

## SEC Update

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Professionals

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# Summary

- I. Operating in a Crisis
- II. Websites
- III. 21<sup>st</sup> Century Disclosure
- IV. IFRS
- V. XBRL
- VI. Proxy Notice and Access

## Operating In A Crisis

- ▶ Communication – It's what you can control (well, sort of...)
  - ▶ Frequently review guidance
  - ▶ Track guidance as other factors change
    - ▶ Equity markets
    - ▶ Investors
    - ▶ Fuel prices
  - ▶ Analyst status and views
  - ▶ Other Constituencies
    - ▶ Customers
    - ▶ Lenders
    - ▶ Vendors
    - ▶ Regulators

- ▶ Communication (cont.)
  - ▶ Websites – Most recent SEC guidance discussed below
    - ▶ Blogs for rumors?
      - ▶ GE
      - ▶ John Mackey @ Whole Foods
        - ▶ Investigation
        - ▶ Transaction Distraction
  - ▶ Accuracy
    - ▶ Lehman statements pre-bankruptcy
    - ▶ Apple on Jobs
    - ▶ Expect change, anticipate that in guidance/disclosure
  - ▶ Review Risk Factors

# Operating In A Crisis

- ▶ Create a record!
  - ▶ Board processes matter
    - ▶ Fiduciary duty of care

## Fiduciary Duties of Corporate Boards...

### ▶ Duty of Care...

#### ▶ Directors are required to:

- ▶ Act with the diligence and competence of a reasonably prudent person in a similar position under like circumstances
- ▶ Avail themselves of all material information *reasonably* available to them

#### ▶ Allegations that a director breached the Duty of Care typically assert a failure to:

- ▶ Obtain adequate information
- ▶ Give thorough consideration to a decision

## Fiduciary Duties of Corporate Boards...

### ▶ Duty of Care...

- ▶ Is very much a question of the adequacy of the process:
  - ▶ Frequency of board meetings
  - ▶ Management reports
  - ▶ Counsel/Advisors
  - ▶ Demonstration of the exercise of due care through concise but comprehensive minutes
  - ▶ Document, Document, Document

## Fiduciary Duties of Corporate Boards...

- ▶ Duty of Care...
  - ▶ Directors may rely in good faith on information prepared by officers, employees, committees and experts
    - ▶ If there is a reasonable basis for believing information relied upon is within the person's professional or expert competence.
    - ▶ Directors may not delegate their fiduciary duties to others

## Fiduciary Duties of Corporate Boards...

### ▶ Duty of Care

- Gross negligence

- ▶ The standard applied for determining whether there is a breach of the Duty of Care is gross negligence

- ▶ In the *Disney* case, directors were considered negligent, but not *grossly* negligent

- ▶ Board (cont.)
  - ▶ Board, not management, has the ultimate responsibility
    - ▶ Keep them informed
    - ▶ Meetings are preferred to one-off communication
  - ▶ Zone of Insolvency
    - ▶ May shift fiduciary duties to creditors
    - ▶ Be aware of financial condition

## Tips for Dealing with One-on-Ones

- ▶ Hold conversations shortly after the earnings release and related conference call when the universe of material nonpublic information is smaller
- ▶ Avoid conversations during black-out periods
- ▶ Establish ground rules for questions that will not be answered
- ▶ Company reps should be fully informed about what information is publicly available
- ▶ Consider debriefing IR or counsel immediately after one-on-ones
- ▶ Consider keeping log of one-on-one conversations

- ▶ Establish policy as to whether you will update guidance
  - ▶ communicate this policy when asked to update (i.e., “our policy is to not update guidance given in our conference calls”)
- ▶ If you intend to update guidance, you should issue a press release prior to the conversation
- ▶ Consider filing and posting the standard presentation

## Analyst Conferences and Roadshows

- ▶ No material non-public information in presentation and breakout sessions
  - ▶ otherwise must disclose the information publicly in advances, e.g. file the presentation on an 8-K and post on website
  - ▶ if **electronic** media, t.v. or news wires are present, you may be able to provide material non-public information, depending on how widely the press reports on the meeting
  
- ▶ Rehearse presenters
  
- ▶ Scrub slides for material non-public information or file with SEC before use
  
- ▶ Always have IR Person or Counsel Present

- ▶ SEC release August 7, 2008
  - ▶ There is an Internet!
- ▶ When is information on the website public?
  - ▶ “Disseminated in a manner calculated to reach the securities market in general through recognized channels of distribution”
  - ▶ Facts and circumstances
    - ▶ Does the Company emphasize the site?
      - ▶ Press releases and disclosure documents
    - ▶ Tell them you will post information
    - ▶ Takes time – start now!

