

## CORPORATE LAW ALERT



Attorneys in SHB's Corporate Law Practice concentrate their practices in mergers and acquisitions, joint ventures, strategic alliances, securities matters, private equity and financing transactions, commercial finance and banking and the general representation of publicly held and private entities.

Our corporate finance attorneys are experienced in all aspects of corporate transactions, including private placements, mergers, acquisitions and divestitures, joint ventures, distributorships, public offerings, tender offers, venture capital financing, equity and debt restructuring, project finance, workouts, corporate governance and general corporate law.

Our banking and commercial law attorneys counsel local, national and international financial institutions and corporate borrowers on loan transactions and regulatory issues and are nationally recognized experts in various areas of commercial law.

For additional information on SHB's Corporate Law Practice, please contact

Timothy J. Kuester  
816-559-2184  
tkuester@shb.com



### SEC PROPOSED RULE AMENDMENTS SIGNAL MAJOR CHANGES FOR 2010 PROXY SEASON

On July 1, 2009, the SEC voted to propose several proxy rule changes designed to further enhance shareholder rights. If adopted, the proposed rule changes would:

- Implement provisions of the Troubled Asset Relief Program (TARP) by requiring registrants receiving TARP funds to include a separate non-binding advisory vote of the shareholders regarding executive compensation;
- Enhance the disclosures that are required for executive compensation and other corporate governance matters and clarify certain rules pertaining to proxy solicitation; and
- Approve the proposed rule changes made by the New York Stock Exchange (NYSE) that would eliminate discretionary voting by brokers in the election of directors.

#### ***How the "Say on Pay" Proposal Would Apply***

The so-called "Say on Pay" proposal for TARP recipients would amend existing proxy rules by adding a new provision (proposed Rule 14a-20) that would require all registrants who have received TARP funds under the Emergency Economic Stabilization Act of 2008 (EESA) to include a separate advisory shareholder vote on executive compensation. This new requirement would apply to all TARP fund recipients during the period in which any obligation arising from the receipt of TARP assistance remains outstanding. Under the new provision, the advisory shareholder vote would be required in connection only with an annual meeting or a special meeting in lieu of an annual meeting if proxies will be solicited for the directors' election.

## CORPORATE LAW ALERT

JULY 2009

The proposed rule would also amend Item 20 of Schedule 14A (information required in a proxy statement) so as to require TARP recipients to disclose in their proxy statements that they are providing an advisory vote on executive compensation as required by EESA. Companies subject to the new say on pay rule would be required to file a preliminary proxy statement under Rule 14a-6.

Although the proposed rule would apply to TARP recipients only, legislative pressure to require non-binding shareholder votes on executive compensation for all public companies is increasing, and Commissioner Walter has publicly encouraged all companies to allow say on pay votes, regardless of whether they are TARP recipients.

### How Compensation and Governance Disclosures Would Be Enhanced

The Commission also proposed rule changes designed to enhance compensation, risk profile and corporate governance disclosures. The proposed rule changes would also require more timely disclosure of annual meeting voting results. The proposed amendments will address several areas:

- The proposal would require expanded discussion in the Compensation Discussion and Analysis (CD&A) section of the proxy statement about the relationship of the registrant's overall compensation policies to the registrant's risk profile. Currently, a registrant is required only to discuss risk considerations in relation to the compensation of named executive officers. The proposed amendment would require the same CD&A discussion with respect to all employees. The proposal would require a discussion of whether the registrant's employee compensation policy incentivizes its employees to take risks that are consistent with the registrant's overall risk objectives;
- The proposal would amend Item 401 of Regulation S-K to expand director nominee disclosures beyond the brief description of business experience currently required. The amendment would impose more detailed disclosure obligations as to each candidate's particular experience, attributes or skills that qualify him or her to serve as a member of the registrant's board. Registrants would also have to disclose legal proceedings involving the candidate going back 10 years, as opposed to the five currently required;
- The proposal would amend Item 407 of Regulation S-K to require a discussion of why the registrant's board has chosen a particular leadership structure. For example, registrants will be required to explain (i) whether and why they have chosen to separate the positions of Chief Executive Officer and Chair of the Board, (ii) whether the board has a lead independent director, and (iii) a discussion of the board's role in the company's risk management process and the effect this has on the way the registrant has organized its leadership structure;
- The proposal would require additional disclosures about compensation consultants. Registrants will have to disclose (i) fees paid to and services performed by the consultant related to executive and director compensation, (ii) additional

## CORPORATE LAW ALERT

JULY 2009

services provided by the consultant and fees paid for such services, (iii) whether management recommended the decision to engage the consultant for any other services, and (iv) whether the board or compensation committee has approved the other services;

- The proposal would require registrants to disclose shareholder voting results in a Form 8-K within four days of the meeting on the vote. Previously, such disclosure could be made in the next Form 10-Q or Form 10-K; and
- The proposal would change how annual equity awards to executives and directors are reported. The proposed amendment would require the disclosure of the aggregate, grant-date, fair value of awards, as opposed to the dollar amount for the fiscal year of the accounting expense recognized in the registrant's financial statements, an amount usually amortized over the award's vesting schedule.

### ***How NYSE Rule Amendment Would Eliminate Broker Discretionary Voting in Director Elections***

NYSE Rule 452 currently allows brokers, as record holders of shares, to exercise discretionary voting authority and vote on behalf of beneficial owners on matters that the NYSE considers "routine." Until now, voting to elect directors in uncontested matters has been considered "routine," and brokers have traditionally been allowed to exercise their discretionary voting authority in favor of the registrant's slate of director nominees.

The SEC's proposal would approve the proposed NYSE amendment to Rule 452 so as to provide that no director election would be considered routine, whether or not contested. Therefore, with respect to all shareholder meetings held on or after January 1, 2010, brokers may not vote shares held of record by them in the absence of written instructions from the shares' beneficial owners. Importantly, because NYSE Rule 452 applies to brokers, it governs how such brokers vote shares of companies on other exchanges, such as NASDAQ, making the rule broadly applicable to all public companies.

The proposed rule is likely to have a significant impact on the number of shares voted at routine annual meetings because votes cast in director elections have historically included a substantial number of broker discretionary votes that will now be prohibited under amended Rule 452. It would be wise, therefore, for companies to engage in shareholder outreach programs and take other steps to increase voter participation, especially for companies that have a majority vote requirement for election of directors or companies that may not be able to obtain a quorum based on institutional shareholders. ■