Legal Alert

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TO: **Our SEC Reporting Companies, Clients and Friends**

RE: **SEC LOOKS TO "SAY ON PAY", ENHANCED SHAREHOLDER ACCESS TO COMPANY PROXY STATEMENTS, AND GREATER DISCLOSURE OF DIRECTOR QUALIFICATIONS**

Two attached articles in today's The New York Times and The Washington Post quoting SEC Chairman Shapiro and SEC Commissioner Walters indicate that the SEC may be poised to support mandatory "say on pay" proposals at annual meetings of shareholders, greater access to company proxy statements by shareholders and more company disclosure of director qualifications.

With respect to "say on pay," Commissioner Walters is quoted as saying that such measures "can help restore investor trust" and lead to "increased shareholder participation." Chairman Shapiro has stated that one way for Wall Street to repair itself after the financial crisis is by "giving shareholders a greater say on who serves on corporate boards, and how company executives are paid."

It is reported that both Shapiro and Walters (who previously served together at the SEC) said that the SEC should revisit the issue of proxy access for shareholders and make it easier for shareholders to put forward their own nominees for board of director seats.

What may become an integral part of any proposal for easier access to a company's proxy statement to put forward shareholder nominees for directors is the concern expressed by both Walters and Shapiro about the need for additional disclosure of director's backgrounds and skills and other qualifications to serve on a company's board. In this regard, Commissioner Walters indicated that it may be preferable if, in addition to the usual short biographical information, companies were required to explain in their proxy statements why they believe the director nominee would "add value" to the company.

We note that, with immediate effect, the American Recovery and Reinvestment Act of 2009 amended the Emergency Economic Stabilization Act of 2008 under which the United States Treasury established its Troubled Asset Relief Program (including its Capital Purchase Program) ("TARP") to require recipients of TARP funds to permit in any proxy for an annual meeting of shareholders a separate, non-binding shareholder vote to approve the compensation of executives as disclosed in the Compensation Discussion and Analysis Section of the company's proxy statement.

n our opinion, the views expressed by these SEC veterans, in connection with prevailing public and Congressional attitudes, may foreshadow significant Congressional and/or SEC proposals affecting proxy statements and shareholder access to such statements in the coming year.

For more information on this matter, please contact our office at 717.731.1700 or:

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SEC to Examine Boards' Role in Financial Crisis

By Zachary A. Goldfarb
Washington Post Staff Writer
Friday, February 20, 2009; Page D01

Securities and Exchange Commission Chairman Mary Schapiro plans to look into whether the boards of banks and other financial firms conducted effective oversight leading up to the financial crisis, according to SEC officials, part of efforts to intensify scrutiny of the top levels of management and give new powers to shareholders to shape boards.

THIS STORY
SEC to Examine Boards' Role in Financial Crisis
SEC Names Former Prosecutor as Enforcement Chief

SEC chairman Mary Schapiro may ask boards to disclose more about the backgrounds of its directors. (By Jose Luis Magana -- Associated Press)

As she examines what went wrong, Schapiro is also considering asking boards to disclose more about directors' backgrounds and skills, specifically how much they know about managing risk, said the officials, who spoke on condition of anonymity because no policy initiative has been launched.

Having led the agency for just three weeks, Schapiro hasn't had the chance to move forward on these initiatives, though that will probably be one of her first tasks. Schapiro has said that Wall Street must repair itself after the financial crisis and that one way to do so is by "giving shareholders a greater say on who serves on corporate boards, and how company executives are paid."

With few exceptions, boards have received little media attention as the country has sought explanations for financial firms' taking on such perilous risks. These boards -- which typically consist of a dozen or more well-known executives, politicians and other influential people -- were ultimately responsible for the decisions of the Wall Street companies, housing firms and banks at the heart of the crisis.

The boards signed off on the risks the companies took and the compensation packages awarded to top executives. But many corporate watchdogs say the boards of top financial firms had characteristics that promoted risky business practices and harmed shareholders.

