PRYOR CASHMAN LLP

LEGAL UPDATE

July 2009 *By: Michael T. Campoli*

SEC APPROVES AMENDMENTS TO NYSE RULE 452 AND OTHER DISCLOSURE ENHANCEMENTS

On July 1, 2009, the U.S. Securities and Exchange Commission (the "SEC") voted, by a 3-2 margin, to approve a change to New York Stock Exchange Rule 452 and the corresponding NYSE Listed Company Manual Section 402.8 to eliminate broker discretionary voting of uninstructed shares in uncontested director elections for meetings held on or after January 1, 2010.

At the same meeting, the SEC also unanimously approved amendments to its rules relating to proxy disclosures about executive compensation, director and nominee qualifications, board leadership structure and risk management of the board, and to the disclosure of shareholder meeting voting results. The SEC published the final text of the rule proposals for comment on July 10, 2009. The proposed rules are subject to a 60-day public comment period after their publication in the Federal Register, which is expected during the week of July 13, 2009. It is anticipated that the final rules will be applicable for the 2010 proxy season.

NYSE RULE 452

NYSE Rule 452 allows brokers to vote on "routine" matters when the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before the scheduled meeting date. However, brokers do not have discretionary authority to vote uninstructed shares on "non-routine" matters, of which there are currently 18 under Rule 452. The amendment to Rule 452 specifically categorizes every election of directors – whether contested or uncontested – as a non-routine matter for all shareholder meetings held on or after January 1, 2010. Thus, brokers will not be able to vote uninstructed shares for the election of directors at such meetings.

The elimination of broker discretionary voting for the election of directors may have a significant impact on shareholder meetings that include uncontested director elections. Specifically, companies with a majority voting standard for director elections may have difficulty in obtaining the requisite shareholder approval for their nominees, since brokers have typically followed the recommendations of management in casting their discretionary votes. The lower voting turnouts in support of management nominees resulting from the rule change could also enhance the effectiveness of "vote no" and similar campaigns launched by activist shareholders against particular directors to express dissatisfaction with management's performance or the performance of the company, especially at companies that have adopted a majority voting standard. In addition, the amendment to Rule 452 could expand the influence of institutional investors and proxy advisory firms over the election of directors, since institutional investors are more likely than retail shareholders both to vote at shareholder meetings and to follow the recommendations of advisory firms.

Moreover, companies may find it more difficult to achieve a quorum at their stockholder meetings if only non-routine matters are included on the agenda. This effect would be greatest a smaller companies who have higher percentages of shares held by retail investors. To address this issue, companies may consider including on the meeting agenda the ratification of auditors, which is still considered a routine item under Rule 452. As long as there is at least one routine item on which brokers are entitled to vote on the agenda at the meeting, broker votes will also be counted for quorum purposes even with respect to "non-

routine" matters on which they are not entitled to vote.

It is important to note that because Rule 452 applies to NYSE-registered brokers, the amendment affects not only companies listed on the NYSE, but also other public issuers, regardless of the exchange on which they are listed. Also, the amendment does not apply to registered investment companies.

Expanded CD&A for Material Risks

A proposed amendment to Item 402 of Regulation S-K would broaden the scope of the Compensation Discussion & Analysis to require a discussion and analysis of the company's overall compensation policies and practices for non-executive officers and employees generally (not limited to named executive officers), if the risks arising from these policies or practices may have a material effect on the company.

Revised Disclosure of Equity Awards

The SEC proposed amending Item 402 of Regulation S-K so that the value of stock option and equity awards reported in the Summary Compensation Table and the Director Compensation Table be disclosed at the aggregate grant date fair value of such awards computed in accordance with Statement of Financial Accounting Standards No. 123(R), rather than the value recognized for that year for financial statement reporting purposes under SFAS 123(R). The proposals seek comment regarding, but do not address, how this change would be implemented in light of the Summary Compensation Table's coverage of not only the most recent fiscal year but the two prior fiscal years (one prior fiscal year in the case of smaller reporting companies).

Director and Nominee Qualifications

The SEC proposed to amend Item 401 of Regulation S-K to expand disclosure about the qualifications of directors and nominees. The proposed amendments would require a company to disclose, for each director and nominee, the particular experience, qualifications, attributes or skills that qualify that person to serve as a director and as a member of any committee on which that person serves or is chosen to serve (if known), in light of the company's business and structure. The types of information that may be disclosed include, for example, information about a director's or nominee's risk assessment skills and any specific past experience that would be useful to the company, as well as information about a director's or nominee's particular area of expertise and why the director's or nominee's service as a director would benefit the company.

The proposed amendments would also require disclosure of any directorships at public companies held by each director or nominee at any time during the past five years (instead of only currently held directorships), and would lengthen the time for which disclosure of legal proceedings is required from five to 10 years.

