

December 18, 2008

Preparing for 2009 Proxy and Annual Report Season

Areas of Interest

Corporate & Securities

United States

As 2008 comes to a close, public companies with calendar year-ends should be planning their proxy statements and annual reports on Form 10-K. Set forth below are some issues to keep in mind when preparing these annual disclosures.

- The New York Stock Exchange and The Nasdaq Stock Market each revised their bright line director independence test with respect to the dollar value of related-person transactions involving directors. The NYSE also revised its bright line director independence test with respect to relationships between directors and independent auditors. As a result, companies that use categorical standards of independence for directors should adopt corresponding amendments prior to making independence determinations so that they do not impose stricter requirements than are necessary under stock exchange rules. Annual director and officer questionnaires should be updated to reflect the revised independence standards. For more information on the amended director independence tests, see our August 15, 2008, Client Alert, "[NYSE and NASDAQ Amend Director Independence Bright Line Tests.](#)"
- The Securities and Exchange Commission has revised the requirements for the audit committee report that appears in proxy statements. As a result of this technical amendment, which updated references to the appropriate auditing standards, the wording of audit committee reports must be changed. In accordance with amended Item 407(d)(3)(i) of Regulation S-K, the audit committee report must now refer to "applicable requirements of 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 Standard No. 1, [Independence Discussions with Audit Committees](#)), as adopted by the Public Company Accounting Oversight Board in Rule 3600T.") Companies should also review their audit committee charters to determine whether a conforming change is necessary.
- The serious economic and market changes that have unfolded over the last few months make it important for companies to review the risk factor section of their annual reports on Form 10-K to determine whether new risk factors should be added or existing risk factors expanded or modified to reflect current conditions. Similarly, the impact of changed economic and market conditions should be discussed in the Management's Discussion and Analysis section of Form 10-K. See our Client Alert, dated October 20, 2008, "[Reflecting the Impact of Recent Market Developments in Upcoming SEC Reports,](#)" for a discussion of this issue.
- For their 2009 annual meetings, reporting companies need to decide if they want to rely on Internet availability of proxy materials, use the full-set delivery option or use some combination thereof. Reliance solely on e-proxy for delivery may save printing costs, but it also accelerates the time frame for completion and posting of the proxy materials. Advance preparation for e-proxy solicitation is essential, and experience has shown that it may lead to reduced participation by investors,

particularly retail investors. For further information on e-proxy delivery options, see our August 24, 2007, Securities Update, "[E-Proxy: Understanding the New Delivery Options for the 2008 Proxy Season](#)."

- Executive compensation continues to get close scrutiny. To the extent current developments, such as falling stock prices and retirement accounts, and new requirements adopted with respect to federal government bailout programs, have influenced compensation decisions, that should be reflected in compensation disclosures in upcoming proxy statements, particularly the Compensation Discussion and Analysis section. For a further discussion of this topic, see our Securities Update dated December 5, 2008, "[Considerations for 2008 Compensation Disclosure](#)."

If you have any questions about upcoming proxy statements or annual reports, please contact the authors of this Alert, [Laura D. Richman](#) (+1 312 701 7304) or [Michael L. Hermsen](#) (+1 312 701 7960) or any other member of our Corporate & Securities practice.

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