

UPDATE ON THE SEC'S NEW PROXY DISCLOSURE ENHANCEMENTS

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Compliance and Disclosure Interpretations (CDIs)

Relating to Proxy Disclosure Enhancements

A. Exchange Act Form 8-K

Section 121A. Item 5.07 Submission of Matters to a Vote of Security Holders

Question 121A.01

Question: How should an issuer calculate the four business day filing period for an Item 5.07 Form 8-K?

Answer: Pursuant to Instruction 1 to Item 5.07, the date on which the shareholder meeting ends is the triggering event for an Item 5.07 Form 8-K. Day one of the four-business day filing period is the day after the date on which the shareholder meeting ends. For example, if the meeting ends on Tuesday, day one would be Wednesday, and the four-business day filing period would end on Monday. [Feb. 16, 2010]

B. Regulation S-K

Section 116. Item 401 – Directors, Executive Officers, Promoters and Control Persons

Question 116.05

Question: For each director and nominee, Item 401(e)(1) requires disclosure of such person's "specific experience, qualifications, attributes or skills" that led the board to conclude that such person should serve as a director at the time that a filing containing the disclosure is made. May a company provide these disclosures on a group basis if the directors or nominees share similar characteristics, such as all of them are audit committee financial experts or all of them are current or former CEOs of major companies?

Answer: No. The disclosure of each director or nominee's experience, qualifications, attributes or skills must be provided on an individual basis. For each person, a company must disclose why the person's *particular* and *specific* experience, qualifications, attributes or skills led the board to conclude that such person should serve as a director of the company, in light of the company's business and structure, at the time that a filing containing the disclosure is made. For example, it would not be sufficient to disclose simply that a person should serve as a director because he or she is an audit committee financial expert. Instead, a company should describe the particular and specific experience, qualifications, attributes or skills that led the board to conclude that this particular person

should serve as a director at the time that a filing containing the disclosure is made. [Jan. 20, 2010]

Question 116.06

Question: Under Item 401(e)(1), how should a company with a classified board disclose why a director's particular and specific experience, qualifications, attributes or skills led the board to conclude that the person should serve as a director at the time that a filing containing the disclosure is made, if the director is not up for re-election at the upcoming shareholders' meeting?

Answer: Because the composition of the entire board is important information for shareholder voting decisions, the purpose of this disclosure requirement is to elicit current information about all directors on the board, including on classified boards. For each director who is not up for re-election, the evaluation of the director's particular and specific experience, qualifications, attributes or skills and the conclusion as to why the director should continue serving on the board, should be as of the time that a filing containing the disclosure is made. For some boards of directors, particularly those that do not conduct annual self-evaluations, this may require implementing additional disclosure controls and procedures to ensure that such information about directors who are not up for re-election at the upcoming shareholders' meeting is recorded, processed, summarized and reported within the time periods specified in the Commission's rules and forms. [Jan. 20, 2010]

Question 116.07

Question: Instruction 3 to Item 401(a) provides that if the information called for by paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates. Is Item 401(e) disclosure required with respect to any director to whom this Instruction applies?

Answer: No. Item 401(e) disclosure is not required for any director for whom the company is not required to provide Item 401(a) disclosure. [Feb. 16, 2010]

Section 117. Item 402(a) – Executive Compensation; General

Question 117.04

Question: During 2009, a company grants an equity award to an executive officer. The same award is forfeited during 2009 because the executive officer leaves the company. Should the grant date fair value of this award be included for purposes of determining 2009 total compensation and identifying 2009 named executive officers?

Answer: Yes. [Jan. 20, 2010]

Question 117.05

Question: A registrant with a calendar fiscal year end has filed a Securities Act registration statement (or post-effective amendment) for which it seeks effectiveness after December

31, 2009 but before its 2009 Form 10-K is due. Must it include Item 402 disclosure for 2009 in the registration statement before it can be declared effective?

