

1

Foley's National Directors Institute Web Conference Series



NDI NATIONAL DIRECTORS INSTITUTE

Moving Your Business Forward: Are You Taking the Right Steps?

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2

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Moving Your Business Forward: Are You Taking the Right Steps?



NDI NATIONAL DIRECTORS INSTITUTE

2010 Proxy Season Legal Update / New and Evolving SEC Disclosure Issues

December 2, 2009

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Today's Presenters

- | | |
|--|--|
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Agenda

- “Not this year” (we hope)
- Broker nonvotes
- E-proxy / notice and access
- Shareholder proposals
- New SEC proxy statement disclosures
- RMG 2010
- Negative recommendations
- Disclosure of relationships
- Other disclosure considerations

What Not to Worry About

- The SEC’s proposed mandated proxy access rules have been delayed and will not impact the 2010 proxy season
- We hope legislation such as the proposed Shareholder Bill of Rights Act of 2009 with its “Say on Pay” requirements likewise will not impact the 2010 proxy season

No Broker Voting for Directors

- Amendment to NYSE Rule 452: brokers cannot vote in uncontested director elections without specific voting instructions from beneficial owners
 - Applies to all stockholder meetings of publicly listed companies, whether NYSE listed or not, commencing January 1, 2010
 - Reclassifies uncontested director elections as “non-routine”

No Broker Voting for Directors (cont.)

- Impact?
 - Will be harder to obtain quorum when company is not seeking shareholder ratification of its auditor
 - Change will lead to decrease in the number of votes cast in director elections
 - Reduced “for” votes is a challenge if facing a withhold vote recommendation or campaign
 - Citi, Bank of America, CVS Caremark examples of effects on elections

No Broker Voting for Directors (cont.)

- Other factors that will magnify importance?
 - Those with majority voting standards more at risk
 - Rule 452 amendment will lead to increased instances of failure to win majority support
 - Notice and Access – to date, has resulted in lower voter turnout

No Broker Voting for Directors (cont.)

- Steps to take?
 - Be proactive in understanding the composition of shareholder base and anticipating director issues
 - Consider hiring a proxy solicitor
 - Review majority voting provisions, if any, with respect to the treatment of abstentions and broker non-votes

E-Proxy / Notice and Access

- Proposed SEC amendments to the e-proxy rules should make the “notice-only” option more flexible and easier to explain to shareholders
 - SEC expects amendments to increase shareholder participation
 - Amendments likely will not bring back retail vote lost to e-proxy

E-Proxy / Notice and Access (cont.)

- Action items
 - Revisit e-proxy language
 - Consider avoiding e-proxy if need votes

Shareholder Proposals

- SEC has released new guidance reducing the ability of companies to exclude shareholder proposals under the Rule 14a-8 ordinary business exception:
 - Internal risk evaluations
 - CEO succession planning

Shareholder Proposals (cont.)

- Hot topics?
 - “Say on Pay”
 - Supermajority voting
 - Staggered board
 - Majority voting
 - Ability of shareholders to call a special meeting
 - Getting the right
 - Reducing the threshold

Shareholder Proposals (cont.)

- Strategies to respond?
 - Try to understand the views of institutional shareholders regarding common shareholder proposals in advance
 - Try to negotiate a withdrawal of the proposal with the proponent by finding middle-ground
 - Pay attention to possible grounds to exclude
 - Including minimum shareholdings

New Shareholder Proposals

- Stricter compensation limits for the governments Troubled Asset Relief Program (TARP)
 - Limiting annual incentive compensation and severance payments
 - Performance-vested equity instruments
 - Main proponents: Laborers' International Union of North America, International Brotherhood of Teamsters and United Brotherhood of Carpenters and Joiners
- Eliminate excise tax gross-ups for senior executives
- Compensation consultant independence: proposals seek more disclosure and greater independence
- Short-slate proxy reimbursement: calls for reimbursing the proxy expenses of successful short-slate dissidents

New Shareholder Proposals (cont.)

- Adopt & disclose succession planning
- Request retention period on stock awards of two years past retirement
- Reincorporate in North Dakota: firms can subject themselves to a new state law that mandates proxy access, split CEO and chairman roles, declassified boards, majority voting, and annual pay votes
- Golden coffin: agreements that provide generous death benefits to family members of CEOs and other top executives

Social / Environmental Proposals

- 359 social and environmental proposals filed for 2009
 - 274 are currently pending or have been voted on
 - For all of 2008, 410 resolutions were filed and 202 came to a vote
- Increased dialogue
 - Nearly 40% of resolutions were withdrawn after successful dialogue between companies and proponents
- SEC challenges remain consistent
 - Between 25-28% in 2007
 - However, omissions permitted by the SEC dropped from 63% in 2007 to 47% in 2009
- Set green house gas emission reduction goals
 - 41% support
- Report on political donations
 - 27% support
- Report on predatory lending
 - 17% support

Likely New Compensation Disclosures

- Impact of compensation disclosure rule changes likely to be effective:
 - Stock-based compensation in SCT
 - May impact which individuals are the NEOs
 - Would require a discussion of compensation policies and practices as they relate to risk management practices and risk-taking incentives
 - Scope beyond NEOs
 - Would require disclosure of potential conflicts of interest involving the use of compensation consultants
 - Recommended: Prepare comp committee early

Other Proxy Disclosure Rule Changes Likely to Apply

- Expanded disclosures regarding directors and director nominees
 - Particular experience, qualifications, attributes, and skills qualifying them to serve as a director of the company and member of board committees
 - New five-year look-back for disclosure of any other directorships held by directors and nominees
 - Expanded 10 year look-back for disclosure of certain bankruptcy-, criminal-, or securities-related legal proceedings

Other Proxy Disclosure Rule Changes Likely to Apply (cont.)

