ECKERT SEAMANS

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SECURITIES REGULATION AND COMPLIANCE ALERT

RECENT LEGAL AND REGULATORY DEVELOPMENTS AFFECTING PUBLIC COMPANIES IN 2010

The following is a summary of noteworthy legal and regulatory developments impacting public companies in 2010.

Annual Meetings and Proxy Statements

Brokers Cannot Cast "Discretionary" Votes for Directors, Making a Quorum More Difficult to Achieve. Effective January 1, 2010, brokers cannot vote shares held in customer accounts in uncontested director elections unless the brokers have received instruction from the customers. This change makes the election of directors a "non-routine" matter and may make it more difficult for the board's slate of directors to receive the majority of votes cast. In addition, companies may have difficulty achieving a quorum at annual shareholders meetings unless at least one "routine" matter (such as the ratification of auditors) is voted upon at the meeting. This change stems from the SEC's recent approval of amended NYSE Rule 452 prohibiting brokers from exercising "discretionary voting" in uncontested director elections. The NYSE Rules apply to NYSE member brokers in all of their discretionary voting activities, including those related to public companies that are listed on the NASDAQ Stock Market and other national securities exchanges.

Companies Must Provide Enhanced Risk, Corporate Governance and Compensation Disclosures in Annual Reports and Proxy Statements. New SEC rules requiring greater disclosure in annual reports and proxy statements on risk, corporate governance and executive compensation became effective February 28, 2010 and affect most companies in the 2010 proxy season if they have fiscal years ended on or after December 20, 2009. The new rules do not generally affect companies with fiscal year-ends before December 20, 2009 until the 2011 proxy season. The new disclosures include the following:

- *Compensation-Related Risk Management.* A company must disclose compensation policies and practices for all employees (not just named executives) if such policies and practices create risks that are reasonably likely to have a material adverse effect on the company as a whole.
- *Enhanced Disclosure for Directors, Director Nominees and Executives*. A company must now disclose, for each director and nominee, the particular experience, qualifications, attributes or skills, that led the board to determine that the person should serve as director and any directorships at public companies or registered investment companies held by such director or nominee during the previous five years. A company must describe whether diversity is a factor in the selection of board candidates. In addition, executive officers, directors and nominees must disclose the occurrence in the last 10 years (rather than 5 years) of any personal involvement in an expanded list of legal proceedings.
- *Board Role in Oversight.* A company must disclose the board's role in oversight related to risks such as credit risk, liquidity risk and operational risk.
- *Compensation Consultants.* Where a compensation consultant is retained to provide advice or recommendations on executive and director compensation and that consultant or its affiliate also provides other services to the company for fees in excess of $120,000, the company must disclose the fees paid to the consultant for executive-compensation consulting services and non-executive compensation services.

- *Stock and Option Award Values.* In the Summary Compensation Table and Director Compensation Table, a company must now report the value of stock and option awards made during the fiscal year based on the "aggregate grant date fair value" of such awards (ASC Topic 718) rather than the compensation expense recognized for financial statement reporting purposes for the fiscal year. For awards that are subject to performance conditions, the disclosure of the aggregate grant date fair value must be based on the probable performance outcome, rather than the maximum performance level. A company must present re-computed stock and option awards values in the Summary Compensation Table for each preceding fiscal year but is not required to revise the named executive officers for any preceding fiscal year based on this re-computation or to amend previously filed executive compensation disclosures.
- *Company Leadership Structure.* A company must describe the leadership structure of the board, including justifying why such a structure is appropriate. A company must disclose whether and why it has chosen to combine or separate the CEO and Board Chairman positions and why this structure is most appropriate.

SEC Guidance on Climate Change Disclosures. In January 2010, the SEC provided interpretative guidance regarding climate change disclosures. The SEC confirmed that general materiality analysis is appropriate to determine whether a company should include disclosures on this topic. The SEC provided the following examples of areas that may require climate change disclosures:

- *Impact of Legislation and Regulation*: A company should consider whether the impact of certain existing federal and state laws and regulations regarding climate change is material. A company should also evaluate the potential impact of pending federal and state legislation and regulation related to climate change, such as reduced emissions standards and "cap and trade" systems for carbon emissions.
- *Impact of International Accords*: A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change, such as the Kyoto Protocol, the Copenhagen Accord, and the European Union Emissions Trading System.
- *Indirect Consequences of Regulation or Business Trends*: A company should consider the actual or potential indirect consequences, including benefits and risks, that it may face due to climate change related regulatory or business trends and, if material, disclose such consequences. Examples include a reduction in demand for a company's products or changes in a company's manufacturing processes to address such trends.
- *Physical Impacts of Climate Change*: A company should evaluate the actual and potential physical impacts of climate change, such as weather and geophysical changes, on its business and, if material, disclose such impacts.