Answer: If the registration statement is on Form S-1, then it must include Item 402 disclosure for 2009 before it can be declared effective. This is because 2009 is the last completed fiscal year. Part I, Item 11(I) of Form S-1 specifically requires Item 402 information in the registration statement, which includes Summary Compensation Table disclosure for each of the registrant's last three completed fiscal years and other disclosures for the last completed fiscal year. General Instruction VII of Form S-1, which permits a registrant meeting certain requirements to incorporate by reference the Item 11 information, does not change this result because the registrant has not yet filed its Form 10-K for the most recently completed fiscal year.

On the other hand, Form S-3's information requirements are satisfied by incorporating by reference filed and subsequently filed Exchange Act documents; for example, there is no specific line item requirement in Form S-3 for Item 402 information. Accordingly, a non-automatic shelf registration statement on Form S-3 can be declared effective before the Form 10-K is due. [Securities Act Forms C&DI 123.01](#) addresses the situation in which a company requests effectiveness for a non-automatic shelf registration statement on Form S-3 during the period between the filing of the Form 10-K and the definitive proxy statement. [Feb. 16, 2010]

Section 119. Item 402(c) – Executive Compensation; Summary Compensation Table

Question 119.20

Question: Instruction 3 to the Stock Awards and Option Awards columns specifies that the value reported for awards subject to performance conditions excludes the effect of estimated forfeitures. Does the grant date fair value reported for awards subject to time-based vesting also exclude the effect of estimated forfeitures?

Answer: Yes. The amount to be reported is the grant date fair value. FASB ASC Paragraph 718-10-30-27 provides, in relevant part, that "service conditions that affect vesting are not reflected in estimating the fair value of an award at the grant date because those conditions are restrictions that stem from the forfeitability of instruments to which employees have not yet earned the right." [Jan. 20, 2010]

Question 119.21

Question: In April 2010, a company grants an equity award to an executive officer, and the terms of the award do not provide for acceleration of vesting if the executive officer leaves the company. The grant date fair value of the award is \$1,000. In November 2010, the executive officer will leave the company, and the company modifies the officer's same equity award to provide for acceleration of vesting upon departure. The fair value of the modified award, computed under FASB ASC Topic 718, is \$800, reflecting a decline in the company's stock price. What dollar amount is included in 2010 total compensation for purposes of identifying 2010 named executive officers and reported in the executive officer's 2010 stock column with respect to this award if he will be a named executive officer? How would the company report the equity award if the award modification and executive's departure occur in 2011?

Answer: Consistent with Instruction 2 to Item 402(c)(2)(v) and (vi), the incremental fair value of the modified award, computed as of the modification date in accordance with FASB ASC Topic 718, as well as the grant date fair value of the original award must be reported in the 2010 stock column. Applying the guidance in paragraph 55-116 of FASB ASC Section 718-20-55, incremental fair value is computed as follows: the fair value of the modified award at the date of modification minus the fair value of the original award at the date of modification equals the incremental fair value of the modified award. In this fact pattern, the fair value of the original award at the date of modification is zero, because the executive officer left the company in November and the original award would not have vested. Therefore, the incremental fair value of the modified award is \$800. As a result, the total amount reported is \$1,800, which reflects the two compensation decisions the company made for this award in 2010. The same amount is included in 2010 total compensation for purposes of identifying the company's 2010 named executive officers pursuant to Items 402(a)(3)(iii) and (iv).

If the award modification and executive's departure occur in 2011, the company would report \$1,000 in the 2010 stock column for the grant date fair value of the original award. In the 2011 stock column, the company would report \$800 for the incremental fair value of the modified award. [Feb. 16, 2010]

Question 119.22

Question: During 2010, a company grants an annual incentive plan award to a named executive officer. Because no right to stock settlement is embedded in the terms of the award, the award is not within the scope of FASB ASC Topic 718. Therefore, it is a non-equity incentive plan award as defined in Rule 402(a)(6)(iii). The named executive officer elects to receive the award in stock. Instruction 2 to Item 402(c)(2)(iii) and (iv) does not apply because the award is an incentive plan award rather than a bonus. Should the company report the award in the stock awards column (column (e)) or in the non-equity incentive plan award column (column (g)) in its 2010 Summary Compensation Table? How should the award be reported in the Grants of Plan-Based Awards Table?