## Websites (cont.)

- ▶ Adequate Dissemination
  - ▶ Manner in which information is posted
  - ▶ Timeliness and ready accessibility
  - ▶ Can investors find information?
  - ▶ Is the format accessible?
- ▶ Do investors pick up the information?
  - ▶ Big company vs. small cap company
    - ▶ Tell them you have posted new information
  - ▶ RSS Feeds and “Push” Technology
    - ▶ “Push” does not guarantee compliance
  - ▶ Adequate web capacity?

## Websites (cont.)

- ▶ Adequate Dissemination (cont.)
  - ▶ Keep the site current and accurate (all of it!)
  - ▶ Use traditional methods too
  - ▶ Nature of the information
  - ▶ Other Regulations – 8-K

- ▶ Reasonable waiting period after information is posted, depends on:
  - ▶ Size and market of the Company
  - ▶ Frequency of access
  - ▶ Steps taken to alert investors
  - ▶ Nature and complexity of information
  - ▶ Inside trading guidance as a model

## Websites (cont.)

- ▶ FD Compliance
  - ▶ Websites may comply in some circumstances
    - ▶ “reasonably designed to provide broad, non-exclusionary distribution to the public”
    - ▶ Facts and circumstances
    - ▶ See factors above
  - ▶ Blog and other postings treated the same

- ▶ Antifraud and the Exchange Act
  - ▶ The law still applies!
    - ▶ Entire site should be compliant
    - ▶ Includes hyperlinks
    - ▶ “Buried Facts”
  - ▶ Some information can be posted only on website
    - ▶ Non-GAAP financials and Regulation G
    - ▶ Committee Charters
    - ▶ Amendment or material waiver to Code of Ethics
    - ▶ Board Member Attendance

## Websites (cont.)

- ▶ Previously posted information
  - ▶ Hyperlinks can count
  - ▶ Did Company help prepare?
  - ▶ Did Company adopt the information?

- ▶ Adoption (cont.)
  - ▶ What is said about the linked information?
  - ▶ Risk of confusing investors
  - ▶ Presentation of the link
    - ▶ Be explicit
  - ▶ Link to a review, customer site or analyst report?
  - ▶ Exit notices may work
    - ▶ Do not be selective
    - ▶ Disclaimers may not work

## Websites (cont.)

- ▶ Summary Information
  - ▶ Can be helpful, need to be explained
    - ▶ Titles
    - ▶ Explanatory language
    - ▶ Use and placement of hyperlinks
    - ▶ Layered or tiered format
- ▶ Interactive features
  - ▶ Blogs and forums
    - ▶ Antifraud laws apply
      - ▶ Employees can not post in individual capacity
    - ▶ Cannot waive security laws

## Websites (cont.)

- ▶ Implicate disclosure controls and procedures
  - ▶ Apply technically if using the website to replace Exchange Act filings
  - ▶ What about the rest? No, but...
- ▶ Format of information and readability
  - ▶ May not have to be printer friendly
  - ▶ If need software (e.g., .pdf), need to link to downloadable reader....free!

# 21<sup>st</sup> Century Disclosure Initiative

- ▶ Cox announces
- ▶ October 8, 2008 webcast
- ▶ Cox is gone...
- ▶ Idea is complete revision from forms based reporting
- ▶ Stay tuned....

- ▶ August 2008 – Propose a roadmap for US Issuers to adopt International Financial Reporting Standards by 2014
- ▶ November 2008 – Release Go/ No Go by 2011
  - ▶ FASB may still have a role
- ▶ Principles based, not proscriptive
- ▶ Major systemic changes

## IFRS (cont.)

- ▶ May make comparisons more difficult
- ▶ Roadmap
  - ▶ Does IFRS develop sufficiently?
  - ▶ IASC status
  - ▶ Interactive data for IFRS reporting
  - ▶ Education and Training for IFRS
  - ▶ Early use of IFRS for comparability
  - ▶ Future rule making
  - ▶ Staged (?) mandatory adoption
    - ▶ 12/15/2009 fiscal year for option adoption

- ▶ February 2, 2009 – 206 page release mandating XBRL
- ▶ Applies to filers with 10-Q, 20-F or 40-F
  - ▶ Containing financials statements for a fiscal period ending:
    - ▶ On or after June 15, 2009 for large accelerated filers that use GAAP and have a worldwide float of \$5 billion
    - ▶ On or after June 15, 2010 for all other large, accelerated filers
    - ▶ On or after June 15, 2011 for all others filers

