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SEC Rule Changes for 2010: Be Ready to be Held Accountable

BY J. MARK POERIO, KEITH D. PISANI, AND CLAUDIA J. KIM

On December 16, 2009, the Securities and Exchange Commission (the "SEC") adopted new disclosure rules intended, in the SEC's view, to hold corporate directors and officers accountable for their "decisions and performance" relating to risk management, compensation, and corporate governance.[1] As discussed in detail below, these rules will require additional disclosure in proxy statements or annual reports relating to:

- the relationship of compensation policies and practices to risk management;
- valuing stock and option awards — revisions to compensation tables;
- the independence of compensation consultants;
- the qualifications of board members and board diversity;
- disclosure of board leadership structure and risk-management oversight; and
- real-time disclosure of shareholder voting results.

In addition, we have provided a brief update on the state of the SEC's proxy access proposal at the end of this alert.

Since the new rules are generally effective on February 28, 2010[2] and will be in place for the 2010 proxy season, we have suggested below certain action items public companies should consider implementing immediately.

For the full text of the SEC's rule changes, see the SEC Release 33-9089 at: http://www.sec.gov/rules/final/2009/33-9089.pdf (the "Proxy Disclosure Enhancements Release").

As the name implies, the Proxy Disclosure Enhancements Release mandates new disclosures that will generally appear in proxy statements. However, subject to certain exceptions, the new rules will also apply to companies that are not required to comply with the SEC's proxy rules, such as "voluntary filers"[3] or issuers that file reports with the SEC pursuant to Section 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[4]

I. Relationship of Compensation Policies and Practices to Risk Management

With the exception of smaller reporting companies,[5] SEC registrants with fiscal years ending on or after December 20, 2009 filing a proxy statement on or after February 28, 2010 must provide narrative disclosure about compensation policies and practices for all employees (not just named executive officers) as they relate to risk management practices and risk-taking incentives, **if** the risks arising from those compensation policies and practices "are reasonably likely to have a material adverse effect on the registrant" [6] (an "MAE"). This standard represents a shift of the requirement from that expressed in the original proposal, which required disclosure if risks arising from a registrant's compensation policies or practices "may have a material effect on the company." By focusing in the final rule on situations where the compensation policies are reasonably likely to have a "material adverse effect," the SEC reduced the potential for voluminous and unnecessary discussions of arrangements that are unlikely to result in inappropriate risk-taking incentives and focused disclosure on the types of policies and practices most relevant to investors.

Who is responsible? Responsibility for this risk determination does not necessarily rest with the registrant's compensation committee, because the new SEC rule imposes the duty merely on "the registrant," and directs the new disclosure to be made entirely separate from the Compensation Discussion & Analysis ("CD&A"), which is uniquely the province of the compensation committee. As a result, the new disclosure requirement places a premium, in the first instance, on identifying who is ultimately responsible for assessing whether or not a registrant's compensation policies and practices are reasonably likely to have an MAE (referred to below as the "MAE Risk Assessment").

> ACTION ITEM #1: Develop Process for Making the MAE Risk Assessment. Will the registrant's principal executive officer and principal financial officer make the new MAE Risk Assessment, and will they alone certify the registrant's determination for shareholders? Or will the compensation committee or full board of directors perform an oversight role, with attendant accountability?
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> Whatever the approach, the registrant should consider documenting the "who, what, and when" of any process that is followed. A fully documented process is advisable given recent trends in shareholder derivative litigation that is increasingly focused on incentive compensation. In confronting any such litigation, the registrant will be best positioned if it is able to show that decision-makers established and followed prudent procedures.
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> The individuals or committee making the MAE Risk Assessment should consider reviewing prior risk analyses, if any, related to compensation incentives, compensation policies and practices for all employees (paying particular attention to the disclosure triggers discussed below), and any compensation incentives currently being considered by the registrant in light of the new rules and risk analyses to be conducted. Registrants should consider the necessity of amending corporate governance guidelines or other company policies in light of the new rules and potential disclosures. Compensation committees should update their charters to reflect any additional responsibility for the MAE Risk Assessment.