Answer: The company should report the award in the non-equity incentive plan award column (column (g)) of the Summary Compensation Table, reflecting the compensation the company awarded, with footnote disclosure of the stock settlement. Similarly, in the Grants of Plan-Based Awards Table, the company should report the award in the estimated future payouts under non-equity incentive plan awards columns (columns (c)-(e)). The stock received upon settlement should not also be reported in the Grants of Plan-Based Awards Table because that would double count the award. [Feb. 16, 2010]

Question 119.23

Question: During 2010, a company grants annual incentive plan awards to its named executive officers. The awards permit the named executive officers to elect payment of the award for 2010 performance in company stock rather than cash, with the election to be made during the first 90 days of 2010. Such company stock will have a grant date fair value equal to 110% of the award that would be paid in cash. One named executive officer elects stock payment, and the others do not. How is the award reported for the named executive officer who elects stock payment? How is the award reported for the named executive officers who receive cash payment?

Answer: For the named executive officer who elects stock payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as an equity incentive award. This is the case even if the amount of the award is not determined until early 2011 because all company decisions necessary to determine the value of the award are made in 2010. For the named executive officers who receive cash payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as a non-equity incentive plan award. [Feb. 16, 2010]

Section 128A - Item 402(s) Narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management

Question 128A.01

Question: The requirement to provide narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management is in Item 402(s), rather than included as part of Compensation Discussion and Analysis in Item 402(b). Where should a registrant present Item 402(s) disclosure in its filings?

Answer: The new rules do not specify where the disclosure should be presented. However, to ease investor understanding, the staff recommends that Item 402(s) disclosure be presented together with the registrant's other Item 402 disclosure. The staff would have concerns if the Item 402(s) disclosure is difficult to locate or is presented in a fashion that obscures it. [Jan. 20, 2010]

Section 133. Item 407 – Corporate Governance

1. Question 133.10

Question: Are the "additional services" provided by executive compensation consultants that are subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B) limited to services for non-executives?

Answer: No. [Jan. 20, 2010]

2. Question 133.11

Question: If a compensation consultant's role is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors and to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the consultant does not provide advice, then such services do not need to be disclosed under Item 407(e)(3)(iii), so long as these are the *only* services provided by the consultant. If the consultant's role extends beyond these two types of services, then disclosure of all of the consultant's services, including consulting on broad-based plans and providing non-customized information, will be required under Item 407(e)(3)(iii), subject to the disclosure threshold in this item. Are the fees for these two types of services considered to be for "determining or recommending the amount or form of executive and director compensation" or are such fees considered to be for "additional services"?

Answer: The answer depends on the facts and circumstances of each service. Fees for consulting on broad-based, non-discriminatory plans in which executive officers or directors participate and for providing information relating to executive and director compensation, such as survey data (in each case, that would otherwise qualify for the exclusion from disclosure if they are the only services provided), are considered to be fees for "determining or recommending the amount or form of executive and director compensation" for purposes of reporting fees under the rule. However, "consulting" on broad-based non-discriminatory plans does not also include any related services, such as benefits administration, human resources services, actuarial services and merger integration services, all of which are "additional services" subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B). In addition, if the non-customized information relates to matters other than executive and director compensation, then the fees for such information would be for "additional services." [Jan. 20, 2010]

C. Proxy Disclosure Enhancements

Question 1

Question: The Proxy Disclosure Enhancements Release amends Regulation S-K Items 401, 402 and 407, effective February 28, 2010. How does this effective date apply to an issuer's Form 10-K for fiscal year 2009 and its proxy statement containing Form 10-K Part III information for 2009?