- ▶ Rules do not change disclosure, but add the interactive format as an exhibit to Registration Statements, Periodic, current and transition reports
- ▶ Updated 8-ks count
- ▶ Does not apply to IPOs or Registration Statements without Financial Statements (S-8, S-3)
- ▶ Does apply to Registration Statements filing after a price or price range or when financial change
- ▶ In M&A, applies to filer but not target
- ▶ Historical financials included

- ▶ Exhibit will use tags from a standard list
- ▶ Uses commercially available software
- ▶ Companies can use “extensions” for unique items
- ▶ Initially, footnotes and schedules will be tagged as blocks, after a year must tag quantitative information and may tag qualitative disclosure
- ▶ Must post financial statements on website on the earlier of the calendar day it was filed or was required to be filed

- ▶ Exceptions to concurrent filing
  - ▶ Initial data exhibit due 30 days after the earlier of due date of filing date of the report or Registration Statement
  - ▶ 30 days after for tagging detailed footnotes and schedule
- ▶ Keep up for twelve months
- ▶ Failure to file will mean not current in filings
- ▶ Limited liability treatment for first 24 months
  - ▶ Deemed not “filed” for specific liability
  - ▶ Exemption for errors in good faith that are promptly corrected
  - ▶ Excluded from officer certifications

- ▶ Summary of the new e-Proxy Rules (rule 14a-3; Rule 14a-16):
  - ▶ Internet Availability of Proxy Materials: permits companies (and other soliciting persons) to post proxy materials on a website and then notify shareholders by mail that the proxy materials are available online; and
  - ▶ Shareholder Choice Re: Proxy Materials: requires all companies (and other soliciting persons) to post their proxy materials on a website and to provide shareholders notice of the availability of the online proxy materials.
- ▶ Compliance Timing:
  - ▶ Already effective for large accelerated filers; and
  - ▶ Effective for ALL others on January 1, 2009
- ▶ What you need to know:
  - ▶ Impacts the overall timing for preparing the proxy solicitation;
  - ▶ The cost savings of sending solely a notice (rather than the full set of proxy materials) may be significant; and
  - ▶ May impact shareholder voting participation

## Required e-Proxy Materials

- ▶ Companies must choose between two options for providing shareholders with proxy materials

- ▶ The “Notice Only” option, OR
- ▶ The “Full Set Delivery” option

Note: the options are not mutually exclusive and companies may use a combination

- ▶ Requirements apply to proxy solicitations for both special meetings and annual meetings.

- ▶ Required e-Proxy Materials

- ▶ Notices of shareholder meetings;
- ▶ Schedule 14A proxy statements and consent solicitation statements;
- ▶ Forms of proxy (*i.e.*, proxy cards);
- ▶ Schedule 14C information statements;
- ▶ Annual reports to security holders;
- ▶ Additional soliciting materials; and
- ▶ Any amendments to such materials

## The Notice Only Option

- ▶ Must mail a “Notice” at least 40 calendar days before the date of the meeting stating that proxy materials are available on a designated website

### Required Contents:

- ▶ A specified legend in bold-face type;
- ▶ The date, time, and location of the meeting;
- ▶ A clear and impartial list of matters to be acted on at the meeting and the company’s recommendations (no supporting statements);
- ▶ A list of materials available on website;
- ▶ Contact information so a hard copy of the proxy materials can be requested;
- ▶ Instructions on how to access the proxy card online; and
- ▶ Information on how to obtain directions to attend the meeting and vote in person.

### Permissible Contents:

- ▶ a copy of any meeting notice required under state law and any other information required by state law;
- ▶ A statement in the Notice advising shareholders that they are not required to provide any personal information other than the identification or control number provided in the Notice to execute a proxy;
- ▶ A logo, pictures, or similar design elements so long as the design is not misleading and the required information is clear; and
- ▶ A pre-addressed, postage-paid reply card for requesting a paper or email copy of the proxy materials

## The Notice Only Option (cont.)

- ▶ File Notice as DEFA14A (Definitive Additional Materials)
- ▶ Send Notice by regular mail unless the shareholder has affirmatively consented to receive mail – householding permitted.
  - ▶ On or before the Notice is sent, post the full set of proxy materials on the designated website
  - ▶ No other materials may accompany the Notice except as required by state law
  - ▶ Cannot mail proxy card until 10 calendar days after the Notice mailing
  - ▶ A copy of the Notice or the proxy statements must accompany the proxy card
- ▶ Provide a method to execute proxies at the time the Notice is sent to shareholders.
  - ▶ Traditional paper proxy card;
  - ▶ Electronic voting platform;
  - ▶ Toll-free telephone number; or
  - ▶ Printable or downloadable proxy card available on the designated website.
- ▶ Upon request, send proxy materials in the requested format via first class mail or email within 3 business days of the request.

