SEC Approves Proposal Regarding Enhanced Proxy Disclosure

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On July 10, 2009, the Securities and Exchange Commission proposed amendments to Regulation S-K and Schedule 14A that expand public company disclosure on issues ranging from executive compensation to risk management and corporate governance. On December 16, 2009, the Commission voted 4-to-1 to approve certain of these amendments, effective February 28, 2010. Click here to view the full text of the final rule in PDF format. This alert provides a brief summary of the impact that each of the amendments contained in the final rule will have on public disclosure for the 2010 proxy season.

I. COMPENSATION STRUCTURE & RISK MANAGEMENT

A new Item 402(s) of Regulation S-K will require discussion and analysis of compensation policies and practices for all employees, including non-executive officers, if the compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company.

Note that the new Item 402(s) disclosure threshold of “reasonably likely to have a material adverse effect” is less stringent, and more in line with the “reasonably likely” disclosure threshold used in Management Discussion & Analysis (MD&A), than the threshold initially proposed by the Commission, which would have required discussion and analysis of those compensation policies and practices that create risks that “may have a material effect on the company.”

Suggested Disclosure:

- The general design philosophy of the company’s compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices
- The company’s risk assessment or incentive considerations, if any, in structuring its compensation policies and practices in awarding and paying compensation
- How the company’s compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short term and the long term
- The company’s policies regarding adjustments to its compensation policies and practices to address changes in its risk profile
- The extent to which the company monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees

II. VALUATION OF STOCK & OPTION AWARDS

Item 402 of Regulation S-K has been amended to require disclosure, in the Summary Compensation Table and Director Compensation Table, of the aggregate grant date fair value of stock and option awards granted during the year, computed in accordance with Financial Accounting Standards Board Accounting Standards Codification Topic 718, Compensation—Stock Compensation (“FASB ASC Topic 718”).

Item 402 has also been amended to require (1) that the value of performance awards reported in the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table be computed based upon the probable outcome of the performance conditions as of the grant date and (2) footnote disclosure in the Summary Compensation Table and Director Compensation Table of the value of performance awards if the maximum level of performance conditions is achieved, provided that an amount less than the maximum was included in the Tables pursuant to (1) above.

Note that under the amended Item 402, grants of large “one time” multi-year awards, including large “new hire” or “retention” grants, may result in significant changes to the group of named executive officers (NEOs) for whom compensation disclosure is required under Item 402. In the event that a large grant to an executive officer results in the omission from Item

402 of another executive officer, whose compensation would otherwise have placed him amongst the company's NEOs, the Commission suggests including compensation disclosure for the omitted executive officer to supplement the required disclosures.

Required Disclosure:

- *Summary Compensation Table* — Disclose (1) the aggregate grant date fair value of stock and option awards granted during the year in accordance with FASB ASC Topic 718, (2) the value of performance awards computed based upon the probable outcome of the performance conditions as of the grant date and (3) in a footnote, the value of performance awards if the maximum level of performance conditions is achieved
- *Grants of Plan Based Awards Table* — Disclose the value of performance awards computed based upon the probable outcome of the performance conditions as of the grant date
- *Director Compensation Table* — Disclose (1) the aggregate grant date fair value of stock and option awards granted during the year in accordance with FASB ASC Topic 718, (2) the value of performance awards computed based upon the probable outcome of the performance conditions as of the grant date and (3) in a footnote, the value of performance awards if the maximum level of performance conditions is achieved

Transition Period: Companies with fiscal years ending on or after December 20, 2009 are required to present recomputed tabular disclosure for each preceding fiscal year included in the Summary Compensation Table, so that the stock and option awards columns (1) reflect the aggregate grant date fair values of the stock and option awards made during each of the preceding fiscal years and (2) for awards with performance conditions, reflect the grant date fair value based on the probable outcome as of the grant date, consistent with FASB ASC Topic 718. The total compensation for each year is also to be recomputed accordingly.

III. DIRECTORS' QUALIFICATIONS

Item 401(e) of Regulation S-K has been amended to require annual disclosure detailing the particular experience, qualifications, attributes or skills of each director and director nominee that led the board to conclude that he or she should serve as a director of the company as of the time of filing with the Commission.

IV. PUBLIC COMPANY DIRECTORSHIPS

Item 401(e) of Regulation S-K has also been amended to require disclosure of all public company directorships held by each director and director nominee at any time during the past five years.

V. CERTAIN LEGAL PROCEEDINGS

Item 401(f) of Regulation S-K has been amended to require disclosure of certain legal proceedings of each director, director nominee or executive officer that occurred any time during the past 10 years and that are material to an evaluation of the director, director nominee or executive officer.

