

# Client Alert

July 20, 2009

## SEC Seeks Significant Expansion of Compensation and Corporate Governance Disclosures for 2010 Proxy Season

Prompted in part by the continuing economic crisis, the SEC on July 17, 2009 published in the Federal Register proposed new requirements for proxy disclosure<sup>1</sup>. If adopted, the amendments will significantly heighten reporting of the details of compensation programs and of corporate governance.

Based on recent precedent, the essence of the new rules is likely to be adopted as presented. However, the SEC has requested substantial public input on a broad array of details for each proposal related to disclosure of compensation and Board governance, as well as more general feedback on the efficacy of the current proxy rules. This is a valuable opportunity for commentators to influence the particulars. Pearl Meyer & Partners will be submitting its own commentary to the SEC and would welcome your viewpoint on these issues.

The areas affected by the changes would include:

- **Executive Compensation**
  - Additional discussion in the Compensation Discussion and Analysis (CD&A) of how compensation practices affect *risk*
  - Use of *grant date fair value* for reporting of annual equity grants in the Summary Compensation Table (SCT) and Director Compensation Table (DCT)
  - Additional disclosure of the *compensation consultant relationship*
- **Board Governance**
  - More information regarding the *experience of Directors and Board nominees*
  - New discussion about *Board leadership and its role in risk management*
- **Timing and Solicitation Process**
  - *A change in disclosure of annual and special meeting results* from Forms 10-Q and 10-K to Form 8-K to provide more timely reporting to shareholders
  - Clarification about certain technical details of the *proxy solicitation process*

This Client Alert focuses on the SEC proposals related to compensation and Board governance.

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<sup>1</sup> A complete copy of the Proposed Rules can be found at <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>

## Executive Compensation Proposals

### **Compensation Programs and Risk in the CD&A**

The Proposed Rules would require a discussion and analysis in the CD&A of situations in which any employee compensation programs may “create incentives that can affect the company’s risk and management of that risk.” Currently, this proxy discussion is generally limited to compensation programs and policies for Named Executive Officers (NEO).

The new disclosure would be limited to risks arising from programs that could have a material effect on the company. While the SEC indicates that materiality is a facts and circumstances analysis, it provided the following examples of policies and situations that would trigger such disclosure:

- A business unit of the company that carries a significant portion of the company’s risk profile;
- A business unit with a significantly different compensation structure from the rest of the company;
- Business units that are significantly more profitable than others;
- Business units in which compensation accounts for a significant percentage of revenues; or
- Programs that vary significantly from the company’s overall risk and reward structure, such as bonuses that are paid upon accomplishment of an objective for which the revenue and associated risk to the company extend over a significantly longer period.

If risk disclosure is triggered, the Proposed Rules offer some examples of issues that may need to be addressed:

- The general design philosophy of compensation policies for employees whose behavior would be most affected;
- The risk assessment or incentive considerations used, if any, in structuring, awarding and paying out compensation;
- Policies that address short-term and long-term compensation risks, such as requirements for claw backs or holding periods;
- How compensation policies are adjusted to address changes in the company’s risk profile; and
- Any material adjustments made to compensation policies or practices due to changes in the company’s risk profile.

***PM&P Observation:*** Committees should immediately begin assessing whether these requirements will affect their 2010 proxy disclosures and begin drafting the related additional disclosure.

### **Reporting of Equity Award Values in the SCT and DCT**

The Proposed Rules would reverse an earlier change made to the disclosure rules and return to calculating aggregate grant date fair value in accordance with FAS 123R. In 2006, shortly before the current rules became effective, the SEC acted to require that companies instead report grants based on the value that was recognized for financial statement reporting purposes during the covered year.

The SEC mentions that returning to the use of grant date fair value will permit investors to better evaluate the value of equity compensation awarded for that year. It also recognizes that many practitioners and investors already focus on this amount (rather than amounts actually reported in the SCT or DCT) which is currently reported in the last column of the Grants of Plan-Based Awards Table (GPBAT). An additional factor motivating the change is that in the current economy, the income recognized on an annual basis may be negative in the years following the original grant. The SEC believes this fact pattern unrealistically reduces an executive's total reported compensation and could result in inappropriate variation in NEOs included in the SCT (other than the Chief Executive Officer and Chief Financial Officer). Nonetheless, companies that believe the full grant date fair value fails to adequately convey an NEO's compensation can explain the inadequacy in a narrative disclosure.

