

Introduction

As the 2015 annual meeting season quickly approaches, recent and continuing corporate governance and securities disclosure developments should be top of mind as financial services companies complete their proxy statements and annual reports and prepare for their 2015 annual shareholders' meetings. This summary highlights some of these topical corporate governance and securities issues, and provides practical tips to consider in addressing these matters.

Corporate Governance

New Proxy Advisory Firm Guidelines

Institutional Shareholder Services (ISS) and Glass Lewis have released updated voting guidelines, including on ballot measures, that will affect many companies' 2015 proxy season.

ISS guidance includes the following:

- ISS will issue a negative voting recommendation against individual directors, committee members or potentially the entire board if a company has amended its charter or bylaws in a manner that ISS determines materially diminishes shareholders' rights.
- ISS will assess, on a case-by-case basis, company-sponsored litigation-related proposals, such as exclusive forum bylaws and fee-shifting provisions, based on several factors, including the rationale for, and breadth of, such provisions.
- ISS will evaluate equity plan proposals based upon a new equity plan scorecard system using three weighted evaluative categories:
 - plan costs (45% weighting);
 - plan features, such as single- vs. double-trigger change-of-control award vesting (20% weighting); and
 - grant practices (35% weighting).
- ISS will automatically issue negative recommendations regarding equity plans with certain identified features, such as liberal change-of-control definitions and authority to re-price options without shareholder approval.
- ISS will evaluate shareholder proposals for the appointment of an independent chairman based on several factors, including current board leadership, governance structure and company performance.
- ISS previously issued guidelines providing that any amount of hedging activities will be considered problematic, possibly resulting in negative recommendations for individual directors, committee members or the entire board slate.¹

Glass Lewis' guidance includes the following:

- Similar to ISS, Glass Lewis may issue a negative voting recommendation against the governance committee chair or the entire committee if a company amended its bylaws in a manner that Glass Lewis determines negatively impacts certain shareholders' rights.
- Glass Lewis will assess whether a company has sufficiently implemented majority-supported shareholder proposals, and any failure may result in a negative recommendation against the governance committee.
- Any "one-off" awards or awards outside a company's standard incentive program will result in increased scrutiny by Glass Lewis in connection with its analysis of say-on-pay proposals.

Practical Tips

- Coordinate with compensation consultants and counsel on equity plan structure to decrease the likelihood of a negative recommendation from proxy advisory firms.
- Supplemental proxy solicitation materials and/or engaging a proxy solicitation firm to actively solicit may be advisable to rebut negative recommendations from proxy advisory firms.
- Consult with counsel regarding helpful revisions to the proxy statement to highlight important information that proxy advisory firms evaluate, such as changes in executive management positions that make compensation changes non-comparable.

SEC Staff Focus on Key Disclosure Areas

The SEC staff continues to focus its review of periodic reports for financial services companies on key disclosure areas, including:

- Disclosure and discussion of known trends and uncertainties in MD&A that are reasonably likely to have a material effect on the company's financial condition or results of operations.
- Proper identification and reporting on operating segments for diversified financial services firms.
- Enhanced disclosures regarding covered loans and related loss share receivables for loans acquired out of FDIC receivership and impact of any FDIC loss share agreements and related indemnification asset.
- Enhanced discussions regarding credit losses and credit quality of underlying loan portfolios.
- Increased focus on risk factor disclosure specific to financial services companies (e.g., cybersecurity, enterprise risk management, regulatory risk etc.).

¹ In February 2015, the Securities and Exchange Commission (SEC) published proposed rules requiring disclosure of hedging policies in proxy statements (see below).

- Reconciliation of non-GAAP measures, such as tangible common equity, pre-tax, pre-provision income, net operating income, operating efficiency ratio, to the most directly comparable GAAP financial measure and the discussion of why disclosure of such non-GAAP measures is material to investors.
- Accounting for material acquisitions or dispositions and recognition of any non-recurring extraordinary gains or losses.

Practical Tips

- Make sure any prior SEC staff comments are appropriately addressed in the company's periodic reports.
- Coordinate with counsel and independent accountants to review and enhance disclosure as appropriate.
- Take into consideration areas of SEC focus in the preparation of all public disclosures, such as earnings releases, investor presentation materials and scripts for investor calls, not just periodic reports.

Beyond this Proxy Season

New SEC Proposal Requiring Disclosure for Hedging Policies

Pursuant to Section 955 of the Dodd-Frank Act, in February 2015, the SEC issued proposed rules mandating enhanced disclosure of company hedging policies applicable to directors, officers and employees. The proposed rules require annual proxy statement disclosure regarding whether directors, officers or employees are permitted to engage in transactions to hedge or offset any decrease in the market value of the company's equity securities, or other transactions that could have comparable economic effects. The proposed rules cover equity securities granted as compensation to, or held directly or indirectly by, the director, officer or employee. The proposed rules focus on disclosure obligations, but do not prohibit hedging transactions or require companies to adopt hedging policies.

The proposed rules are not yet effective and will not impact required disclosure for the 2015 proxy season.

Practical Tips

- Review current company hedging policies and determine whether to adopt or update such policies in anticipation of the SEC's final rules.

Shareholder Activism

Shareholder activism continues at historically high levels, with continued focus on financial services firms, and there is no reason to believe it will abate in the near future. Some of the more common shareholder proposals include:

- Clawback provisions and limitations on equity awards.
- Independent board leadership (i.e., separation of chairman and CEO) and declassification of staggered boards of directors.
- Requests for additional disclosure about and limitations on political spending and lobbying activities.
- Enhanced disclosure about board diversity policies and activities has been a focus of certain large institutional investors.

Practical Tips

- Engage early with activists and keep the board of directors informed on a real-time basis.
- Routinely evaluate the shareholder base, including through engagement of shareholder intelligence services, monitoring trading activity and reviewing Schedule 13D and 13G filings.
- Familiarize yourself with significant investors' voting policies, practices and strategies.
- Windows for effectively responding to activist shareholders are often short. Upon receipt of shareholder proposals, coordinate immediately with counsel and proxy advisors on responses, including compliance of the proposal with SEC rules, company bylaws and applicable state law.
- Develop a procedure and strategy with counsel to address shareholder activism.
- Examine the company's potential vulnerabilities to shareholder criticism, such as corporate governance matters or operational issues, and be prepared to respond to potential activists about the company's strategy.
- Treat institutional shareholders as potential sources of valuable advice and allow them the opportunity to provide input.
- Review the company's articles of incorporation and bylaws to determine whether emerging governance provisions are appropriate, such as exclusive forum bylaws and fee shifting provisions, while keeping in mind the potential negative recommendations from proxy advisory firms.

Our Financial Services Practice

(Corporate Governance and Securities Regulation)

We counsel a broad range of financial services companies with respect to corporate governance, securities and financial services regulatory compliance. We provide practical, solution-oriented advice to clients on a day-to-day basis and in managing crises with respect to:

- SEC periodic and event reporting and stock exchange listing requirements.
- Proxy and executive compensation matters.
- Board and committee structure and committee charter drafting.
- Shareholder activism response.
- Board and management training in corporate governance, enterprise risk management, vendor risk management and cybersecurity.
- Internal investigations and regulatory enforcement actions, including with BSA/AML regulations and OFAC, Fair Lending, CRA and consumer regulation, etc.

For more information regarding the matters covered in this client alert, please contact your principal Squire Patton Boggs lawyer or one of the lawyers listed in this publication.

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