

Market News

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A monthly review of IR developments for our clients and friends. . .

Proxies are going to be a lot more interesting in 2011

The SEC's final "proxy-access" rule is a real game-changer. Under the new rule, large investors having three percent or more stake in the company for at least three years will be able to propose Board nominees starting in 2011. Prior to the rule, shareholders who wanted to install their own directors had to bear the cost of winning support from other investors. We have compiled some comments about the potential impact of the rule from several securities-law experts:

J. Robert Brown, Jr., University of Colorado, Sturm College of Law

"The authority will likely be used tentatively, as institutional investors only favor the nomination and election of insurgent directors hesitantly, unwilling to significantly disrupt the traditional management dominated board. It is about providing shareholders with an alternative when they are particularly dissatisfied with management. This will occur in companies that have poor governance records or overpaid managers relative to the company's performance. Boards will increasingly become more responsive to shareholders if for no other reason than to avoid an access challenge. It will accelerate the end of CEO dominated boards."

Larry E. Ribstein, University of Illinois, College of Law

"The new proxy access rule is not pro-shareholder, because it bars any possibility for shareholders or state law to provide for less proxy access than under the new rule. Perhaps the answer is that shareholders shouldn't participate in governance because they are too easily manipulated and misled and simply don't know what's good for them. Rather, the SEC knows best."

Ira Millstein, Well Gotshal & Manges LLP, and Stephen Davis, Yale School of Management

"Boards and investors, both, will need to rethink their respective responsibilities, new or expanded. The most critical step boards can take is to open dialogue with shareholders. Today, few directors do outreach. They leave it to management. Boards should invite investor input on nominations, risk and executive compensation policies, while preserving director authority."

Stephen Bainbridge, UCLA School of Law

"It could have been worse. The ownership requirement will deter short-term activists from making use of the rule. At the same time, however, proxy access has never been a good idea."

Christopher Bruner, Washington & Lee University School of Law

"To the extent that excessive risk-taking led to the crisis, reforms like proxy access – aiming to empower the corporate constituency whose incentives are most skewed toward greater risk – simply don't add up. The far greater governance power of U.K. shareholders appears to have done little to mitigate the crisis over there. That ought to give pause to those suggesting that augmenting shareholder powers will prevent future crises over here."

More detailed risk disclosure necessary, says SEC

The Securities and Exchange Commission is pushing for more detailed disclosure in annual and quarterly financial statements and proxy statements on the heels of the financial crisis. The agency wants specifics on risk tied to credit and liquidity, goodwill impairments and compensation, detailing how it applies specifically to each company and its operations. They want companies to stop “copying and pasting” their risk disclosures every quarter from the previous quarter. Rather they want management to start from scratch every quarter addressing in detail each risk and how it impacts the company and its stakeholders.

It may pay to come clean and cooperate

So your company is being investigated by the SEC for possible wrongdoing. Do you cooperate or keep your mouth shut? A study conducted by the University of Texas of 1,249 companies making restatements between 1997 and 2005 showed while it pays in dollar terms (lower penalties) to cooperate, it also increases the likelihood of getting sanctions, censures and trading suspensions. In January the commission adopted internal guidelines designed to convince more violating companies and individuals to come forward and help its overall mission of combating securities fraud. Some that cooperate may receive lesser penalties or no enforcement action.

Buyback programs are on the rise

While the uncertain economy has captured headlines, corporate America has just experienced its third consecutive quarter of stellar profit growth. But the profit growth isn't easing management's tension over an economy stuck in neutral—or worse—and an unforgiving stock market that is depressing stock prices. So, buybacks are in vogue again. In the first quarter this year, 251 companies repurchased stock, up from 214 companies in the fourth quarter of 2009 and 194 companies in the first quarter a year ago. More dramatic, the dollar amount of repurchased stock rose 80 percent from the first quarter 2009 to \$55.3 billion, though it remains far from the all-time high of \$172 billion set in the third quarter 2007, according to Standard & Poor's.

SEC enforcement division granted permanent subpoena powers

After a one-year trial period, the SEC in August was quietly granted permanent subpoena power for documents and to compel testimony. According to the Commission, subpoenas more than doubled to 496 from 223 during the trial period.

Study suggests a modest stock benefit from tweets

Three professors at the University of Michigan's Ross School of Business have detected a modest but statistically significant beneficial market effect from tweeting by public companies. Elizabeth Blankespoor, Gregory Miller, and Hal White examined whether social media messages (in this case, tweets) issued to amplify the effect of traditional corporate disclosures via news services, can be effective. They discovered that companies that coordinated their traditional releases with tweets (and particularly when the tweets contained hyperlinks to the original release), their shares experienced greater liquidity, as measured by lower bid-ask share price spreads and greater depth (shares available). The authors say the effect was small, and most noticeable among shares of smaller, less visible companies. They also admit that other factors could be involved. The study covered 3,693 releases by 71 publicly traded information technology companies.



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