Answer: If the issuer's fiscal year ends on or after December 20, 2009, its Form 10-K and proxy statement must be in compliance with the new proxy disclosure requirements if filed on or after February 28, 2010. If such an issuer is required to file a preliminary proxy statement and expects to file its definitive proxy statement on or after February 28, 2010, then the preliminary proxy statement must be in compliance with the new proxy disclosure requirements, even if filed before February 28, 2010. If such an issuer files its 2009 Form 10-K before February 28, 2010 and its proxy statement on or after February 28, 2010, the proxy statement must be in compliance with the new proxy disclosure requirements.

If the issuer'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 new proxy disclosure requirements, even if filed on or after February 28, 2010. [Dec. 22, 2009]

Question 2

Question: If an issuer is not required to comply with the new disclosure requirements for its 2009 Form 10-K and related proxy statement, may it do so on a voluntary and discretionary basis?

Answer: Yes; provided, however, that an issuer may voluntarily comply with the Summary Compensation Table and Director Compensation Table amendments only if it also complies with all other Regulation S-K amendments adopted in the Proxy Disclosure Enhancements Release that apply to the form filed. An issuer may provide the other new disclosures without having to comply with all of the new requirements. [Dec. 22, 2009]

Question 3

Question: How does the February 28, 2010 effective date for the Regulation S-K amendments affect Securities Act and Exchange Act registration statements filed by a reporting issuer with a 2009 fiscal year that ends before December 20, 2009?

Answer: A reporting issuer with a 2009 fiscal year that ends before December 20, 2009 will not be required to comply with the Regulation S-K amendments until the filing of its Form 10-K for fiscal year 2010. As a result, any Securities Act or Exchange Act registration statements for such registrant filed before the 2010 Form 10-K is required to be filed would not be subject to the Regulation S-K amendments. [Dec. 22, 2009]

Question 4

Question: How does the February 28, 2010 effective date for the Regulation S-K amendments affect a new registrant, such as for an initial public offering or a first registration on Form 10?

Answer: If the new registrant first files its registration statement on or after December 20, 2009, compliance with the Regulation S-K amendments would be required for such registration statement in order for it to be declared effective on or after February 28, 2010. [Dec. 22, 2009]

Question 5

Question: New Item 5.07 of Form 8-K is effective February 28, 2010. If the annual meeting of shareholders takes place on or after February 28, 2010, but the proxy statement for the meeting was mailed to shareholders before that date, are the results of the meeting subject to reporting pursuant to Item 5.07?

Answer: Yes. Any shareholder meeting that takes place on or after February 28, 2010 is subject to the new Form 8-K Item 5.07 reporting requirement. If the meeting takes place before February 28, 2010, an Item 5.07 Form 8-K is not required. [Dec. 22, 2009]

Question 6

Question: If the annual meeting of shareholders takes place before February 28, 2010, how should the results of the meeting be reported on Form 10-K or Form 10-Q, as applicable, if such form is due on or after February 28, 2010?

Answer: If the Form 10-K or Form 10-Q is due on or after February 28, 2010, the results of the meeting should be reported in the "Other Information" Item of each form, rather than in the "Submission of Matters to a Vote of Security Holders" Item, which will be rescinded from Form 10-K and Form 10-Q on February 28, 2010. [Jan. 20, 2010]

Question 7

Question: A reporting issuer with a fiscal year ending on or after December 20, 2009 files a Securities Act or Exchange Act registration statement on or after December 20, 2009. How

does the February 28, 2010 effective date for the Regulation S-K amendments affect the registration statement?

Answer: In general, compliance with the Regulation S-K amendments would be required for such registration statement in order for it to be declared effective on or after February 28, 2010. However, if the registration statement is on Form S-3, it will incorporate by reference the issuer's 2009 Form 10-K, for which compliance with the Regulation S-K amendments is addressed by Question 1. [Jan. 20, 2010]