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SEC EXPANDS PROXY DISCLOSURE REQUIREMENTS

The Securities and Exchange Commission (the “SEC”) has adopted rule amendments (the “Amendments”) that expand the executive compensation and corporate governance disclosures that companies must include in their annual meeting proxy statements. The Amendments will also require Form 8-K reporting of shareholder voting results. The Amendments were adopted in December 2009, and are effective February 28, 2010, but do not apply to proxy statements filed by a company with a fiscal year ending before December 20, 2009.

I. EXPANDED COMPENSATION DISCLOSURES

(a) Narrative Disclosure Of The Company’s Overall Compensation Policies And Practices For Employees If The Risk Posed By Such Policies And Practices Are Material And Adverse

The Amendments require a company to discuss and analyze their broader compensation policies and overall compensation practices for employees generally, including non-executive officers, if risks arising from those policies or practices “are reasonably likely to have a material adverse effect” on the company. The Amendments include the following “non-exclusive” list of situations where compensation practices may have the potential to raise material risks to a company and that could trigger discussion of broader employee compensation practices: (i) a business unit of the company that carries a significant portion of the company’s risk; (ii) a business unit with compensation structured significantly differently than other units within the company; (iii) a business unit that is significantly more profitable than other units within the company; (iv) a business unit where the compensation expense is a significant percentage of the unit’s revenues; and (v) the company provides bonuses that are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time. According to the SEC, if a company has compensation policies and practices for different groups that mitigate or balance incentives for risk taking, these could be considered in deciding whether risks are likely to have a material adverse effect on the company as a whole.

If disclosure of broader employee compensation policies and practices is required because of the risks posed, the rule includes examples of the issues that a company may need to address, such as: (i) the general design philosophy of the policies and practices; (ii) the company’s risk assessment or incentive considerations, if any, in structuring the policies and practices or in awarding and paying compensation; (iii) how the policies and practices relate to the realization of risks resulting from the actions of employee in both the short and long term, such as through policies requiring claw backs or imposing holding periods; (iv) plans for adjustments to policies and practices to address changes in risk profile; (v) adjustments made as a result of changes in risk profile; and (vi) the extent to which the company monitors the practices and policies to determine whether risk management objectives are being met with respect to incentivizing employees.

The discussion of broader employee compensation policies and practices, if required, is not part of the CD&A. Moreover, smaller reporting companies are not required to provide this disclosure.

(b) Revisions to the Summary Compensation Table

The Amendments require a company to include in the Summary Compensation Table (“SCT”) and Director Compensation Table the aggregate grant-date fair value of the stock and option awards granted in any fiscal year. The aggregate grant-date fair value of the awards will be calculated in accordance with FASB ASC Topic 718.¹ Only the annual accounting expense of stock and option awards previously granted is included in the SCT under current rules. This change can affect the calculation of total compensation for purposes of determining who is a named executive officer (NEO). Moreover, the Amendments require companies to recalculate the SCT for each prior year reported (*e.g.*, recalculate for 2007 and 2008 fiscal years) so that the columns reflect the applicable aggregate grant date fair values, and the total compensation column for each preceding fiscal year is recalculated. However, companies are not required to include different NEOs for prior years when recalculating reported compensation in the SCT.

There are special instructions for determining the grant date fair value of stock and option awards that are subject to performance conditions other than vesting. The aggregate grant date fair value must be determined based on the probable outcome of the performance conditions, and not based on the maximum performance of the individual or the company.

II. EXPANDED DISCLOSURE FOR DIRECTORS AND NOMINEES

The Amendments require annual disclosure with respect to each director (including incumbents) and director nominee, as to: (i) the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director of company (but not with respect to committee assignments); (ii) any directorships at public companies and registered investment companies held by each director and nominee at anytime during the past five years (as opposed to current director positions); and (iii) the legal proceedings against the director or nominee during the last 10 years (instead of current five years), as well as an expanded list of legal proceedings that require disclosure. In addition, a company must disclose whether, and if so how, the nominating committee (or board) considers diversity in identifying nominees for director. If the nominating committee (or board) has a policy with regard to the consideration of diversity in identifying director nominees, disclosure would be required of how this policy is implemented, as well as how the board assesses the effectiveness of its diversity policy. “Diversity” is not defined, as the SEC acknowledged that companies may define the term in a variety of ways, *e.g.*, some may conceptualize diversity to include “differences of viewpoint, professional experience, education, skill and other attributes that contribute to board heterogeneity” while others may focus on concepts of race, gender and national origin.

III. DISCLOSURE ABOUT BOARD LEADERSHIP STRUCTURE AND THE BOARD’S ROLE IN RISK OVERSIGHT

The Amendments require disclosure of the leadership structure of the board and why the company believes that the structure is appropriate. A company must disclose whether it has combined or separated the chief executive officer and the chairman of the board positions, and why the company believes its structure is most appropriate. If the same person serves as chief executive officer and chairman of the board, a company must disclose whether it has a lead independent director and what specific role the lead independent director plays in the leadership of the company.

The company is also required to disclose the board’s role in risk oversight of the company. The disclosure should state how the company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.

IV. DISCLOSURE REGARDING COMPENSATION CONSULTANTS

New disclosure requirements regarding compensation consultants are intended to provide shareholders with information to help them better assess the potential conflicts of interest a compensation consultant may

¹ FASB ASC Topic 718 recodified the accounting rules under SFAS 123(R), which established the standards for the accounting of stock-based compensation.

have in recommending executive compensation in the event he or she is providing additional services to the company. Accordingly, the Amendments provide the following additional disclosure requirements related to compensation consultants:

- If the compensation consultant was engaged by the compensation committee (or persons performing equivalent functions) to provide advice or recommendations on the amount or form of executive and director compensation (other than any role limited to broad based plans that do not discriminate in favor of executives or directors and that are available generally to all salaried employees; or providing information that is not customized for the company or that is customized based on parameters that are not developed by the consultant and about which the consultant does not provide advice), and the consultant (or its affiliates) provides other services to the company in excess of \$120,000 during the fiscal year, disclosure is required as to the aggregate fees paid to the compensation consultant for determining or recommending executive or director compensation, and the aggregate fees paid to the consultant for the other services. Disclosure must also be provided as to whether the decision to engage the consultant for the other services provided was made or recommended by management, and whether the compensation committee or the board approved such other services.
- If the board has not hired its own consultant, but management has engaged a compensation consultant to provide advice or recommendations on the amount or form of executive and director compensation (other than any role limited to broad based plans that do not discriminate in favor of executives or directors and that are available generally to all salaried employees; or providing information that is not customized for the company or that is customized based on parameters that are not developed by the consultant and about which the consultant does not provide advice), and the consultant (or its affiliates) provides other services to the company in excess of \$120,000, disclose is required as to the aggregate fees paid to the compensation consultant for determining or recommending executive or director compensation, and the aggregate fees for the other services.

The company is not required to disclose the nature and extent of services provided that are unrelated to executive and director compensation. In addition, if management or the company and the board have each engaged different compensation consultants, the aggregate fees paid to the compensation consultant engaged by management or the company do not have to be disclosed, even if the consultant provides additional services to the company in excess of \$120,000.

V. REPORTING OF VOTING RESULTS ON FORM 8-K

The Amendments require a company to file a Current Report on Form 8-K and disclose the results of a shareholder vote within four business days after the end of the meeting at which the vote was held. This replaces the requirement to disclose voting results in Annual Reports on Form 10-K or Quarterly Reports on Form 10-Q, which often are filed months after the annual or special meetings.

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