordance with the SEC's requirements in effect on July 20, 2010

Three New Disclosure Requirements (cont.)

- A number of interpretive issues are raised by the legislative language that will need to be sorted out in the SEC rulemaking process
- SEC expects to propose rules in the second quarter of 2011

Three New Disclosure Requirements (cont.)

- Hedging Policy Disclosure
- New subsection 14(j) of the Exchange Act
- Requires every public company to disclose whether any employee of board member, or any designee of an employee or board member, is permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of the company's equity securities held by such person
- SEC expects to propose rules in the second quarter of 2011

Two New Shareholder Vote Requirements

- Say-on-Pay
- New Section 14A of the Exchange Act
- At least every three years, every public company must have shareholders vote to approve the disclosed compensation of the company's executive officers
- At least every six years, every public company must have shareholders vote on whether to have the say-on-pay vote occur every one, two or three years

Two New Shareholder Vote Requirements (cont.)

- Golden Parachutes
- When soliciting shareholder approval of a business combination transaction, a public company must disclose any agreements or understandings the person making the solicitation or the acquiring company has with a named executive officer concerning any type of compensation that relates to the transaction
- Shareholders must vote to approve the agreements or understandings and compensation as disclosed, unless it was the subject of a previous say-on-pay vote

Two New Shareholder Vote Requirements (cont.)

- The two new vote provisions are effective January 22, 2011
- Shareholder votes are nonbinding and the shareholder vote requirements do not create or imply any additional fiduciary duties for the company or the board
- The new requirements do not limit the ability of shareholders to make executive compensation proposals
- Institutional investment managers must report votes of Schedule 13F
- SEC expects to propose rules in the fourth quarter of 2010 and adopt rules in the first quarter of 2011

Three New Listing Standards

- Compensation Clawbacks
- New Section 14D of the Exchange Act
- A listed company must develop and implement a policy with respect to recovery of incentive-based compensation that:
 - That requires disclosure of the company’s policy, and
 - If the company is required to prepare a restatement due to material noncompliance with any financial reporting requirement, it must require recovery from any current or former executive officer excess incentive payments during the previous three years
- SEC expects to propose rules in the second quarter of 2011

Three New Listing Standards (cont.)

- Independent Compensation Committees
- Standard for independence will be heightened from what exists today
- In setting standard, stock exchanges are to consider all relevant factors, such as:
 - The source of compensation, and
 - Whether the director is otherwise affiliated with the company

Three New Listing Standards (cont.)

- Compensation Committee Advisers
- A listed company may only select an adviser after considering independence factors the stock exchange identifies, including:
 - The provision of other services to the company
 - The amount of fees received by the adviser as a total percentage of all of their revenue
 - The policies and procedures the adviser has in place designed to prevent conflicts of interest
 - Any business or personal relationships of the adviser with members of the compensation committee
 - Any stock owned by the adviser

Three New Listing Standards (cont.)

- Compensation committee must have authority to retain the advice of an adviser, and must be directly responsible for the appointment, compensation and oversight of the work of the adviser
- Compensation committee does not have to act consistently with advice of adviser
- A listed company must disclose in an annual meeting proxy statement for meetings after July 21, 2011 whether the compensation committee retained a compensation consultant and whether the work raised any conflicts
- SEC expects to propose rules in the fourth quarter of 2010 and adopt rules in the first quarter of 2011

Broker Non-votes

- Stock exchanges must prohibit any member that is not the beneficial owner from granting a proxy to vote in connection a shareholder vote with respect to:
 - The election of directors
 - Executive compensation
 - Any other significant matter determined by the SEC
- Provision effective July 22, 2010
- NYSE acted with respect to election of directors in July of 2009 and with respect to executive compensation in September of 2010; NASDAQ also acted in September
- SEC expects to propose rules with respect to other matters in the second quarter of 2011

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Proxy Access Rules & Proxy Plumbing

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SEC Adopts Proxy Access Rules (Rel. No. 34-62764, Aug. 25, 2010)