Item 401(f) has also been amended to expand the list of certain legal proceedings that require disclosure to include:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity
- Any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking or insurance laws and regulations, or any settlement to such actions (other than settlements of civil proceedings among private parties)
- Any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization

VI. CONSIDERATIONS OF THE NOMINATING COMMITTEE

Item 407(c) of Regulation S-K has been amended to require disclosure of (1) whether, and if so how, nominating committees consider diversity in identifying nominees for director and (2) if the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, how the policy is implemented and how the nominating committee (or the board) assesses the effectiveness of the policy.

Although “diversity” is not specifically defined in Regulation S-K, in the adopting release, the Commission directs each company to define diversity in a manner that it considers appropriate. Examples of diversity provided by the Commission include differences in viewpoint, professional experience, education and skill, as well as differences in race, gender and national origin.

VII. BOARD LEADERSHIP STRUCTURE & ROLE IN RISK OVERSIGHT

A new Item 407(h) of Regulation S-K will require disclosure of the company’s board leadership structure and the reasons why the company believes that its board leadership structure is appropriate.

Required Disclosure:

- *Leadership Structure* — Describe the leadership structure of the company’s board
- *Combination of Powers* — Disclose whether and why the company has chosen to combine or separate the positions of chief executive officer and the chairman of the board
- *Lead Independent Director* — If the positions of chief executive officer and the chairman of the board are combined, disclose (1) whether and why the company has designated a lead independent director and (2) the specific role that the lead independent director plays in leadership of the board
- *Appropriateness of Leadership Structure* — Explain why the company has determined that its leadership structure is appropriate as of the time of filing with the Commission
- *Role in Risk Oversight* — Describe the extent of the board’s role in the risk oversight of the company, such as how the board administers its oversight function, and the effect that this has on the board’s leadership structure

VIII. COMPENSATION CONSULTANTS SERVICES & FEES

Item 407(e)(3)(iii) of Regulation S-K has been amended to require, under certain circumstances, disclosure of (1) fees paid to compensation consultants, (2) management’s involvement in engaging compensation consultants to provide non-executive compensation services and (3) the board’s involvement in approving such non-executive compensation services. Disclosure under this amended Item 407(e)(3)(iii) is not required unless the aggregate fees paid for such non-executive compensation services exceed $120,000 in a given fiscal year.

Required Disclosure:

- *Shared Compensation Consultant* — If the board engages a compensation consultant to provide executive compensation services and such compensation consultant (or any of its affiliates) also provides non-executive compensation services to the company, and the fees for such non-executive compensation services exceed $120,000 during the company’s fiscal year, then the company must disclose (1) the aggregate fees paid for executive compensation services, (2) the aggregate fees paid for non-executive compensation services, (3) whether management either recommended or made the decision to engage the compensation consultant for the non-executive compensation services, and (4) whether the compensation committee (or board) approved the non-executive compensation services.
- *Company Compensation Consultant* — If the board has not engaged its own compensation consultant but a compensation consultant has been engaged by the company to provide both executive compensation and non-executive compensation services, and the fees for such non-executive compensation services exceed $120,000 during the company’s fiscal, then the company must disclose (1) the aggregate fees paid for executive compensation services and (2) the aggregate fees paid for non-executive compensation services.

- *Separate Compensation Consultants* — If the board and the company have each engaged their own compensation consultant, then no disclosure is required under Item 407(e)(3)(iii).

UPDATING D&O QUESTIONNAIRES — WHAT TO DO NOW

In conjunction with approval of the amendments to Regulation S-K and Schedule 14A, companies will need to act now to update their D&O Questionnaires, or to prepare and distribute supplemental questionnaires, to elicit additional information from their officers and directors. The following is a brief summary of necessary updates to D&O Questionnaires for the 2010 proxy season.

Involvement in Certain Legal Proceedings

Questionnaires will be updated to (1) require disclosure of involvement in certain legal proceedings during the past 10 years, instead of the past 5 years, and (2) expand the list of certain legal proceedings to include:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity
- Any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking or insurance laws and regulations, or any settlement to such actions (other than settlements of civil proceedings among private parties)
- Any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization

Public Company Directorships

Questionnaires will be updated to require disclosure of both current directorships and all public company directorships during the past five years.

Qualifications of Directors & Nominees for Director

Questionnaires may be updated to include a new question regarding each director's and director nominee's particular experience, qualifications, attributes or skills that led the board to conclude that he or she should currently serve as a director of the company. Alternatively, companies may prefer to elicit qualification information directly through one-on-one discussions with each director and director nominee.

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