



NEW SEC RULES ON ENHANCED DISCLOSURE IN PROXY STATEMENTS AND OTHER REPORTS

The SEC has adopted final rules (the “Rules”), effective February 28, 2010, intended to enhance proxy statement and Form 10-K disclosure relating to risk oversight, executive compensation and corporate governance. In addition to imposing additional disclosure requirements, the Rules also move disclosure of the results of a shareholder vote from the Form 10-Q or Form 10-K to the Form 8-K. A brief description of the new requirements is set forth below.

Compensation Policies and Risk. The Rules require a company to provide narrative disclosure regarding its compensation policies and practices for all employees (including employees who are not executive officers) as they relate to risk management and risk-taking incentives, if the company determines that its compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. This new discussion will be separate from the Compensation Discussion and Analysis, which relates to the named executive officers. The Rules include a non-exclusive list of situations that may trigger disclosure, and examples of issues a company may need to address if risk disclosure is required. If a company determines that risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company, no disclosure is required. Smaller reporting companies are not required to provide this disclosure.

Reporting of Equity Awards. The Summary Compensation and Director Compensation Tables must now provide the aggregate grant date fair value of stock and option awards computed in accordance with FASB ASC Topic 718 (former SFAS 123R), instead of the dollar amount recognized for financial statement purposes for the fiscal year as previously required. This could change the identity of the company’s named executive officers in the compensation tables. A company providing disclosure for a fiscal year ending on or after December 20, 2009, must also recompute the stock and option award and total compensation columns for each preceding fiscal year included in the Summary Compensation Table. A company is not required to include different named executive officers for any preceding fiscal year based on recomputed total compensation for those years.

The Rules clarify that the value of awards subject to performance conditions should be computed based on the probable outcome of the performance conditions as of the grant date. If the value of the performance award reported in the tables is not based on the highest level of performance conditions being achieved, a company must include footnote

disclosure of the maximum value of an award at the grant date.

Director and Nominee Qualifications. For each director and nominee for director, the Rules require companies to disclose:

- the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director, and
- any directorships held by the person at any public company or registered investment company at any time during the past five years.

Legal Proceedings. The Rules:

- expand the types of legal proceedings involving a company’s executive officers, directors and nominees for director that must be disclosed, and
- extend from five to ten years the time period for which disclosure of legal proceedings is required.

Diversity. The Rules require disclosure of whether, and if so how, the nominating committee considers diversity in identifying nominees for director. If the nominating committee (or board) has a policy regarding consideration of diversity in identifying director nominees, the Rules require disclosure of how the policy is implemented and how the effectiveness of the policy is assessed.

Board Leadership Structure and Role in Oversight of Risk. The Rules require disclosure about whether and why a company has chosen to combine or separate the principal executive officer and board chairman positions, and the reasons the company believes this board leadership structure is the most appropriate structure for the company. If one person serves as both the principal executive officer and board chairman, the Rules require disclosure of whether the company has a lead independent director and what role the lead independent director plays in the board leadership.

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Companies must also provide disclosure about the board's role in the oversight of risk.

Compensation Consultant Disclosure. In addition to disclosure currently required regarding compensation consultants, the Rules require fee and other disclosure related to the retention of a compensation consultant in certain circumstances.

If a consultant was engaged by the compensation committee or the board to provide advice or recommendations on the amount or form of executive and director compensation, and if the consultant or its affiliates also provided other non-executive compensation consulting services to a company or its affiliates in an amount in excess of \$120,000 during the company's most recently completed fiscal year, the company is required to disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such other non-executive compensation consulting services. In addition, the company is required to disclose whether the decision to engage the compensation consultant or its affiliates for these other services was made, or recommended, by management, and whether the compensation committee or the board approved the non-executive compensation consulting services.

If the compensation committee or the board has not engaged a compensation consultant, but management has engaged a compensation consultant to provide advice or recommendations on the amount or form of executive and director compensation, and if such compensation consultant or its affiliates has provided additional services to the company in an amount in excess of \$120,000 during the company's most recently completed fiscal year, the company is required to disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such other non-executive compensation consulting services.

No disclosure is required if the compensation consultants only provide services for broad-based non-discriminatory plans or information that is not customized for the company, such as surveys, or that is customized based on parameters that are not developed by the consultant, and about which the consultant does not provide advice.

Reporting of Shareholder Votes on Form 8-K. The Rules require the results of a shareholder vote to be disclosed in a Form 8-K filed within four business days after the end of the meeting at which the vote was held, rather than in the next Form 10-Q or Form 10-K as currently provided. If the company does not have the final voting results by the fourth business day, the company is required to file a Form 8-K with preliminary voting results, and must file an amended Form 8-K with the final voting results within four business days after the final voting results are known.

Effective Date. The Rules are effective February 28, 2010. The SEC's Division of Corporation Finance has issued Compliance and Disclosure Interpretations that, among other things, clarify how the effective date applies to a company's Form 10-K and proxy statement for fiscal year 2009 and 2010:

- If a company's fiscal year ends on or after December 20, 2009, its Form 10-K and proxy statement must be in compliance with the Rules if filed on or after February 28, 2010. If the Form 10-K is filed before February 28, 2010, but the proxy statement is filed on or after February 28, 2010, only the proxy statement is required to be in compliance with the Rules.
- If a company with a fiscal year ending on or after December 20, 2009 files a preliminary proxy statement before February 28, 2010, the preliminary proxy statement must be in compliance with the Rules if the company expects to file its definitive proxy statement on or after February 28, 2010.
- If a company's fiscal year ends before December 20, 2009, its 2009 Form 10-K and related proxy statement are not required to be in compliance with the Rules, even if filed on or after February 28, 2010, and any registration statement the company files before its 2010 Form 10-K is required to be filed is not required to comply with the Rules.

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There are a number of steps companies should consider taking in light of the new Rules. Companies should ensure that its management, board and compensation committee are familiar with the new disclosure requirements. D&O questionnaires should be updated to incorporate the additional information that directors, nominees for director and executive officers need to provide. Companies may want to review their board policies taking the new disclosure requirements into consideration. Finally, companies should allow for additional time to prepare and review their 2010 proxy statement to address the enhanced disclosure requirements.

If you have questions about the SEC's rule changes or steps you should take to comply with the new Rules, please contact Barbara A. Young, Peter H. Struzzi or Jennifer Kleiner of our office at (203) 222-0885 or by e-mail at byoung@levettrockwood.com, pstruzzi@levettrockwood.com and jkleiner@levettrockwood.com.

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