- History of prior attempts to adopt proxy access rules
- Once effective, new rules will enable shareholders to include their nominees in the company's proxy materials
- New Rule 14a-11 would govern when companies required to include shareholder nominees in their proxy material
- New rules were to be effective on November 15, 2010
- Petition for review: *Business Roundtable and Chamber of Commerce of U.S. v. SEC* (No. 10-1305, D.C. Cir., 9/29/10)
 - Also filed motion to stay with SEC (9/29/10)
 - On Oct. 4th, SEC issued order granting stay, pending resolution of petition by D.C. Circuit Court of Appeals

Conditions to Meet under Rule 14a-11

- Will apply to all companies subject to SEC proxy rules except for “smaller reporting companies” (Rule 12b-2)
- To be eligible to nominate, shareholder, individually or as part of a group, must:
 - Own at least 3% of voting power of class of securities subject to proxy rules and entitled to vote for directors
 - Have owned qualifying amount continuously for at least 3 years
 - Agree to hold qualifying amount thru date of meeting and disclose intent as to continued ownership after election
 - In calculating voting power, hold both voting and investment power of the qualifying amount of securities
 - File notice on Schedule 14N with the SEC

Conditions to Meet under Rule 14a-11

- The nominating shareholder/group may *not*:
 - Hold company's securities with purpose/effect to change control of company or gain number of seats on board that > maximum number that the company can include under 14a-11
 - In connection with the election of directors at the meeting:
 - Be a member of any other group engaged in solicitations or other nominating activities
 - Separately conduct a solicitation
 - Act as a participant in another person's solicitation
 - Have an agreement with the company or management with respect to the nomination before filing the Schedule 14N

Conditions to Meet under Rule 14a-11

- Nominee requirements

- Nominee may be excluded by company if:
 - Nominee’s candidacy or board service violates federal, state or foreign law, or stock exchange requirements
 - State or foreign law or company’s charter or bylaws prohibit shareholders from nominating candidates
 - Nominee is not “independent” under “objective” standards under stock exchange rules (but not under subjective or board-imposed standards)
- Limits: companies are only required to include the greater of (i) one shareholder nominee or (ii) number of shareholder nominees that represent 25% of the company’s board
- Number of available slots allocated to nominees based on nominating shareholders holding highest % of voting securities

Conditions to Meet under Rule 14a-11

- Schedule 14N

- Nominating shareholder/group must file notice on Schedule 14N and send notice to the company
 - Not earlier than 150 days and not later than 120 days before anniversary of date that company mailed proxy statements for prior year's meeting
- Schedule 14N must contain certifications by shareholder/group:
 - No purpose/effect to change control or to gain number of seats on board > maximum number company can include under Rule 14a-11
 - Nominating shareholder and nominee eligibility
- Written statement from registered holder or brokers/banks regarding holding of qualifying shares for 3 years
- If desired, statement in support of nominee
- Must obtain codes from EDGAR system in order to file

Procedures after Schedule 14N is filed

- Company may exclude nominee if:
 - Nominating shareholder/group or the nominee does not comply with Rule 14a-11 eligibility requirements
 - Company receives more nominees than it is required to include
- If company decides to exclude nominee:
 - It must notify nominating shareholder/group and SEC within 14 days after close of submission period
 - Company can seek no-action letter concurrence from staff
- Inclusion of nominee does not require company to file a preliminary proxy statement with SEC

Time Frame for Proxy Access Procedures

Due Date	Action Required
<p><u>No earlier</u> than 150 days before, and <u>no later</u> than 120 days before, anniversary date of last year's annual meeting proxy statement mailing</p>	<p>Nominating shareholder/group must file Schedule 14N and provide same to company</p>
<p>Not later than 14 calendar days after close of window period for submissions</p>	<p>Company must notify nominating shareholder/group of decision not to include nominee (deficiency notice)</p>
<p>Not later than 14 calendar days after receipt of company's deficiency notice</p>	<p>Nominating shareholder/group must respond to deficiency notice & cure any defects</p>
<p>Not later than 80 days before company files definitive proxy material with SEC</p>	<p>Company must notify SEC of its intention to exclude nominee and basis therefor</p>
<p>Not later than 14 days after shareholder/group receives notice of company's notifying SEC</p>	<p>Nominating shareholder/group may submit a response to company's notice to SEC staff</p>
<p>As soon as practicable, company can submit request for no-action letter from staff</p>	<p>SEC staff, if it chooses, <u>may</u> provide no-action letter giving informal statement of its views</p>
<p>Promptly following receipt of staff's no-action letter or informal statement of its views</p>	<p>Company must provide notice to nominating shareholder/group as to whether it will/will not include nominee</p>