Corollary changes to this amendment would also require:

- Elimination of the last column of the GPBAT, thereby eliminating grant-by-grant fair value information as the SCT and DCT provide only aggregate grant date fair values;
- Expansion of the Options Awards column of the SCT/DCT to include any incremental fair value associated with repricings or other modifications; and
- Elimination of the reporting of salary or bonus forgone at the NEO's election in the Salary or Bonus columns. Instead, non-cash awards would be reported in the column applicable to the form of the award elected.

The Proposed Rules do not provide transition guidance for 2007 and 2008 reporting in the SCT. The preamble and request for comment sections of the Proposed Rules, however, do suggest that in addition to reporting 2009 values under the new rule, the SEC may require revised disclosure in the Stock Award, Option Award and Total columns for each of the two preceding years for the NEOs in the 2009 SCT. However, the SEC would provide relief by foregoing reporting for any different NEOs that would have resulted using the new reporting methodology in any preceding year, based on recomputed total compensation values for those years.

**PM&P Observation:** Companies should act now to estimate new total values for executives who are anticipated to be disclosed in the 2009 SCT. They should also identify and discuss how to address any potential optics issues created by re-reported disclosures for 2007 and 2008.

**PM&P Observation:** Interestingly, the SEC seeks comment on whether an equity award should be disclosed for the year in which it was earned, as opposed to the year in which it was granted (as currently required).

### ***Enhanced Compensation Consultant Disclosure***

The Proposed Rules cite shareholders' concern about potential conflicts of interest when executive compensation consultants perform additional services for the company, particularly if the fees earned for such additional services are exponentially bigger than those for executive compensation consulting. In an effort to shed more light on such potential conflicts, the SEC would require additional disclosure of any "other services" provided to the company or its affiliates by its compensation consultants.

Currently, the disclosure of the use of a compensation consultant in Item 407(e) is limited to:

- Identification of the consultant;
- Any role in determining or recommending the amount or form of executive and Director compensation;
- The nature and scope of the assignment;
- Whether the consultant is engaged directly by the Compensation Committee or another person; and
- The material elements of the instructions or directions given to the consultant with respect to the performance of duties.

The Proposed Rules would require that where "other services" are provided, companies additionally disclose:

- The nature and extent of any and all other services provided by the compensation consultant;
- The consultant's aggregate fees related to advising on executive and Director compensation;
- The consultant's aggregate fees related to other services;
- Whether management directly engaged, or otherwise participated in, the decision to engage the consultant for other services; and
- Whether the Board or Compensation Committee approved the other services

Notably, this additional disclosure is not required if the consultant advised solely on broad-based, non-discriminatory plans that are generally available to all salaried employees (and that, by their nature, include NEOs). However, if the consultant was retained to advise on executive or Director programs, the company must then disclose information on any additional services provided, including for any broad-based, non-discriminatory plan.

***PM&P Observation:*** The Administration is also tackling the perceived consultant conflict problem. A Fact Sheet issued by Treasury and draft legislation submitted to Congress on July 16, 2009<sup>2</sup> directs the SEC to create new standards of independence for any advisors to the Compensation Committee – including consultants, attorneys and others.

<sup>1</sup> See <http://ustreas.gov/press/releases/tg218.htm>

## Board Governance Proposals

### ***Company Leadership Structure and Board's Role in Risk Management***

The SEC believes investors will make better voting and investment decisions if they have access to more meaningful information about corporate governance practices, particularly the Board's leadership structure. In this regard, companies would be required to explain the rationale for the leadership structure in place at the time of filing, including why the positions of Chief Executive Officer and Board Chair are combined or separate. Where the two roles are combined, companies would disclose whether they have a lead independent Director, and the role that the lead independent Director plays in the company's leadership structure or governance.

Given the role that risk and the adequacy of risk oversight played in the recent market turmoil, the SEC also believes investors need better disclosure regarding how a company perceives the role of its Board and the relationship between the Board and senior management in managing material risks. Under the Proposed Rules, discussion of the Board's role in the company's risk management process is required, and may include information such as whether the Board or a committee manages and implements risk management functions; whether the person(s) who oversee risk report directly to the Board or a committee; and whether and how the Board or committee monitors risk.