What could trigger disclosure? The SEC has identified certain situations that could trigger required discussion including compensation policies and practices:

1. at a business unit that carries a significant portion of the registrant's risk profile;
2. at a business unit with compensation structured significantly differently than other units within the registrant;
3. at a business unit that is significantly more profitable than others within the registrant;
4. at a business unit where compensation expense is a significant percentage of the unit's revenues; and
5. that vary significantly from the overall risk and reward structure of the registrant, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the registrant from the task extend over a significantly longer period of time.

The above list is illustrative, and is not intended to be exclusive (per the SEC's general principles-based approach). Each registrant must assess its particular facts and circumstances, with attention to identifying those compensation programs, if any, that create risks of an MAE.

What mitigates risk? The SEC has expressly stated that risk assessments relating to incentive compensation policies and practices may consider steps or controls designed to limit risks and policies and practices that mitigate or balance incentives, including the protections that come from claw-back and holding period requirements. Carefully drawn protections of this kind should, in most cases, defuse the potential that the registrant's compensation-related incentives will have an MAE.

What disclosure is required? If a registrant determines that the risks arising from its compensation policies and practices are not reasonably expected to have an MAE, the SEC's new rules do not require any disclosure at all, nor do they require registrants to make an affirmative statement that the risks arising from its compensation policies and practices are not reasonably expected to have a material adverse effect on the registrant. However, it is expected that many registrants will opt to make affirmative disclosure of this type as evidence that the issue was taken into consideration. If a registrant determines that disclosure of risks is required, the SEC requires a narrative disclosure of material information that will vary depending on the nature of the registrant's business and its compensation approach. The SEC's general principles-based approach controls in this regard. The SEC has, however, provided the following non-exclusive list of issues that may require discussion:

1. the general design philosophy of the registrant's compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices, as such policies and practices relate to or affect risk taking by employees on behalf of the registrant, and the manner of their implementation;
2. the registrant's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;

3. how the registrant'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, such as through policies requiring claw-backs or imposing holding periods;
4. the registrant's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;
5. material adjustments the registrant has made to its compensation policies and practices as a result of changes in its risk profile; and
6. the extent to which the registrant monitors its compensation policies and practices to determine whether its risk-management objectives are being met with respect to incentivizing its employees.

ACTION ITEM #2: Risk Report. Given the complex determination called for by this disclosure requirement, those who are responsible for making the MAE Risk Assessment may consider, as a means of reducing the risks associated with the task, obtaining a risk report upon which to justify their determination and related disclosure decisions. The key issues associated with such a report are generally as follows:

- Is a written report desired?
- Will the report be produced internally or independently?
- If internally produced, will the report be independently critiqued? If yes, by whom?
- Will the risk report be performed annually, or more often?
- Should the report be previewed by, or addressed to, the registrant's legal counsel in order to protect its confidentiality and privilege?

Whatever process the registrant ultimately employs, it will need to make an initial MAE Risk Assessment before finalizing its 2010 proxy statement. In the current environment, registrants should avoid issuing a 2010 proxy statement that attests to an absence of risky compensation practices when that is prematurely concluded, or not assuredly the case.

ACTION ITEM #3: Recoupment Protections. The SEC's explicit recognition of the mitigation of risks is just one more reason for joining the 73% of Fortune 100 companies that have implemented claw-back protections. Considering such protections, or their improvement, makes general sense as a facet of risk management relating to incentive compensation.[7]

There are several basic types of recoupment and holding period requirements. In a nutshell, registrants may use these clawback devices to recover specified incentives that were (i) overpaid due to inaccurate or restated financial results, (ii) paid during periods for which the registrant has had to file restated financial results, and/or (iii) paid to an executive who later violates a loyalty condition, such as a post-employment non-competition provision. Holding periods serve a complementary purpose, by locking executives into holding the registrant's stock for a period most

commonly lasting until retirement or other termination of employment. This type of requirement typically applies to stock issued pursuant to stock awards and stock options.