Other Changes

- If a shareholder nominee is included in proxy statement, the proxy card must provide for voting on each nominee – no voting for all of the company’s nominees as a group
- No requirement for nominating shareholder/group to be present at shareholder meeting
- New exemptions from proxy solicitation rules for:
 - Solicitations to form a shareholder group under Rule 14a-11
 - Except where purpose/effect is to change control of company or gain number of seats on board > maximum number that the company can include under Rule 14a-11
 - Solicitations in support of nominee that is/will be included in proxy statement under Rule 14a-11

Shareholder Proposals and Nominating Procedures

- Under current Rule 14a-8(i)(8), companies may exclude shareholder proposals regarding a nomination or election for director, or procedure for such nomination/election
- New Rule 14a-8(i)(8) would require companies to include proposals to amend governing documents regarding nomination procedures or disclosures related thereto
 - But companies can *still* exclude proposals that would:
 - Disqualify a nominee standing for election
 - Remove a director before his term is expired
 - Question competence, business judgment or character of a nominee
 - Otherwise affect the outcome of the upcoming election of directors

Shareholder Proposals and Nominating Procedures

- Also, a proposal that seeks to include a specific individual in a company's proxy materials could be excluded under Rule 14a-8(i)(8)
- Rule 14a-8 proposal process could not be used to nullify or restrict rights granted by Rule 14a-11 or state law
- However, new Rule 14a-8(i)(8) would permit proposals to amend bylaws to establish procedures for shareholder nominations that could establish different ownership thresholds, holding periods or other qualifications
 - An additional avenue for submitting shareholder nominees – could not be substitute for, or restrict, operation of Rule 14a-11

Other Items of Note

- Form 8-K Item 5.08 - If company did not hold annual meeting in prior year *or* date of annual meeting has changed by > 30 days from date of prior year's meeting, company must file 8-K to disclose submission date for next annual meeting (a “reasonable time” before mailing)
 - Note: failure to timely file 8-K will result in loss of S-3 eligibility
- Proxy contests - Rule 14a-11 applies if company is subject to a proxy contest at same time – but: nominating shareholder/group may not participate in proxy contest
- “Group” determinations and “affiliate” status
- Liabilities of nominating shareholder/group

Practical Implications of Proxy Access Rules

- Majority voting provisions and advance notice bylaws should be reviewed
- Consider confidentiality agreements and policies for directors as matter of board qualification
- Review corporate governance guidelines, nominating committee charter and bylaws
 - Move director qualifications provisions to bylaws?
- Small- and mid-cap companies may be disproportionately affected to a greater degree by Rule 14a-11
- Consider changes to bylaws under Section 112 of Delaware General Corporation Law (2009)

“Proxy Plumbing” Concept Release (Rel. No. 34-62495, July 14, 2010)

- Addressed infrastructure & technical issues on soliciting, tabulating and voting proxies in US
 - Over-voting and under-voting
 - Vote confirmation
 - Proxy voting by institutional securities lenders
 - Proxy distribution fees
 - Issuer direct communication with shareholders
 - Means to increase retail investor participation
 - Data-tagging proxy-related materials

Proxy Plumbing Release (continued)

- Infrastructure & technical issues (continued)
 - Proxy advisory firms
 - Dual record dates
 - Empty voting and related de-coupling issues
- Release poses many questions about these issues and gives companies and investors an opportunity to weigh in through comments process
 - Release says comments due by October 20, 2010

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