### ***More Details of Director/Nominee Experience***

Currently, disclosure regarding incumbent Directors and nominees is limited to brief biographical data for the previous five years. The Proposed Rules would significantly expand the current requirement by focusing disclosure on the specific experience, skills and qualifications that qualify an individual to serve as a Director for the company and on any committee, particularly in light of the company's business and structure. In addition, specific disclosure would be required for:

- Any directorships held at any time *during the past five years* at public companies (vs. the existing reporting of only current directorships); and
- Involvement in any legal proceedings *for the past ten years* (vs. the current rule of five years)

***PM&P Observation:*** Since these Proposed Rules will become effective for the next proxy season, immediate revision of record keeping questionnaires presented to Directors and officers may be warranted.

### **Potential Future Developments**

The SEC is also seeking comment on other issues related to the future direction of executive compensation disclosure. Among the significant questions posed by the SEC in the Proposed Rules:

- Are there any disclosures required that are now unnecessary in light of the proposed amendments?
- Should the competitive harm exclusion for performance targets be eliminated? Alternatively, should performance targets be reported on an after-the-fact basis – after the performance related to the award is measured?
- Should the CD&A be part of the Compensation Committee Report (CCR), and should the CCR be filed, rather than furnished (which would increase potential liability for the statements in the CCR)?
- Should compensation expertise of Compensation Committee members be disclosed?
- Should additional disclosure about “hold to retirement” and/or claw back provisions be required?
- Should additional disclosure about internal pay equity be required (i.e., the ratio of compensation of executive officers to compensation of rank and file employees)?
- Should disclosure be required as to the company’s total number of compensation plans and total number of variables on which compensation is based?
- Should the value to the executive with respect to a tax gross-up be required disclosure?

### **What to Expect Next**

The Proposed Rules are subject to a 60-day comment period ending September 15, 2009. The rules are expected to be issued in the fourth quarter and are likely to become effective for the 2010 proxy season. If the SEC pays heed to the voluminous commentary expected, the details of the final amendments may be revised considerably – in fact, we believe the SEC is still deliberating many aspects of the particulars.

In response to the SEC’s invitation, Pearl Meyer & Partners intends to submit its own comments on the Proposed Rules and welcomes your input. We also will be monitoring other commentary received. We have attached as Appendix A a list of specific questions provided by the SEC for each revision, in the event you would like to submit your company’s thoughts directly or through our firm.

Pearl Meyer & Partners will continue to provide updates and alerts as the process moves forward.

**APPENDIX A**  
**SEC'S REQUESTS FOR COMMENT**  
**COMPENSATION AND CORPORATE GOVERNANCE PROPOSALS**

***Compensation Programs and Risk in the CD&A***

- Would expanding the scope of the CD&A to require disclosure concerning a company's overall compensation program as it relates to risk management and or risk-taking incentives provide meaningful disclosures to investors? Should the scope of the amendments be limited in application to specific groups of employees, such as executive officers? Should it be limited to companies of a particular size, like large accelerated filers? Should it be limited to particular industries like financial services, including companies that have segments in such industries? Is the cost of tracking and disclosing the nature of the risk different at different types of companies or company segments and if so, should that be reflected in our rules?
- In light of the complexity of the issue and compensation programs generally, we recognize that it may be difficult to identify and describe which compensation structures may expose a company to material risks. We believe the listed examples are situations where compensation policies may induce risk taking behavior, and therefore, potentially have a material impact on the company. Are the listed examples appropriate issues for companies to consider discussing and analyzing? Are there any other specific items we should list as possibly material information? Are there any items that are listed that should not be? If so, why?
- Should other elements of compensation that may encourage excessive risk taking be highlighted in the CD&A?
- We have included a list of examples of the types of issues that would be appropriate for a company to discuss and analyze. Is that list appropriate? Rather than treat the list as examples, should we require discussion of each item?
- Are there other disclosure requirements that would provide more meaningful information about the effect of the registrant's compensation policies on its risk profile or risk management?
- Are there certain risks that are more clearly aligned with compensation practices the disclosure of which would be important to investors?
- If a company determines that disclosure under the proposed amendments is not required, should we require the company to affirmatively state in its CD&A that it has determined that the risks arising from its broader compensation policies are not reasonably expected to have a material effect on the company?
- Should smaller reporting companies, who are currently not required to provide CD&A disclosure, be required to provide disclosure about their overall compensation policies as they relate to risk management?