ACTION ITEM #4: Consider Voluntary Disclosure. Registrants should consider disclosing their processes for monitoring the level of risk of their incentive compensation program, even if they determine that no compensation policy or practice is reasonably likely to involve an MAE. Disclosure of this kind would be voluntary, and consequently should be weighed carefully.

II. Valuing Stock and Option Awards — Revisions to Compensation Tables

Under the SEC's new rules, the method of valuing stock awards and stock option awards has changed for purposes of reporting in the Summary Compensation Table and the Director Compensation Table. Prior to 2010, these award values mirrored the incremental expense that the registrant recognized for financial statement purposes. The value for awards that vested over multiple years was consequently subject to disclosure as amortized over the multi-year period. Going forward, all stock and option awards will be reported in the fiscal year they are granted based on their aggregate grant date fair value, as computed in accordance with Financial Accounting Standards Board Accounting Standards Codification Topic 718, Compensation — Stock Compensation ("FASB ASC Topic 718") (formerly SFAS 123(R)), regardless of whether the awards are to vest over multiple years.

The SEC had proposed to rescind the requirement to report the full grant date fair value of *each* equity award in the Grants of Plan-Based Awards Table, given that the full grant date fair value of *all* awards on *an aggregate basis* will now be provided in the Summary Compensation Table. However, this disclosure requirement has been retained, as the SEC believes that this disclosure helps investors better evaluate compensation committee decisions because it reveals the value associated with *each* type of equity award and the mix of values associated among various awards with different incentive effects.

A special rule applies to the disclosure of performance awards reported in the Summary Compensation, Grants of Plan-Based Awards and Director Compensation tables. The SEC has adopted a new instruction requiring that the value of such awards for purposes of these tables be reported based on the probable outcome of the performance conditions, measured as of the grant date. The value should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718 (but without regard to expected forfeitures). In addition, the maximum value of these awards, calculated assuming the highest level of performance condition is probable, must be disclosed in footnotes to the Summary Compensation and Director Compensation tables.

Significantly, the foregoing changes will factor into the determination of total compensation for the purpose of determining a registrant's named executive officers ("NEOs"). Although NEO determinations for past years will not change, registrants with fiscal years ending on or after December 20, 2009 are required to retroactively apply the new rules to those individuals listed as NEOs for the 2009 fiscal year. The registrant must "[recompute] disclosure for each preceding fiscal year required to be included in the [Summary Compensation Table], so that the stock awards and options awards columns present the applicable full grant date fair values, and the total compensation column is correspondingly recomputed."[8] In addition, these values will have to be provided for all three fiscal years in the Summary Compensation Table for any person who has not previously been

included as an NEO. However, smaller reporting companies, which are only required to provide disclosure for the two most recent fiscal years, are permitted to provide Summary Compensation Table disclosure only for 2009, if the person was an NEO for 2009 but not for 2008.

> ACTION ITEM #5: Begin Work on Compensation Tables. Registrants should immediately begin work on the compensation tables for their 2010 proxy statements, to the extent this process has not begun already. It is critical to make NEO determinations as soon as possible to assess the impact of the new rules on previously reported compensation, and identify any issues that need follow-up attention. The new grant date fair value reporting may result in a change in NEOs for the 2010 proxy statement, particularly if the registrant made select, larger or "one-time" grants during fiscal 2009. If an executive will be added as an NEO for the first time in light of the rule change, additional time may be needed to gather all the detail needed for the disclosures. To the extent an NEO from a registrant's most recent fiscal year would be omitted from the Summary Compensation Table under the new rules due to a large "one-time" grant to another executive officer, such as a new hire or retention grant, the registrant should consider providing compensation disclosure for the executive officer who would otherwise be omitted from the compensation disclosure under the new rules as a supplement to the required disclosure so as to provide more consistency for year-to-year comparison.[9]

