



SECURITIES AND CORPORATE GOVERNANCE NEWSLETTER

October 2009

To our Clients and Friends:

We are pleased to provide the October 2009 issue of our Securities and Corporate Governance Newsletter, a quarterly newsletter summarizing recent legal and regulatory developments of interest to publicly-traded U.S. companies. The Newsletter is intended to inform you about issues that may affect you. Please contact us if you would like to discuss these issues in greater depth, or if there are other matters you would like to see addressed in the future.

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Deadline for Full Compliance with SOX 404 Extended for Small Public Companies

The Securities and Exchange Commission has granted a further extension for non-accelerated filers to come into full compliance with Section 404 of the Sarbanes-Oxley Act. Such registrants were expected to begin filing the auditor's attestation regarding internal controls with their annual reports for the first fiscal year ending on or after December 15, 2009. On October 2, however, the SEC announced in a [press release](#) that non-accelerated filers would not be required to comply until the first fiscal year ending on or after June 15, 2010.

The extension was granted so that the SEC's Office of Economic Analysis could complete a [study](#) of whether additional guidance provided in 2007 was effective in reducing the costs of compliance. Because the study was published less than three months before the December 15 deadline, the SEC determined that additional time was appropriate so that small companies and their auditors could better plan for the required auditor attestation.

As a result of the extension, companies with December 31 and March 31 fiscal year-ends will be given an extra year to begin complying with the auditor attestation requirement.

SEC Proxy Access Rule Delayed

In our last newsletter, we discussed the SEC's latest [rule proposal](#) to require companies to include director nominations by stockholders in company proxy materials, provided certain conditions are met. At the time, it was widely assumed that the proposed rules would be approved in time to take effect prior to the 2010 proxy season. Recently, however, the SEC determined that more time is required for the Commission to finalize the regulations. SEC

chairperson Mary Schapiro expressed the hope that the Commission would take up the final regulation in early 2010, as reported in this [Reuters article](#). The new regulations, should they be approved, are unlikely to take effect until after the upcoming proxy season.

First No-Fault Clawback of Executive Bonus under SOX

Under Section 304 of the Sarbanes-Oxley Act, where a company is required to restate its financial statements “as a result of misconduct,” the CEO and CFO must forfeit their bonuses and profits from sales of company stock earned during the period affected by the restatement, regardless of whether they participated in such misconduct. The theory behind such a “clawback” provision, however crude in its application, is that such bonuses and profits were based on illusory financial results, and that the CEO and CFO are ultimately responsible for misconduct that occurs on their watch.

In July, the SEC asked a court to require the former CEO of CSK Auto Corporation to reimburse the company for more than \$4 million in bonuses and stock sale profits that he had earned while CSK was committing accounting fraud. According to the SEC’s [press release](#) announcing the action, this was the first instance in which the SEC took action under Section 304 against an officer who was not alleged to have directly engaged in violations of securities laws. Said one SEC official, the former CEO “was captain of the ship and profited during the time that CSK was misleading investors about the company's financial health.”

Amendment of Delaware General Corporation Law to Protect Director and Officer Indemnification Rights

Section 145 of the Delaware General Corporation Law has been amended to protect directors and officers from retroactive elimination or impairment of indemnification rights that are provided in a company’s certificate of incorporation or bylaws. The amendment was adopted in response to the 2008 decision in *Schoon v. Troy*, in which the Chancery Court held, based on the language of the indemnification provisions in a company’s bylaws, that the company could lawfully eliminate a former director’s right to advancement of attorneys’ fees by amending its bylaws after the occurrence of the events giving rise to the director’s indemnification claim. The amendment added a sentence to Section 145(f) that provides indemnification or advancement rights under a provision of a company’s certificate of incorporation or bylaws may not be eliminated or impaired by amendment of the provision after the occurrence of the act or omission that is the subject of the action or proceeding for which indemnification or advancement is sought, unless the provision in effect at the time of such act or omission expressly authorizes such modification after the act or omission has occurred.

On the Horizon

In July the U.S. House of Representatives approved the [Corporate and Financial Institution Compensation Fairness Act of 2009](#). The bill, one of several under consideration that address executive compensation matters, is in line with a proposed bill submitted by the Treasury Department. The bill is now pending before the Senate.

Say on Pay

The proposed law would require an annual nonbinding shareholder vote on the compensation of a public company's "named executive officers" (the officers named in the Summary Compensation Table). In addition, the law would require that any proxy statement relating to a proposed acquisition of the company seek a nonbinding shareholder vote with respect to any "golden parachute" compensation payable to a named executive officer in connection with the transaction.

Independence of Compensation Committees

The bill addresses the independence of compensation committees in a similar manner to the Sarbanes-Oxley Act's approach to audit committees. The bill lists a series of independence standards, which would be implemented through SEC regulations mandating requirements in exchange listing rules. The proposed requirements include the following:

- Each member of the compensation committee must be independent; to be considered independent, among other things, a committee member must not receive any compensation other than in his or her capacity as a member of the board or a committee of the board.
- Any compensation consultant or other adviser to the committee must be independent.
- The committee must have sole authority over the retention, compensation and oversight of an independent compensation consultant.
- The committee must have the authority to retain independent counsel.
- The company must disclose in its annual proxy statement whether its compensation committee retained a consultant meeting the independence standards set forth in the regulations.

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If you have any questions about any of the matters discussed in this newsletter, please contact [Paul Blumenstein](#) of our Silicon Valley Office or [William Caffee](#) of our Portland Office.

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