### ***Reporting of Equity Award Values in the SCT and DCT***

- Is the proposed Summary Compensation Table reporting of equity awards a better approach for providing investors clear, meaningful, and comparable executive compensation disclosure consistent with the objectives of providing concise analysis in CD&A and a clear understanding of total compensation for the year? Would the proposals facilitate better informed investment and voting decisions?
- The proposal contemplates that the Summary Compensation Table would report the aggregate grant date fair value of stock awards and option awards granted during the relevant fiscal year, just as the Grants of Plan-Based Awards Table reports each grant of an award made to a named executive officer in the last completed fiscal year. Should the Summary Compensation Table instead report the aggregate grant date fair value of equity awards granted for services in the relevant fiscal year, even if the awards were granted after fiscal year end? Explain why or why not. For example, could such an approach be applied in a manner inconsistent with the purposes of our compensation disclosure rules, for example by distorting the determination of named executive officers? If we change our approach with respect to the Summary Compensation Table, should the Grants of Plan-Based Awards Table be amended correspondingly to conform to the scope of awards reported in that table?
- If the Summary Compensation Table is amended as proposed, should the Grants of Plan-Based Awards Table disclosure of the full grant date fair value of each individual award be retained, rather than rescinded as proposed? Should the Grants of Plan Based Awards Table continue to disclose the incremental fair value with respect to individual awards that were repriced or otherwise materially modified during the last completed fiscal year? If so, why? If disclosure of grant date fair value of individual awards is retained, should it also be made applicable to smaller reporting companies?
- As described above, one reason for adopting the financial statement recognition model was the potential for distortion in identifying named executive officers when a single large grant, to be earned by services to be performed over multiple years, affects the list of named executive officers in the Summary Compensation Table, even though the executive earns a consistent level of compensation over the award's term. Are multi-year grants a common practice, so that they would introduce significant year-to-year variability in the list of named executive officers if the proposed amendments are adopted relative to the variability under the current rules? If so, how should our rules address this variability?
- Under the proposal, all stock and option awards would be reported in the Summary Compensation Table at full grant date fair value, including awards with performance conditions. Would the proposal discourage companies from tying stock awards to performance conditions, since the full grant date fair value would be reported without regard to the likelihood of achieving the performance objective? If the proposal is adopted, is any disclosure other than that already currently required (e.g., in the Compensation Discussion and Analysis, the Grants of Plan-Based Awards Table, and the Outstanding Equity Awards at Fiscal Year-End Table) needed to clarify that the amount of compensation ultimately realized under a performance-based equity award may be different?
- As proposed, Instruction 2 to the salary and bonus columns would be revised to provide that any amount of salary or bonus forgone at the election of a named executive officer pursuant to a program under which a different, non-cash form of compensation may be received need not be included in the salary or bonus column, but instead would need to be reported in the appropriate other column of the Summary Compensation Table.