III. Independence of Compensation Consultants

In certain circumstances, the use of compensation consultants will trigger enhanced disclosure under the SEC's new rules. Generally, the new rules require disclosure in proxy statements with regard to compensation consultants if the following three conditions are present during a relevant fiscal year:

- the consultant was engaged to provide advice or recommendations on the amount or form of executive and director compensation;
- the same consultant or its affiliates provided the registrant with additional non-executive compensation consulting services; and
- the aggregate fees paid for such non-executive compensation consulting services exceeded $120,000 during the registrant's fiscal year.

Under the above circumstances, the registrant must disclose the: (1) identity of the consultant, whether it was engaged directly by the compensation committee (or others performing equivalent functions), the nature and scope of their assignment, and the material elements of the instructions given to the consultant for its assignment; (2) aggregate fees paid for services provided to either the board or to management with regard to determining or recommending the amount or form of executive and director compensation; and (3) aggregate fees paid for any non-executive compensation consulting services provided by the compensation consultant or its affiliates. In addition, if the compensation consultant was engaged by the compensation committee (or others performing equivalent functions), the disclosure must address whether the decision to engage the compensation consultant or its affiliates for non-executive compensation consulting services was made, or recommended, by management, and whether the compensation committee or the board approved such other services.

An exception to the above disclosure requirement for consulting fees is available for fees paid to compensation consultants that are retained by management where the board or the compensation committee (or other persons performing equivalent functions) has engaged a separate consultant from that engaged by management. This exception is available without regard to whether the compensation consultant engaged by management is invited to participate in board meetings. In addition, the new disclosure requirements are not applicable to situations where the only role the consultant plays in advising on executive and director compensation is limited to (i) consulting on any broad-based plans that do not discriminate in favor of executive officers or directors or (ii) providing non-customized information, such as surveys that are either not customized or that are customized based on parameters not developed by the consultant.

> ACTION ITEM #6: Director Briefing. Boards and compensation committees should receive a briefing about the new SEC rules. A review of the services provided by the board's or registrant's current compensation consultant or advisor, if any, should be undertaken, with particular attention to the independence of its advisors, and the potential disclosure of fees and conflicts of interest associated with each consultant or advisor. The board and compensation committee should consider the advisability of adopting written guidelines with respect to the hiring and retention of compensation consultants, including procedures for approval of additional non-executive compensation services to be performed by such consultants.

IV. Qualifications of Board Members and Board Diversity

Director and Nominee Disclosure

The final rules amend Item 401 of Regulation S-K relating to the background and experience of directors in three ways. First, the disclosure requirements for the qualifications of directors and nominees have been expanded. Second, past directorships held by directors and nominees must now be disclosed. Finally, the time period during which past legal proceedings must be disclosed, as well as the types of legal proceedings that must be disclosed, have been expanded.

Director Qualifications. Companies must now disclose the particular expertise, qualifications, attributes or skills that a director or nominee possesses that led the board of directors to determine that the individual should serve on the board. This information must be provided as of the time of the filing of the proxy statement or annual report. The new disclosure will be required for each director and nominee, whether put forward by the registrant or another proponent. Thus, the disclosure will be made annually for all directors who comprise or may comprise the board.

While the SEC did not specify the exact type of information that must be disclosed nor did it require the specific experience, qualifications or skills that qualify a director to serve on a particular committee, registrants should disclose such considerations as applicable. For instance, if an individual is chosen to serve on the board on the basis of particular skills or experience that qualifies him or her to serve on a specific committee, then that information should be disclosed.

Past Directorships Held by Directors and Nominees. Prior to the adoption of the new rules, Item 401 of Regulation S-K required disclosure of any *current* directorships at any public company or registered investment company held by each nominee and director of the registrant. This disclosure requirement has now been expanded to also require disclosure of any such directorships held by each director and nominee at any time during the past five years.