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"Corporate governance is about managing risk. It's about incentive compensation. It's about corporate strategy and sustainability. And all of those things are what the boards failed to do," said Nell Minow, a co-founder of the Corporate Library and an advocate of reforming corporate boards.

The Obama administration and Congress have already taken steps to limit the type of board behavior that may have contributed to the crisis. The stimulus legislation includes limits on compensation at companies receiving tax dollars as well as provisions that give shareholders an advisory vote on executive compensation, known as "say on pay."

Most boards have committees to oversee risk and compensation, and corporate watchdogs say their biggest failure was allowing executives to be paid in exchange for the quantity of business rather than the quality. This often promoted short-term risk-taking at the expense of long-term gains.

"Management and traders are compensated on booking profits. It didn't take a long time to figure out if you undertake very risky activities, you get higher bonuses," said Ivo Welch, professor of finance and economics at Brown University. "There's nobody to say this is not in the interest of shareholders or the United States overall."

Watchdogs point to flawed boards at many firms -- including Countrywide, American International Group and Wachovia -- involved in the crisis. Minow points out that at Bear Stearns, the compensation committee had nine criteria to decide on the chief executive's compensation, such as total return to shareholders and earnings per share. But in the end, it could choose to award the maximum compensation to the chief executive based on only one of the criteria.

Over five years at Bear Stearns, chief executive James E. Cayne took home $155 million, according to Forbes. A few months after Cayne stepped down as chief, a collapsing Bear Stearns was snapped up by J.P. Morgan in a federally engineered fire sale in which shareholders lost most of their investment.

The Bear Stearns board had other characteristics that corporate governance advocates found problematic. For example, several directors served on the boards of four public companies, raising questions about whether they had the time to oversee a complex financial firm.

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FEBRUARY 19, 2009, 6:06 AM

S.E.C. Commissioner Backs 'Say on Pay'

A top U.S. regulator on Wednesday backed the idea of giving public company shareholders a so-called say on pay on executive compensation, a concept gaining momentum among investors and lawmakers amid the financial crisis.

The comments by an S.E.C. commissioner, the Democrat Elisse Walter, come as banks and other companies receiving federal bailout money have been ordered to give shareholders such voting power, Reuters said.

These votes are nonbinding on companies but seen as sending a strong signal about shareholders' attitudes about companies' pay decisions.

Some other companies, including **Intel Corp.** and **Hewlett-Packard**, have said they would voluntarily adopt say-on-pay voting as Corporate America faces pressure from angry investors about the size of executive pay packages at a time when the economy is in turmoil.

Say-on-pay measures "can help restore investor trust" and lead to "increased shareholder participation," Ms. Walter said in a speech at a corporate governance forum in New York sponsored by the Practising Law Institute.

Ms. Walter is one of five S.E.C. commissioners, who make decisions on federal securities rules.

The new S.E.C. chairman, Mary Schapiro, has also said it is appropriate to allow shareholders to cast an advisory vote on executives' compensation.

Like Ms. Schapiro, Ms. Walter also said on Wednesday that the commission should revisit the thorny issue of proxy access, or giving stockholders an easier way to put forward their own nominees for corporate board seats.

"I believe the commission should move forward with proxy access," she said, adding that she believed the commission needed to "carefully consider" a range of possibilities on the matter.

Shareholders already have the right to put forth board nominees by waging a proxy fight. However, that route is considered onerous and expensive, and shareholder advocates say the S.E.C. should allow investors to place their nominees for board elections on the company's annual proxy document instead.

Business groups counter that such an idea only serves activists who may not have a company's best interests at heart.

Ms. Walter also said she wanted to see more disclosure from companies in board election materials distributed to shareholders about a nominee's qualifications to serve on the board.

Currently, companies typically list only a nominee's biography. It would be better, Ms. Walter said, if companies were required to explain why they believe that director nominee would "add value" the company.