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# SEC Signals Proxy Access Rules Not Likely To Be Effective For The 2010 Proxy Season, But It May Adopt Other Proxy And Risk Disclosure Enhancements In Time For 2010

On June 10, 2009, the Securities and Exchange Commission, or the SEC, proposed a comprehensive series of rule amendments to facilitate the rights of shareholders to nominate a minority slate of directors on corporate boards.[1]There was speculation that final action could be taken on the proposed rule amendments—known as the direct access proposal—as early as November 2009 and that the changes would be effective for the 2010 proxy season. Commissioner Elisse B. Walter, in a speech on October 2, 2009, indicated that it was unlikely that the proposed rules would be acted upon before the 2010 proxy season but assured that she is "quite serious" about the direct access proposal and expected the SEC to consider an adopting release in early 2010.[2]

Historically, a company's proxy statement has been reserved for matters that the company desires to present to its shareholders. Activists seeking election contests have been required to pay for preparation and mailing of their own separate proxy materials to campaign for their nominees. The direct access proposal would, in contrast to current practice, require companies to include in their proxy materials (subject to certain requirements):

- directors nominated by certain shareholders or groups of shareholders; and
- shareholder proposals seeking to amend a company's governing documents as they relate to director nomination procedures or disclosure related to shareholder nominations.

Although more and more companies have adopted a majority voting requirement for the election of directors, Ms. Walter stated that majority voting provides shareholders an opportunity to show opposition to a candidate, whereas access to the company's proxy statement provides shareholders an opportunity to offer a different candidate.

Ms. Walter's speech also covered other matters including:

*Proxy Enhancements and Risk Disclosures*. While the direct access proposal may not be in place for the 2010

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proxy season, Ms. Walter stated that she hoped and expected that the SEC's proposed proxy and risk disclosure enhancements will be. The proxy disclosure improvements are designed to:

- provide shareholders with better disclosure about the particular experience, qualifications, attributes and skills of director candidates;

- require companies to discuss their overall compensation policies beyond the named executive officers if risks arising from those policies may have a material effect on the company; and

- accelerate the timing of disclosure of voting results.

*Management's Discussion and Analysis*. Ms. Walter stressed the importance of a robust MD&A section to an investor's evaluation of his or her investment. In her view, the MD&A disclosure in company reports is not where it should be. Ms. Walter called on companies to "recognize trends and uncertainties sooner; make reasonable likelihood determinations before they become more likely than not; and disclose this information to investors so that they can make their own, fully-informed investment decisions."

*Climate Change*. Ms. Walter remarked that the SEC is "taking a very serious look at" climate change disclosures and that it is time for the SEC to consider issuing interpretive guidance regarding disclosure in this area. Ms. Walter indicated that even without any further guidance, if she were drafting a company's disclosure, she would carefully consider whether the company's particular facts and circumstances raise any disclosure obligations under the current rules, and in particular, under the MD&A requirements.

*IFRS*. Ms. Walter concluded her speech by addressing International Financial Reporting Standards, or IFRS. Indicating that there are critical issues to be addressed as the SEC moves forward on a decision concerning the adoption of IFRS for U.S. companies, she noted that before she can support a move she must be satisfied that the standards will continue to be set through an independent process to provide transparent information for the benefit of investors. The SEC is reviewing the over 200 comments that it has received on the IFRS roadmap the SEC adopted last fall. Ms. Walters expects that the public can hear from the SEC on this matter in the next few months.

If you have any questions regarding this information, please contact Jamie Mercer at (858) 720-7469 or Jeralin Cardoso at (858) 720-7431.

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[1]Proposed Rule 14a-11 would apply to all companies that are subject to US proxy solicitation rules, including registered investment companies. The full text of the proposed rules is available here.

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[2] The full text of Commissioner Walter's speech entitled "SEC Rulemaking – 'Advancing the Law' to Protect Investors" is available here.