Company Leadership Structure and Risk Management

A proposed new disclosure requirement to Item 407 of Regulation S-K and Item 7 of Schedule 14A would require disclosure of a company's leadership structure, including a discussion of why the company believes its leadership structure is the best structure for the company. This discussion would include a disclosure about whether and why the company has chosen to combine or separate the CEO and board chairperson positions. For companies that have not separated the role of CEO and board chairperson, it would also include a discussion of whether it has a lead independent director, and the specific role that the lead independent director plays in the leadership of the company. Moreover, the proposals call for additional disclosure in proxy and information statements about the board's role in the company's risk management process, and the effect, if any, that such role has on the way the company has organized its leadership structure.

New Disclosures Regarding Compensation Consultants

New disclosure would be required under the proposed amendments to Item 407 of Regulation S-K about the fees paid to and services provided by compensation consultants and their affiliates if they play any role in determining or recommending the amount or form of executive or director compensation and also provide other services to the company. The additional disclosure includes: (i) the nature and extent of all additional services provided by the compensation consultant to the company during the last fiscal year; (ii) the

aggregate fees paid for all additional services; (iii) the aggregate fees paid for work relating to executive and director compensation consulting; (iv) whether the decision to engage the consultant or its affiliates for any other services was made, recommended, subject to screening or reviewed by management; and (v) whether the board or compensation committee has approved all of these other services.

The proposed amendments would not apply if the compensation consultant's only role in recommending the amount or form of executive or director compensation is in connection with consulting on broad-based plans that do not discriminate in favor of executive officers or directors, such as 401(k) plans or health insurance plans.

Annual Meeting Voting Results

The SEC proposed adding a new Item 5.07 to Form 8-K to require a company to disclose on Form 8-K the results of a shareholder vote. The Form 8-K would be filed within four business days after the end of the meeting at which the vote was held, with limited exceptions for contested elections where the voting results are not definitively determined at the end of the meeting (in which case companies should disclose on Form 8-K the preliminary voting results within four business days after the preliminary voting results are determined, and file an amended Form 8-K within four business days after the final voting results are certified). Currently, a company can delay reporting these voting results until its periodic report covering the fiscal quarter in which the meeting was held. If the proposal is adopted, the SEC will delete the requirement relating to disclosure of shareholder votes from Forms 10-Q and 10-K.

Clarifications to Proxy Solicitation Rules

The SEC proposed amendments to certain rules under the Securities Exchange Act of 1934, as amended, to clarify rules already in place regarding proxy solicitations. Specifically, the SEC has proposed to amend:

- Rule 14a-2(b) to clarify that: (i) an unmarked copy of a management proxy card that is requested to be returned directly to management is not a form of revocation that renders the 14a-2(b) exemption unavailable and (ii) substantial interest in the subject matter of the solicitation that would otherwise make the exemption unavailable may be present even if the soliciting party is not a shareholder;
- Rule 14a-4(d) to provide that a soliciting person can round out a director short slate with nominees named in a non-management proxy statement in the same manner as already permitted by the rule for nominees named in management's proxy statement;
- Rule 14a-4(e) to clarify that any condition specified by a soliciting party as to when it may not vote shares over which it has received proxy authority must be objectively determinable; and
- Rule 14a-12 to clarify that information regarding the identity and interests of participants in a solicitation must be available and on file no later than the time shareholders are first solicited.

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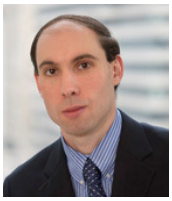
The foregoing is intended to summarize the principal issues relating to the SEC's approved amendments to NYSE Rule 452 and other disclosure enhancements, and is not intended to provide legal advice. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael Campoli at (212) 326-0468.

About The Author



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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including Securities and Exchange Commission and self-regulatory organization reporting and compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, and SEC and NASDAQ reporting and compliance requirements
- Representation of Javelin Pharmaceuticals, Inc. (NYSE - Amex: JAV) as outside general counsel in connection with its equity financings, and SEC and NYSE - Amex reporting and compliance requirements
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- Represented Open Range Communications Inc. in connection with a $380 million financing that consisted of the issuance of a $270 million promissory note to the U.S. Department of Agriculture and preferred stock to private investors
- Represented The Kushner Companies in connection with its acquisition of the office building located a 666 Fifth Avenue, New York, New York
- Represented Implantable Vision, Inc. (OTCBB: IMVS) as outside general counsel in connection with SEC compliance and reporting matters
- Represented a privately-held alternative media company in connection with general corporate matters and its acquisition of a coffee sleeve advertising business
- Represented a private medical devices manufacturer in connection with equity and debt offerings for aggregate gross proceeds of up to $4,000,000
- Represented a private life sciences company in connection with the issuance of $15 million of convertible notes
- Represented a private television production company in connection with the issuance of $3.5 million of equity securities