- Should this approach cover elections to receive salary or bonus in the form of equity compensation only if the opportunity to elect equity settlement is within the terms of the original compensatory arrangement, so that the original arrangement is within the scope of FAS 123R? Why or why not?
- The Commission also has received a rulemaking petition requesting that we revise Summary Compensation Table disclosure of stock and option awards a different way. Instead of reporting the aggregate grant date fair value of awards granted during the year, as we propose, the petition's suggested approach would report the annual change in value of awards, which could be a negative number if market values decline. For restricted stock, restricted stock units and performance shares, the reported amount would be the change in stock price from year-end to year-end. For stock options, it would be the change in the in-the-money value over the same period. Would the approach suggested by the rulemaking petition be easy to understand or difficult to understand? Would the information provided under the suggested approach be useful to investors? In particular, would investors be able to evaluate the decision making of directors with respect to executive compensation if the value of equity compensation on the date of the compensation decision is not disclosed, but instead investors are provided information regarding changes in value of the compensation, which changes occur after the compensation decision is made? Would it enhance or diminish the ability of companies to explain in CD&A the relationship between pay and company performance? Would it be more or less informative to voting and investment decisions than the aggregate grant date fair value approach we propose? Would it be a better measure for computing total compensation, including for purposes of identifying named executive officers? Are there any other ways of reporting stock and option awards that would better reflect their compensatory value? If so, please explain. For example, are there any potential amendments to the Grants of Plan-Based Awards Table or the Outstanding Equity Awards at Fiscal Year-End Table that we should consider to better illustrate the relationship between pay and company performance?
  - The Summary Compensation Table requires disclosure for each of the registrant's last three completed fiscal years, and with respect to smaller reporting companies, for each of the registrant's last two completed fiscal years. Regarding transition, our goal is to facilitate year-to-year comparisons in a cost-effective way. To this end, we are considering whether to require companies providing Item 402 disclosure for a fiscal year ending on or after December 15, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table, so that the Stock Awards and Option Awards columns would present the applicable full grant date fair values, and Total Compensation would be recomputed correspondingly. If a person who would be a named executive officer for the most recent fiscal year (2009) also was disclosed as a named executive officer for 2007, but not for 2008, we expect to require the named executive officer's compensation for each of those three fiscal years to be reported pursuant to the proposed amendments. However, we would not require companies to include different named executive officers for any preceding fiscal year based on recomputing total compensation for those years pursuant to the proposed amendments or to amend prior years' Item 402 disclosure in previously filed Forms 10-K or other filings. Would recomputation of prior years included in the 2009 Summary Compensation Table to substitute aggregate grant date fair value numbers for the financial statement recognition numbers previously reported for those years cause companies practical difficulties? Is there a better approach that would preserve the objective of year-to-year comparability on a cost-effective basis as a transitional matter?

### ***Enhanced Compensation Consultant Disclosure***

- Will this disclosure help investors better assess the role of compensation consultants and potential conflicts of interest, and thereby better assess the compensation decisions made by the board?
- Would the disclosure of additional consulting services and any related fees adversely affect the ability of a company to receive executive compensation consulting or non-executive compensation related services? If so, how might we achieve our goal while minimizing that impact?
- Are there competitive or proprietary concerns that the proposed disclosure requirements should account for? If so, how should the amendments account for them if the compensation consultant provides additional services?
- Are there additional disclosures regarding the potential conflicts of interest of compensation consultants that should be required? For example, would requiring disclosure of any ownership interest that an individual consultant may have in the compensation consultant or any affiliates of the compensation consultant that are providing the additional services to the company help provide information about potential conflicts? If so, why?
- The proposed disclosure requirement calls for disclosure of services during the prior year. Should we also require disclosure of any currently contemplated services in order to capture a situation where the compensation consultant provides services related to executive pay in one year and in the next year receives fees for other services? If so, should we require that fees for the currently contemplated services be estimated? Is there a better way to require that information, for instance through the date of the filing? Should we require disclosure for the prior three years?
- Is the proposed exclusion for consulting services that are limited to broad-based, non-discriminatory plans appropriate? Should we consider any other exclusions for services that do not give rise to potential conflicts of interest? If so, describe them.
- Should we establish a disclosure threshold based on the amount of the fees for the non-executive compensation related services, such as above a certain dollar amount or a percentage of income or revenues? If so, how should the threshold be computed?
- Would disclosure of the individual fees paid for non-executive compensation related services provided by the compensation consultants be more useful to investors than disclosure of the aggregate fees paid for non-compensation related service provided as proposed?
- Would disclosure about the fees paid to compensation consultants and their affiliates help highlight potential conflicts of interest on the part of these compensation consultants and their affiliates? Is fee disclosure necessary to achieve this goal, or would it be sufficient to require disclosure of the nature and extent of additional services provided by the compensation consultant and its affiliates? Should disclosure only be required for fees paid in connection with executive compensation related services?
- Should we make any special accommodations in the proposed amendments to Item 407(h) for smaller reporting companies? If so, what accommodations should be made and why?

- Are there other categories of consultants or advisors whose activities on behalf of companies should be disclosed to shareholders? If so, what kind of disclosure would be appropriate?