Expanded Disclosure of Legal Proceedings Involving Directors, Nominees and Executive Officers. The SEC expanded the disclosure requirement for legal proceedings involving directors, director nominees and executive officers both with respect to the time period for which disclosure is required and the substance of the information required to be disclosed. The time period during which this disclosure must be provided has been increased from five to ten years. In addition, the following three types of legal proceedings have been added to the list of legal proceedings for which disclosure is required:

- 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 activities;[10] and
- Any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

ACTION ITEM #7: Revise Director and Officer Questionnaires and Review Director Qualifications. Registrants must revise their director and officer questionnaires to ensure that they pick up all the new disclosure requirements. The board should review and discuss each director's qualifications and should review and approve the disclosure relating to its determination with respect to the qualification of each director. Given its role with respect to director nominations, a board may consider delegating to the nominating committee the task of initially reviewing and recommending the disclosure regarding the qualifications of directors. In crafting disclosure regarding director qualifications, management should consider any prior disclosure regarding minimum qualifications required by the nominating committee and any provisions of the nominating committee charter or the registrant's governance guidelines that set out any criteria.

Diversity Considerations

Registrants are now required to disclose in their proxy statements whether and, if so, how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying nominees for the board, the registrant is required to disclose how the policy is implemented and how the effectiveness of the policy is assessed. The SEC realizes that companies may define diversity in various ways (*e.g.*, some companies may consider diversity to include differences in viewpoint, professional experience or education, while others may focus on concepts such as race, education, gender or national origin). Accordingly, the SEC has not defined diversity and has allowed companies to define diversity in ways they consider appropriate.

ACTION ITEM #8: Consider Practices/Policy Regarding Diversity. Companies should review their diversity practices, if any. To the extent the nominating committee (or the board) does not have a policy with regard to the consideration of diversity in identifying nominees, it should consider whether it desires to adopt such a policy. To the extent the nominating committee (or the board) has an unwritten policy, it should consider putting it in writing. The nominating committee (or the board) should review the disclosure generated to comply with this new requirement.

V. Disclosure of Board Leadership Structure and Risk-Management Oversight

In order to provide investors with information about the corporate governance practices of companies and transparency as to how the board functions, proxy statements will now require disclosure of the company's board leadership structure and why it believes such structure is appropriate. Registrants must disclose whether the same person serves as both principal executive officer and board chairman. A registered investment company must disclose whether the chairman of the board is an "interested person" of the registrant as defined in Section 2(a)(19) of the Investment Company Act of 1940. If one person serves as both principal executive officer and chairman of the board, or if the chairman of the board of an investment company is an "interested person" of the registrant, a registrant must disclose whether it has a lead independent director and the specific role played by the lead independent director in the leadership of the board. The disclosure should indicate why the board has determined its leadership structure is appropriate given the registrant's specific characteristics or circumstances. The SEC's new rules also add a requirement to describe the board's role in risk oversight, including how the board carries out its risk oversight function, such as through a whole board or separate committee, and the effect this has on the board's leadership structure. The Proxy Disclosure Enhancements Release suggests that companies discuss whether the individuals who supervise the day-to-day risk management of the company report to the whole board or a board committee. The new rules also require registered investment companies to provide disclosure about the board's role in risk management.

> ACTION ITEM #9: Evaluation of Board Leadership Structure and the Board's Role in Risk Management. The board should evaluate its leadership structure and its role in risk oversight and should specifically review the disclosure generated to comply with this requirement. Members of management that focus on risk assessment should be involved in drafting this disclosure. The board may consider delegating to the committee charged with risk oversight the role of initial review and recommendation of the required disclosure. If the board's procedural role in risk oversight is not documented in writing (*e.g.*, lines of reporting authority, duties of the full board vs. responsibility of specific committees), the board should consider adopting relevant procedures.