Climate change disclosures are likely to fall within one or more of the following disclosure categories under Regulation S-K: Item 101 (Description of Business); Item 103 (Legal Proceedings); Item 503 (Risk Factors); and Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operation).

Changes to E-Proxy Rules. On March 29, 2010, amendments to the SEC's notice and access, or "e-proxy," rules became effective. The amendments give companies greater flexibility in describing and presenting the information required by the SEC in the notice of Internet availability of proxy materials delivered to shareholders and allow companies to include in the notice an explanation as to how shareholders can review proxy materials and vote under the e-proxy rules. In addition, the amendments changed the deadline by which a soliciting person other than the issuer has to send a notice to shareholders. As amended, a soliciting person other than the issuer (i) has to file a preliminary proxy statement with the SEC within 10 calendar days after the issuer files its definitive proxy statement and (ii) has to send its notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC.

Periodic SEC Filings

Companies Must Report Results of Shareholder Voting on Form 8-K. For shareholder meetings held on or after February 28, 2010, companies must report the results of shareholder votes within four business days after the meeting under new Item 5.07 of Form 8-K. Companies will no longer have to report voting results on Form 10-K or 10-Q.

Non-Accelerated Filers Must Include Auditor Attestation in 10-Ks for Fiscal Years Ending On or After June 15, 2010. Non-accelerated filers must file the independent auditor's attestation report in their annual reports for fiscal years ending on or after June 15, 2010. Legislation is pending in Congress that would remove this requirement for smaller reporting companies.

SEC Staff Sanctions Greater Flexibility to Use Non-GAAP Financial Measures. On January 15, 2010, the SEC Staff revised its Compliance and Disclosure Interpretations ("CDIs") relating to the use of non-GAAP financial measures by reporting companies in SEC filings and other public disclosures. A non-GAAP financial measure is a numerical measure of financial performance, financial position or cash flows that excludes (or includes) amounts that are otherwise included in (or excluded from) the most directly comparable GAAP measure. Examples of non-GAAP financial measures include EBITDA, Adjusted EBITDA, free cash flows, organic sales growth and funds from operations. Significant updates in the Staff's guidance include the following:

- Adjusting for recurring items is permitted provided that: (i) the non-GAAP financial measure is not labeled "non-recurring" and (ii) the company clearly discloses and explains the reasons for the elimination.
- Non-GAAP financial measures not regularly used by management in managing the business are permitted, but the company must explain why management believes the measure is useful to investors and, if material, the extent to which management uses the measure.
- Adjusted EBITDA is permitted provided that (i) the measure is referred to as "Adjusted EBITDA" or another similar title so that it is not confused with "EBIT" or "EBITDA" and (ii) the requirements of S-K Item 10(e) are satisfied (*i.e.*, the company must include a presentation of the most comparable GAAP measure, explain why management believes the measure is useful to investors and, if material, the extent to which management uses the measure).

Except as described above, the Staff reaffirmed most of its prior guidance on non-GAAP financial measures in the recent CDIs, including the prohibition on labeling an adjustment "non-recurring," "infrequent" or "unusual" unless it did not occur within the last two years and is reasonably likely not to occur in the next two years.

Reminder- XBRL Interactive Format for Financial Statements Compliance Dates. In April 2009, the SEC rules requiring eXtensible Business Reporting Language ("XBRL") became final. XBRL is a computer language that defines or "tags" data and allows investors to navigate within financial documents and locate related financial data. With XBRL, investors can download financial information directly into spreadsheets which, the SEC asserts, will facilitate analysis of financial information. Companies will be required to tag the financial statements, footnotes and any financial statement schedules in their periodic reports and certain registration statements filed with the SEC. The schedule for XBRL compliance is as follows:

- Large accelerated filers that have a worldwide public float above $5 billion are required to provide interactive data in XBRL format beginning with their first periodic report on Form 10-Q for a fiscal period ending on or after June 15, 2009.
- All other large accelerated filers will be required to provide interactive data in XBRL format beginning with their first periodic report on Form 10-Q for a fiscal period ending on or after June 15, 2010.
- All other filers (including smaller reporting companies) will be required to provide interactive data in XBRL format beginning with their first periodic report on Form 10-Q for a fiscal period ending on or after June 15, 2011.

Until a company is subject to the XBRL rules, it should not check either box relating to the Interactive Date File paragraph that appears on the cover page of Forms 10-K and 10-Q.

Foreign private issuers are also subject to the XBRL rules, except that foreign private issuers that do not prepare their financial statements in accordance with U.S. GAAP or IFRS are not required to provide interactive data in XBRL format.

The Securities Regulation and Compliance Alert is intended to keep readers current on matters affecting securities regulation and compliance and is not intended to be legal advice. For more information, please contact any of the following attorneys in the firm's Securities and Corporate Finance Practice Group:

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