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The SEC Proposes Rules to Improve Corporate Governance and Enhance Investor Confidence

On July 1, 2009, the Securities and Exchange Commission (the "SEC") proposed a set of rule revisions on the proxy voting process that would:

- Require public companies receiving money from the Troubled Asset Relief Program ("TARP") to provide a shareholder vote on executive compensation in their proxy solicitations; and
- Improve disclosure to shareholders of public companies of compensation and corporate governance in their proxy statements.

The SEC also voted to approve a New York Stock Exchange ("NYSE") rule that would prohibit brokers from voting proxies in corporate elections without instructions from their customers. Because the related rule amendments have not been finalized, this Securities Law Update is based on the approved rule proposals. The SEC will accept public comments on these proposed rules if the comments are received within 60 days after the publication of the proposed rule amendments in the *Federal Register*.

The SEC's Proposed Rules

Under the Emergency Economic Stabilization Act of 2008 shareholders must approve a company's executive compensation at any time when such company has any remaining outstanding obligations arising from financial assistance under TARP. The rule change proposed by the SEC would (i) require public companies that receive TARP funds, and have outstanding TARP financial assistance obligations, to provide a separate shareholder vote in proxy solicitations, (ii) require a separate shareholder vote only on proxies solicited for an annual meeting (or a special meeting in lieu of the annual meeting) of security holders for which proxies will be solicited for the election of directors, (iii) require companies to disclose in their proxy statements that they are providing a separate shareholder vote on executive

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Our Practice

Our Capital Markets Practice Group represents publicly held companies, investment banks and institutional shareholders in connection with public offerings of equity and debt securities. We have particular experience in initial public offerings and offerings of convertible and other hybrid securities. We represent leading national investment banks, as well as maintaining an extensive base of public corporate clients. Our lawyers regularly participate in transactions involving a wide variety of industries, including compensation and briefly explain the effect of the vote, and (iv) exempt small reporting companies from having to include a compensation discussion and analysis section in their proxy statements.

The SEC also proposed to improve the disclosure of compensation and corporate governance matters when voting decisions are made. The proposed rule is designed to enhance the information included in proxy and information statements by requiring that information be included about (i) the relationship between a company's overall compensation policies and risk, (ii) the qualifications of directors, executive officers and nominees, (iii) company leadership structure, and (iv) potential conflicts of interest with compensation consultants. The proposed rule also attempts to improve how annual stock and option awards to company executives and directors are reported, as well as to require quicker reporting of election results.

SEC Approval of NYSE Rule Change on Discretionary Proxy Voting

In an effort to enhance corporate governance and accountability, and in order to address concerns that broker discretionary voting for directors has impacted election results, the SEC also voted to approve an NYSE proposal that eliminates broker discretionary voting for all elections of directors, whether contested or not. NYSE Rule 452 and corresponding Listed Company Manual Section 401.08 currently allow brokers to vote on behalf of their beneficial owner customers only in uncontested director elections if such broker's customers have not returned voting instructions. The NYSE proposal also adds "election of directors" to the list of enumerated items for which a broker generally may not give a proxy vote without instructions from the beneficial owner. However, companies registered under the Investment Company Act of 1940 are exempted. The NYSE proposal also codifies two previously published interpretations that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company. The NYSE proposal will apply to shareholder meetings held on or after January 1, 2010.

Conclusion

Ultimately, these new rule proposals give insight into the timely concerns of the SEC to restore investor confidence and the SEC's ongoing efforts to improve access to information and to empower investors to improve their corporations' corporate governance measures.

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