### ***Company Leadership Structure and Board's Role in Risk Management***

- Are the proposed amendments to Item 407 appropriate? Are there additional disclosure requirements that should also be included in these proposed requirements?
- Are there certain considerations that would affect the company's leadership structure that should be highlighted in the proposed amendment? If so, explain.
- Are there any additional disclosures about a company's leadership that would be helpful to investors?
- Should we require disclosure of the specific duties performed by the board's chair or independent lead director?
- Should we require disclosure of other board structure matters, such as how a company determines the number of independent directors to have on its board, and/or how a company determines the size of the board?
- Are there competitive or proprietary concerns about the level of detail about the company's risk management structure and function that the proposed rule should account for? If so, please identify these concerns and explain how they should be accounted for.
- Should we make any special accommodations in these proposed amendments for smaller reporting companies? If so, what accommodations should be made and why?
- The proposals address risk management oversight by the board of directors as a part of the corporate governance disclosures required in proxy and information statements. We are considering whether we should revise our existing disclosure requirements, such as in Items 303 and 305 of Regulation S-K, to require additional disclosure regarding a registrant's risk management practices in other registrant filings, such as annual and quarterly reports? Should we consider proposing additional requirements? If so, what additional or different disclosure requirements should we consider proposing?
- Should we, as proposed, require a registered management investment company to provide disclosure about its leadership structure and the board's role in the risk management process? Are there alternative disclosures relating to a fund's leadership structure and board involvement in the risk management process that would be more helpful to investors? If we require each of the disclosures, where should such disclosures appear (e.g., proxy statements, statements of additional information, and/or shareholder reports)?
- As proposed, funds would be required to include the proposed disclosure in registration statements filed on Forms N-1A, N-2, and N-3. Should we differentiate between open-end and closed-end funds? For example, should we omit this requirement from Form N-2 because closed-end funds generally hold annual shareholder meetings pursuant to exchange requirements and their shareholders will receive this disclosure in annual proxy or information statements?

### ***Enhanced Director/Nominee Experience Disclosure***

- Would the proposed amendments provide investors with important information regarding directors and nominees for director? Are there any additional changes that we should make to further improve the disclosures about director and nominee qualifications?
- If Item 401 is amended as proposed, should the disclosure currently required by Item 407(c)(2)(v) of Regulation S-K regarding disclosure of any minimum qualifications that a nominating committee believes must be met by someone nominated by the committee for a position on the board, be retained? Does the disclosure elicited by Item 407(c)(2)(v) provide useful information that would supplement the information provided pursuant to the proposed amendment to Item 401?
- Should we amend Item 407(c)(2)(v) to require disclosure of any additional factors that a nominating committee considers when selecting someone for a position on the board, such as diversity? Should we amend our rules to require additional or different disclosure related to board diversity?
- Would director qualification disclosure for all of a company's board committees be useful to investors, or should the disclosures be focused on membership of certain key committees, such as the audit, compensation and nominating/governance committees?
- Should we require the proposed director qualification disclosure less frequently than annually? Even though the overall composition of a board may change, is it sufficient to require this disclosure only when a director is first nominated or periodically, such as every three years? Should the disclosure be required only when the director is standing for election, or should it be required each year, as proposed, in order to facilitate shareholders' assessments of the quality of the board as a whole?
- Would it be helpful to investors if we required companies to list and describe all committees of the board similar to the current disclosure requirements for audit, compensation and nominating/governance committees? Would it also be helpful if we required disclosure of whether the board (or a committee) periodically conducts an evaluation of the performance of the board as a whole, the committees of the board and/or each individual director?
- Should we require disclosure of other directorships for more than the past five years? If so, for how long?
- Could requiring more director and nominee qualification disclosure in any way hinder a company's ability to find potential candidates for the board? If so, explain how.
- Should the current five-year disclosure period for legal proceedings be maintained? Should it be longer than proposed, for example for fifteen or twenty years? Should there be no time limit? Would it be more appropriate to require disclosure of legal proceedings for longer periods with respect to certain types of legal proceedings—for example, criminal fraud convictions, civil or administrative actions based on fraud involving securities, commodities, financial institutions, insurance companies or other businesses? If so, for what period or periods and why?
- Are there additional legal proceeding disclosures that reflect on a director's, executive officer's, or nominee's character and fitness to serve as a public company official that should be required to be disclosed? For example, should we expand the current requirements to require disclosure of:

- (i) Any civil or administrative proceedings resulting from involvement in mail fraud, or wire fraud;
  - (ii) Any judicial or administrative findings, orders or sanctions based on violations of federal or state securities, commodities, banking or insurance laws and regulations or any settlement to such actions;
  - (iii) Any disciplinary sanctions imposed by a stock, commodities or derivatives exchange or other self-regulatory organization; or
  - (iv) Situations where the director, nominee, or executive officer was a general partner of any partnership or served as a director or executive officer of any corporation subject to any federal or state agency receivership?
- Should we continue, as proposed, to permit companies to exclude disclosure of director, director nominee or executive officer legal proceedings, when the registrant concludes that the information would not be material to an evaluation of the ability or integrity of the director, director nominee or executive officer, or should this disclosure be required in all cases?
  - Should we make any special accommodations in the proposed amendments to Item 401 for smaller reporting companies? If so, what accommodations should be made and why?
  - Should the proposed amendments regarding director and nominee qualifications, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings apply to registered management investment companies? If so, where should each of the disclosures be required (e.g., proxy statements, statements of additional information, and/or shareholder reports)? Does the disclosure requirement need to be modified in any way to make it more appropriate for registered management investment companies?

### **General Requests for Comment**

- Are there any disclosures required in the proxy statement that we should consider proposing to eliminate in light of the proposed amendments?
- Are there other initiatives we should consider in order to improve the disclosure in proxy statements, particularly with regard to disclosure regarding executive compensation? For instance should we propose requiring disclosure of the compensation paid to each executive officer, not just the named executive officers? Should we consider proposing to eliminate the instruction that provides that performance targets can be excluded based on the potential adverse competitive effect on the company of their disclosure? Alternatively, should we consider proposing to revise the CD&A to require disclosure of performance targets on an after-the-fact basis, after the performance related to the award is measured, such as three or more fiscal years later, whether or not the disclosure may result in competitive harm?
- Under current Item 407(e)(5) of Regulation S-K, the Compensation Committee Report must state whether the committee: (1) has reviewed and discussed the CD&A with management; and (2) recommended to the board of directors that the CD&A be included in the company's annual report and the proxy or information statement. Although the CD&A is considered "filed", the Compensation Committee Report is "furnished." Because it is furnished, the Compensation Committee Report does not have the same liability as the CD&A and other information that is "filed." For example, it is not incorporated by reference or otherwise considered a part of the company's Form 10-K, registration statements and other filings, and is not covered by the principal executive officer and

principal financial officer certifications required under Exchange Act Rules 13a14 and 15d-14. Should we consider proposing to amend this rule to make the CD&A be a part of the Compensation Committee Report? Why or why not? If we make the CD&A part of the Compensation Committee Report, should the Compensation Committee Report be “filed”? If we were to make the CD&A part of the Compensation Committee Report, are there any requirements to the CD&A that we should change?

- Should we consider requiring disclosure regarding whether a member of the Compensation Committee has expertise in compensation matters and whether the committee has the resources to hire its own independent legal counsel?
- Some investors may want more information regarding whether compensation arrangements are reasonably designed to create incentives among executives to increase long-term enterprise value. Should we consider supplementing any of the tabular and narrative disclosure requirements to require additional disclosure about whether or not a company has “hold to retirement” and/or claw back provisions and if not, why not?
- Are investors interested in disclosure of whether the amounts of executive compensation reflect any considerations of internal pay equity? For example, would investors find such disclosure relevant in considering the motivation and effectiveness of broad based compensation plans? Should we consider proposing additional requirements to address this? For instance, should we consider proposing required disclosure regarding internal pay ratios of a company, such as disclosure of the ratio of the total compensation of the named executive officers, or total compensation of each individual named executive officer, to the total compensation of the average non-executive employee of the company?
- In order to give investors a better understanding of the breadth and depth of a company’s focus on compensation, should we require disclosure regarding the total number of compensation plans a company has and the total number of variables in all of its compensation plans? Are there other ways to convey the complexity and significance of all of a company’s plans?
- Should we consider proposing to supplement the required disclosure of tax gross-up arrangements that the company has for the named executive officers to include a requirement to disclose and quantify the savings to each executive?



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