VI. Real-Time Disclosure of Shareholder Voting Results

The SEC also adopted amendments to Form 8-K to move the requirement to disclose shareholder voting results from Forms 10-Q and 10-K to new Item 5.07 of Form 8-K. Preliminary voting results must be disclosed on a Form 8-K within four business days after the end of the meeting at which the vote took place followed by an amended report on Form 8-K within four business days after the final results are known. However, if definitive results are available within four business days of the shareholder meeting, a registrant need only file one Form 8-K with the definitive results. Item 5.07 requires corresponding information with respect to matters submitted to shareholders other than at a meeting of security holders.

The effective date of the final rules is February 28, 2010. Therefore, any shareholder meeting that takes place on or after February 28, 2010 is subject to the new Item 5.07 reporting requirement. If the meeting takes place before February 28, 2010, an Item 5.07 Form 8-K is not required.

> ACTION ITEM #10: Adjust Disclosure Controls and Procedures. Registrants must adjust their disclosure controls and procedures to ensure that the information required

by new Item 5.07 of Form 8-K is available and disclosed in a timely manner. For example, the Item 5.07 Form 8-K should be added to the registrant's annual meeting timetable.

VII. Update on Proxy Access

Under the proxy access rules proposed by the SEC in June 2009, a company would be required to include a limited number of shareholder director nominees in its proxy materials under specified circumstances as long as the nominating shareholders are not seeking to effect a change in control of the company. On October 2, 2009, SEC Chairman Mary Schapiro announced that the SEC is delaying the vote on its controversial proxy access proposal until early 2010. Accordingly, proxy access will not be in place for the 2010 proxy season. On December 14, 2009, the SEC announced that it is re-opening the public comment period for its proxy access proposal to seek views on additional data and analyses received by the SEC at or after the close of the original public comment on August 17, 2009.

Despite a strong push by institutional investors for proxy access, it remains hotly debated – even within the SEC, which narrowly approved its proxy access proposal by a 3-to-2 vote. Several organized groups, such as the Business Roundtable, an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues, have suggested that the SEC lacks authority to implement proxy access and may bring litigation if the SEC were to adopt proxy access. However, as we have previously reported, proposed federal legislation, such as the Shareholder Bill of Rights and the 2009 Shareholder Empowerment Act, if signed into law, would give the SEC clear authority to adopt proxy access rules.

This is the SEC's third attempt to implement proxy access in the last six years. It is unclear whether Congress will pass legislation mandating proxy access or whether the SEC will, on this third try, succeed in adopting proxy access rules in the absence of such legislation.

Conclusion

Although the SEC's final rules made welcome improvements upon a few of the original proposals, the final rules are fairly consistent with the proposed rules. Compliance should be achievable on registrants' regular proxy schedule, provided that directors and officers start the year by establishing a time-and-responsibility schedule for ensuring a thoughtful response to the new rules. Executive compensation and corporate governance should not be addressed in a vacuum, of course. Both topics remain under public scrutiny, and consequently are susceptible to continuing governmental attention, potentially leading to further tax or securities law or regulatory initiatives that may come in 2010 from Congress, the Treasury Department, the SEC or all of them. These initiatives may include some form of proxy access applicable to public companies during the 2011 proxy season.

In the face of escalating public pressure and increased transparency for their decisions and processes, corporate boards should approach 2010 warily, and be sure to be fully informed about the ever more complex and high stakes issues that the new SEC rules highlight.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings members of our Executive Compensation and Securities & Capital Markets Practice:

Atlanta
Elizabeth H. Noe
404-815-2287
elizabethnoe@paulhastings.com

Jared Brandman
404-815-2276
jaredbrandman@paulhastings.com

Hong Kong
Neil Torpey
852-2867-9902
neiltorpey@paulhastings.com

Los Angeles
Robert R. Carlson
213-683-6220
robcarlson@paulhastings.com

Stephen H. Harris
213-683-6217
stephenharris@paulhastings.com

Robert A. Miller, Jr.
213-683-6254
robertmiller@paulhastings.com

New York
Jeffrey J. Pellegrino
212-318-6932
jeffreypellegrino@paulhastings.com

Keith D. Pisani
212-318-6053
keithpisani@paulhastings.com

Scott R. Saks
212-318-6311
scottsaks@paulhastings.com

William F. Schwitter
212-318-6400
williamschwitter@paulhastings.com

Michael L. Zuppone
212-318-6906
michaelzuppone@paulhastings.com

Orange County
Stephen D. Cooke
714-668-6264
stephencooke@paulhastings.com

John F. Della Grotta
714-668-6210
johndellagrotta@paulhastings.com

Palo Alto
Robert A. Claassen
650-320-1884
robertclaassen@paulhastings.com

Paris
Joel M. Simon
33-1-42-99-04-45
joelsimon@paulhastings.com

San Diego
Leigh P. Ryan
858-458-3036
leighryan@paulhastings.com

Teri O'Brien
858-458-3031
teriobrien@paulhastings.com

San Francisco
Jeffrey T. Hartlin
415-856-7024
jeffhartlin@paulhastings.com

Thomas R. Pollock
415-856-7047
thomaspollock@paulhastings.com

Gregg F. Vignos
415-856-7210
greggvignos@paulhastings.com

Tokyo
Kenju Watanabe
81-3-6229-6003
kenjuwatanabe@paulhastings.com

Washington, D.C.
J. Mark Poerio
202-551-1780
markpoerio@paulhastings.com

[1] See comments of SEC Chairman Shapiro in SEC Release 2009-268 (3rd para), issued 12/16/2009, available at http://sec.gov/news/press/2009/2009-268.htm.

[2] For additional information about the effective dates of the new rules as they relate to registration statements and other specific situations, see the Division of Corporation Finance's interpretations at http://www.sec.gov/divisions/corpfin/guidance/pdetinterp.htm and the Division of Investment Management's interpretations at: http://www.sec.gov/divisions/investment/guidance/icproxydisclosuretransition.htm.

[3] A "voluntary filer" is typically a company whose reporting obligations under the Exchange Act have been suspended, but that continues to file reports with the SEC to satisfy an indenture covenant or other contractual obligation. Many "high yield" issuers are voluntary filers or agree to provide reports as if they had a reporting obligation under Section 15(d) of the Exchange Act. Several of the new rules contained in the Proxy Disclosure Enhancements Release will be applicable to these companies because certain information required by the new rules must be included in a Form 10-K if it is not incorporated into the Form 10-K by reference to a proxy statement.

[4] The following will not be applicable to voluntary and Section 15(d) filers: (i) the disclosure requirements discussed in Section III (Independence of Compensation Consultants), (ii) the disclosure requirements discussed under the heading "Diversity Considerations" in Section IV (Qualifications of Board Members and Board Diversity) and (iii) the disclosure requirements discussed in Section V (Disclosure of Board Leadership Structure and Risk-Management Oversight).

[5] A "smaller reporting company" is generally an issuer (other than an investment company or an asset-backed issuer) that has a public float of less than $75 million.

[6] Proxy Disclosure Enhancements Release, Section II.A.1.c. Note that the "reasonably likely" standard is the same standard that applies to MD&A disclosure.

[7] From Equilar report (Nov. 2009). See generally Poerio, "*Executive Pay & Loyalty: From Velvet Glove to Iron Fist*", Corporate Governance Advisor (Jan./Feb. 2010).

[8] Proxy Disclosure Enhancements Release, Section II.A.2.d. See also footnote 81 in the Proxy Disclosure Enhancements Release.

[9] See the Proxy Disclosure Enhancements Release, Section II.A.2.c.

[10] The final rules clarify that settlement of civil proceedings between private litigants does not need to be disclosed in response to this item.

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