- New Disclosures Regarding Company Leadership Structure
 - Leadership structure, justification for the structure and an explanation for why such structure is the best for the company
 - Whether and why the company has combined or separated the principal executive officer and board chair positions
 - Whether the company has a lead independent director and, if it does, the reasons for having a lead independent director and the specific role that the lead independent director has in the leadership of the company
 - The board's involvement in the risk management process
 - Oversight by board or committee?
 - To whom does risk manager report?
- NYSE Changes in Governance Disclosure

2010 RiskMetrics Group (RMG) Guidance

- What are key changes for 2010?
 - Non-shareholder approved poison pills
 - More frequent reviews – companies will be reviewed every three years (or every year if board is classified) if they adopt or renew a poison pill with a term greater than one year
 - At each review, RMG will recommend a withhold vote against all nominees who are current directors if the pill is still in place without shareholder approval
 - RMG may apply this policy retroactively in years after the 2010 proxy season

New RMG Guidance (cont.)

- How much weight does RMG carry?
 - Still influential
 - Other proxy advisory firms are gaining influence
 - Large institutional investors with significant stakes are making their own decisions more often
 - Does not ensure that they will vote differently
 - Know your shareholders!

Dealing With Negative Voting Recommendations

- Timing issues – companies do not have much time to respond after RMG recommendation
- Prospect for negotiating a change?
 - Reluctance or refusal of RMG to agree to a deal
- How much weight do the proxy advisory recommendations carry?

Dealing With Negative Voting Recommendations (cont.)

- Key reasons?
 - Non-shareholder approved poison pills
 - Gross-ups – excise tax, perks
 - Failing to take action after an approved shareholder proposal
 - Certain compensation actions
 - Director relationships
 - On too many boards

Relationship Disclosure and its Consequences

- Consequences of the disclosure of director relationships?
 - Can easily lead to proxy advisory withhold vote recommendations
 - Do not disclose more than is required
 - But 404(a) and 407(a)
 - Note recently approved NYSE rules changes affecting disclosure of categorical standards

Expected Requirement to Disclose Voting Results

- Proposed rules would require companies to report results of shareholder votes on a Form 8-K within four business days after the end of the meeting at which the vote was taken

The State of the Economy

- What impact will the current state of the economy have on a company's filings?
 - Can there be less doom and gloom?
 - This year will likely still include negative impacts but hopefully some positive trends
 - Consider “Dear CFO” letter – August ‘09
 - Those companies for which most relevant
 - General principles

The SEC's "Dear CFO" Letter

- The current economic environment may require a reassessment of how companies account for and disclose the provision and allowance for loan losses
- MD&A reminder – known trends
- Specific areas:
 - Additional disclosure regarding higher risk loans
 - Declines in collateral value
- The SEC warns that, although determining the allowance for loan losses requires the exercise of judgment, it is inconsistent with GAAP if a company delays recognizing credit losses that could be estimated based on current information and events
- Expect SEC comments in this area

Impairment Disclosure

- Informal sources indicate that the SEC's expectations regarding MD&A disclosure of impairment charges will include:
 - Comprehensive discussion of underlying analysis including projections and assumptions
 - Breakdown of goodwill
 - Sensitivity to future trends
- The SEC may expect analysis even if companies determine no impairment is needed

Other Disclosure Issues

- Sustainability and green initiatives
- Focus on risk

The FASB Codification

- SEC guidance:
 - Outdated references in the SEC's rules and staff guidance should be understood to mean the corresponding reference in the FASB Codification
 - Though the FASB Codification includes references to some SEC rules and staff guidance, the SEC has said Codification is not the authoritative source for such content

Questions & Answers

Save the date for upcoming NDI Web Conference Series programs:

- **December 16, 2009**
Compensation Committee Issues
- **January 13, 2010**
Audit Committee Issues
- **January 27, 2010**
Corporate Governance
Developments
- **February 10, 2010**
Risk Management in the
Boardroom
- **February 24, 2010**
Investor Relations Issues
- **March 10, 2010**
General Counsel Evolving Trends
- **March 24, 2010**
Nonprofit Corporate Governance
- **April 7, 2010**
Climate Change Update
- **April 21, 2010**
Trends in the Recruitment and
Selection of Directors
- **May 5, 2010**
SEC Enforcement Update
- **May 19, 2010**
M&A in the Boardroom

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