- ▶ Post all e-proxy materials and proxy card on a designated website:
  - ▶ Applies whether or not Notice Only option chosen; and
  - ▶ Companies can use their own websites or a third-party website
- ▶ Timeline for posting e-proxy materials
  - ▶ Must be posted no later than the date the Notice is sent to shareholders;
  - ▶ Must remain online through the conclusion of the shareholder meeting; and
  - ▶ Additional soliciting materials sent or publicly disclosed after Notice is sent must be posted on the same day.
- ▶ The e-proxy materials must:
  - ▶ Be presented in a way that is convenient for both reading online and printing;
  - ▶ Be accessible free of charge, and
  - ▶ Not contain a link to EDGAR.
- ▶ Requirements for the website hosting the e-proxy materials:
  - ▶ Cannot infringe shareholder anonymity (e.g., no cookies/user-tracking features)
  - ▶ Cannot use email addresses, or transfer email addresses to parties other than employees/agents, except in connection with the distribution of proxy materials.

## Lessons from the 2008 Proxy Season

- ▶ As of June 30, 2008...
  - ▶ 653 corporate issuers surveyed
  - ▶ 586 already held annual meeting
- ▶ Companies using Notice Only option printed a full set of proxy materials for an average of 11.4% of shareholders.
- ▶ Very few shareholders requested paper copies of proxy materials after receiving a Notice:
  - ▶ Only about 1% of shareholders who received a Notice requested a full, hard copy set of proxy materials

## Lessons from the 2008 Proxy Season (cont.)

- ▶ Companies employing the Notice Only option were more likely to be soliciting proxies for routine proposals. Of the companies using the Notice Only option:
  - ▶ 56.8% included only routine proposals;
  - ▶ 30.8% included a non-routine proposal submitted by management; and
  - ▶ 12.4% included a non-routine proposal submitted by shareholders.
- ▶ Companies adopting the Notice Only option experienced a meaningful negative impact on the voting participation of their retail shareholders:
  - ▶ In the 2007 proxy season (prior to Notice Only), an average of 34.3% of retail shareholders voted; and
  - ▶ In the 2008 proxy season, an average of 16.6% of retail shareholders who received a Notice during the 2008 proxy season voted.

## Practical Guidance for e-Proxy Compliance

- ▶ Notice Only, Full Set Delivery or combination of the two?
- ▶ Use a bifurcated approach:
  - ▶ Consider using Full Set Delivery for largest shareholders, shareholders who voted in 2008 proxy season and foreign shareholders, AND Notice Only delivery for all others;
  - ▶ Distribute only specific materials in paper copy (e.g., annual report).
- ▶ Wait-and-see what other issuers do? Assess:
  - ▶ The actual cost savings to other issuers;
  - ▶ The expanded preparation time needed to comply with the e-Proxy rules; and
  - ▶ The impact on shareholder participation and shareholder relations

## Practical Guidance for e-Proxy Compliance (cont)

- ▶ e-Proxy rules designed to enhance shareholder participation:
  - ▶ Declining voting participation of retail shareholders suggests increased shareholder apathy/confusion with the Notice Only option
  - ▶ Consider a second mailing to shareholders that includes selective proxy materials with proxy card
  - ▶ Consider using full Set Delivery for any meetings involving a proxy contest of potentially controversial proposal
- ▶ Decide early who will be preparing and maintaining the hosting website for the online proxy materials:
  - ▶ Develop a compliance plan with in-house technology departments or third-party vendors
  - ▶ Third-party vendors may be better equipped to manage the website hosting requirements (e.g., Broadridge, Bowne)

## Practical Guidance for e-Proxy Compliance (cont)

- ▶ Overriding benefit of Notice Only option is lowering the cost of preparing, producing, and sending proxy solicitations.
  - ▶ BUT, the const-savings can be negated/mitigated by...
    - ▶ Costs of a second mailing—delivery of the proxy card, if desired, must follow notice delivery by at least 10 days;
    - ▶ Printer costs associated with processing small batch on an expedited basis; and
    - ▶ Costs associated with processing shareholder requests for hard copies;
    - ▶ Increased solicitation costs;
  - ▶ In addition, the Notice Only option reduced costs of third-parties seeking to engage in a proxy contest.
- ▶ To avoid these increased transaction costs:
  - ▶ Estimate number of hard copies requests company expects (~1%), and order a small batch from printer in advance
  - ▶ Upon request, company may print paper copy of materials itself

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