



SEC ADOPTS CHANGES TO COMPENSATION AND CORPORATE GOVERNANCE DISCLOSURES FOR 2010 PROXY SEASON

On December 16, 2009, the Securities and Exchange Commission (the “SEC”) adopted amendments to its rules relating to executive compensation and corporate governance disclosure. A copy of the final rules may be found by [clicking here](#). The new rules become effective February 28, 2010, and apply to proxy statements and other filings containing information covered by the new rules filed on or after that date. The final rules, which contain a number of changes from the proposed rules, are summarized below.

Enhanced Compensation Disclosure

Risk Management Disclosure. The new rules require disclosure regarding the company’s compensation policies and practices for all employees (not just executive officers) if those policies and practices create risks that are “reasonably likely to have a material adverse effect” on the company. This is a higher disclosure threshold than originally proposed and parallels the MD&A risk disclosure requirement. Companies will have to perform a risk assessment to determine if such disclosure is required, and the SEC acknowledged that this assessment may include a consideration of any risk mitigating policies implemented by the company, such as compensation recovery policies. If the company concludes that this disclosure is required, it will be included in the proxy statement as a separate disclosure item, but will not be included in the Compensation Discussion and Analysis. The SEC also adopted as proposed five examples of situations that could potentially trigger this disclosure.

Summary Compensation Table and Director Compensation Table. The new rules revise the Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (formerly FAS 123R) for the year of grant. This disclosure replaces the current requirement to disclose the dollar amount recognized for financial statement reporting purposes, which included amounts related to grants made in prior years. The new rules also revise the disclosure of performance awards by requiring that the grant date fair value of such awards be based on the probable outcome of the performance conditions, instead of assuming achievement of the maximum performance level. This revised approach is consistent with the recognition criteria under the accounting rules. Disclosure of the maximum value of an award assuming achievement of the highest level of performance is still required, but will be reflected in footnote disclosure to the tables. Finally, in order to facilitate year-to-year comparisons, companies will be required to recompute the amounts reported in the Stock Awards, Option Awards, and Total Compensation columns for prior fiscal years included in the table.

The SEC did not adopt its proposed amendment that would have removed the amount of salary or bonus forgone at a named executive officer’s election from those columns in the Summary Compensation Table. As such, the current rule remains in place, requiring inclusion of these amounts in the applicable column with footnote disclosure detailing the non-cash compensation that the officer elected to receive instead.



Enhanced Director and Nominee Disclosure

The new rules expand disclosure related to the qualifications of directors and nominees, past directorships held by directors and nominees, and the time frame and nature of disclosure of legal proceedings involving directors, nominees, and executive officers. The new rules require companies to disclose the particular experience, qualifications, attributes, or skills that led the board of directors to conclude that the person should serve as a director of the company. The SEC did not approve a proposal that would have required an explanation of a director's qualifications to serve on a particular committee.

Under the final rules, there is required disclosure of directorships held by each director or nominee during the past five years at any public company to allow investors to better evaluate the director or nominee's professional performance and any potential conflicts of interests. The new rules also expand the time frame during which disclosure of specific legal proceedings is required from five to ten years, and expand the list of legal proceedings that will trigger disclosure to include proceedings that may reflect an individual's competence and integrity.

Companies must also disclose whether, and if so how, the board or nominating committee considers diversity in identifying nominees for director. Companies must disclose if they have a policy with regard to the consideration of diversity in identifying nominees, how that policy is implemented, and how the board or committee assesses the effectiveness of the policy. The SEC did not define the term "diversity," and has left it to each company to define diversity as it deems appropriate.

New Disclosure about Board Leadership Structure and the Board's Oversight of the Risk Management Process

Under the new rules, companies are required to disclose their board's leadership structure and the reasons why the company believes its structure is appropriate given the specific characteristics or circumstances of the company. Companies that combine the role of principal executive officer and board chairman must disclose whether and why the company has a lead independent director, and the specific role the lead independent director plays in the leadership of the board. Companies must also disclose the board's role in the oversight of the company's risk management process, including, where appropriate, whether the oversight function is performed by the entire board or a committee thereof, and whether individuals who supervise the risk management responsibilities report directly to the board.

New Disclosure Regarding Compensation Consultants

In an effort to address investor concerns regarding compensation consultant independence, the new rules require additional disclosure regarding the fees paid to the consultant under certain conditions. Under the new rules, in addition to the current requirement that the company disclose the role of the compensation consultant in determining or recommending the amount or form of executive and director compensation, the aggregate fees paid to the compensation consultant (and its affiliates) must be disclosed under the following circumstances:

- If the board or compensation committee has engaged its own compensation consultant to provide advice on executive and director compensation, and the consultant or its affiliate provides non-executive compensation consulting services to the company in excess of \$120,000 during the fiscal year.



- If the board or compensation committee has not engaged its own compensation consultant, but a compensation consultant provides executive compensation consulting services and non-executive compensation consulting services to the company, if the fees for the non-executive compensation consulting services exceed \$120,000 during the fiscal year.

However, the new rules provide that fees and related disclosure for consultants that work with management are not required if the board or compensation committee has its own consultant. In addition, services involving only broad-based non-discriminatory plans or the provision of information (such as surveys) that are not customized for the company, or are customized based on parameters that are not developed by the consultant, are not treated as executive compensation consulting services under these rules.

If fee disclosure is required in a situation where the board or compensation committee's consultant is providing additional services to the company, the company must also disclose whether the decision to engage the consultant to provide non-executive compensation consulting services was made or recommended by management, and whether the board approved the additional services.

Reporting of Voting Results on Form 8-K

The new rules accelerate the disclosure of voting results of shareholder meetings by transferring this disclosure requirement from Forms 10-Q and 10-K to Form 8-K. New Item 5.07 of Form 8-K requires companies to disclose the results of all shareholder votes within four business days. If the voting results are not definitively determined within that time frame, companies must disclose on Form 8-K the preliminary voting results within the four business day time period, and file an amended report on Form 8-K within four business days after the final voting results are certified.

—[*Kelly C. Simoneaux*](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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