

A Guide to Implementing the SEC's New Rules on Proxy Disclosure Enhancements

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STEP 1: GATHER INFORMATION TO MAKE REQUIRED DISCLOSURES OR DETERMINE DISCLOSURES ARE NOT APPLICABLE.

- Update officers' and directors' questionnaires to gather information with respect to expanded disclosures regarding legal proceedings and, for directors, all directorships currently held and held in the past five years. See Annex A (last two pages of this document) for our suggestions regarding an updated questionnaire.
- Discuss with the board or the nominating committee the specific experience, qualifications, attributes or skills that led to the conclusion that each director and nominee should serve as a director for the registrant.
- Determine whether risks arising from the registrant's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the registrant. While this determination is complex and nuanced, consider:
 - o The amount of incentive compensation in relation to base salary.
 - o The balance of short-term and long-term incentive compensation. Consider as well:
 - the thresholds to meet short-term and long-term performance goals;
 - whether the goals are realistic or encourage unduly risky behavior;
 - whether incentive compensation is capped; and
 - how the goals relate to the annual business plan and if the goals are in alignment with the overall business strategy.
 - o Do vesting requirements for equity compensation awards encourage a focus on long-term performance?
 - o Are there special risks associated with certain divisions or subsidiaries? Are there special risks associated with certain individual performance goals?
 - o Are pay practices in alignment with market practices?
 - o Are there claw-back or long-term equity ownership requirements to mitigate the incentive to engage in unduly risky behavior?
 - o Whether the exercise of discretionary judgment by the compensation committee in awarding incentive compensation appropriately mitigates risk.
 - o Whether the registrant has other compensating controls to identify and control risks.

The SEC's recent release does not precisely specify the meaning of "material adverse effect." The SEC noted, however, that the phraseology is meant to "parallel the MD&A requirement, which requires risk-oriented disclosure of known trends and uncertainties that are material to the business." The SEC also noted, "the amendments are intended to elicit disclosure about incentives in the company's compensation policies and practices that would be most relevant to investors."

We recommend that each registrant create a task force to examine this question and document conclusions appropriately. While we believe relatively few registrants will be required to make disclosures under these new provisions, we believe documentation of conclusions reached may be

crucial in responding to SEC comments.

- Discuss with the board or the nominating committee whether the board or the nominating committee considers diversity in identifying nominees for director. Determine whether the board or the nominating committee has a policy with regard to the consideration of diversity in identifying director nominees, and how this policy is implemented and how effectiveness of this policy is assessed.

The SEC recognizes some registrants may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. The SEC believes that for purposes of this disclosure requirement, registrants should be allowed to define diversity in ways that they consider appropriate. As a result, the final rules do not define diversity.

- Determine whether disclosure is required regarding fees paid to compensation consultants selected by the board or management because such compensation consultants also provided other services to the company. Disclosure is not required where the value of other services is less than \$120,000 or where the other services relate to broad-based plans or certain surveys.

- Gather information as to why the registrant has determined that its board leadership structure is appropriate. "Leadership structure," as used in the new rule, means whether the principal executive officer and chairman of the board positions are held by the same person, and if so, whether the registrant has a lead independent director.

- Gather information about the extent of the board's role in the risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure.

- Gather information to disclose grant date fair value of equity awards in the Summary Compensation Table for named executive officers and in the Director Compensation Table for directors. Information in the Summary Compensation Table must be restated for all prior years presented to reflect grant date fair values of equity awards. Much of this information can likely be derived from the Grants of Plan-Based Awards Table in prior years, as the requirements for that table already included reporting of grant date fair values. The Summary Compensation Table must also include the incremental fair value of any previous awards that were repriced or materially modified.

- New Item 5.07 to Form 8-K requires the results of any shareholder vote to be reported by Form 8-K within four days following the end of the meeting. Responsibility for preparing and filing of this Form 8-K should be assigned to a specific person while preparing for the annual meeting.

STEP 2: UPDATE THE PROXY STATEMENT

- Update biographies included in proxy statement.
 - o Disclose all directorships currently held and held in the last five years for directors and nominees for directors.
 - o Disclose any relevant legal proceedings as a result of expanded disclosure requirements for directors, nominees for directors and executive officers.
 - o See Regulation S-K Items 401(e)(2) and 401(f).
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- Disclosure of conclusions regarding directors and director nominees.
 - o For each director or person nominated or chosen to become a director, briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant in light of the registrant's business and structure.
 - o If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications.
 - o See Regulation S-K Item 401(e)(1).

 - Disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management. To the extent that risks arising from the registrant's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the registrant, discuss the registrant's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives.
 - o See Regulation S-K Item 402(s) regarding matters that may trigger disclosure, and if so, a non-exclusive list of possible required disclosures.
 - o These items do not need to be discussed in the Compensation, Discussion and Analysis.

 - Disclosure of consideration of diversity in the director nominating process.
 - o Describe whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director.
 - o If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.
 - o See Regulation S-K Item 407(c)(2)(vi).

 - Disclosure of fees of compensation consultants.
 - o Disclose the aggregate fees of compensation consultants for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services if:
 - The compensation consultant or its affiliates also provided additional services to the registrant or its affiliates in an amount in excess of \$120,000 during the registrant's last completed fiscal year; and
 - o The compensation consultant was engaged by the compensation committee (or persons performing the equivalent functions) to provide advice or recommendations on the amount or form of executive and director compensation (if disclosure is required, also 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 such other services of the compensation consultant or its affiliates); or
 - o The compensation consultant was engaged by management to provide advice or recommendations on the amount or form of executive and director compensation and the compensation committee (or persons performing the equivalent functions) has not engaged a compensation consultant.
 - o No disclosure is required where the additional role is limited to:
 - Consulting on any broad-based plan that does not discriminate in scope, terms, or operation in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees; or
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- Providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.
 - o See Regulation S-K Item 407(e)(3)(iii).
- Disclosure of board leadership structure.
- o Briefly describe the leadership structure of the registrant's board, such as whether the same person serves as both principal executive officer and chairman of the board, or whether two individuals serve in those positions.
 - o If one person serves as both principal executive officer and chairman of the board, disclose whether the registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the board.
 - o This disclosure should indicate why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the registrant.
 - o See Regulation S-K Item 407(h).
- Disclosure of board role in risk oversight.
- o Disclose the extent of the board's role in the risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure.
 - o See Regulation S-K Item 407(h).
- Disclosure of grant date fair values for equity awards.
- o In the Summary Compensation Table:
 - Disclose the aggregate grant date fair value for stock awards (column (e)) and option awards, with or without tandem SARs (column (f)). The disclosure of aggregate grant date fair values must be made for all prior years presented. Determine that the revised disclosures are consistent with amounts included in the Grants of Plan-Based Awards Table in prior years, which already required disclosure of grant date fair values.
 - If during the last completed fiscal year, the registrant adjusted or amended the exercise price of options or SARs, whether through amendment, cancellation or replacement grants, or any other means, or otherwise materially modified awards, include in column (f) the incremental fair value with respect to the repricing.
 - For awards that are subject to performance conditions, report the grant date fair value based on the probable outcome such conditions. In a footnote to the table, disclose the value of the award at the grant date assuming the highest level of performance conditions will be achieved if an amount less than the maximum was included in the table.
 - See Regulation S-K Item 402(c).
 - o In the Grants of Plan-Based Awards Table:
 - Continue to disclose the grant date fair value of each award.
 - For awards that are subject to performance conditions, report the grant date fair value based on the probable outcome such conditions.
 - See Regulation S-K Item 402(d).
 - o In the Director Compensation Table, disclose the aggregate grant date fair value of stock awards and option awards in a manner similar to the Summary Compensation Table.
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CONTACT US

Should you need more information with respect to the foregoing SEC rules, please contact any of the attorneys listed below or the Leonard, Street and Deinard attorney with whom you regularly work.

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Updates to Officers' and Directors' Questionnaires

The format of officers' and directors' questionnaires varies, but the sample update shown below can be used as a guide. Additions are shown in *bold italics*.

If you are a director of the company or are nominated to become a director, list any other directorships you hold, *and any other directorships held during the past five years*, in any company with a class of securities registered pursuant to section 12 of the Exchange Act or subject to the requirements of section 15(d) of such Act or any company registered as an investment company under the Investment Company Act of 1940, 15 U.S.C. 80a-1, et seq., as amended, naming such company.

Answer: _____

Have any of the following events occurred during the preceding *ten* years? If so, describe the circumstances below [Note: This question must be answered by all directors, any person nominated to be a director and executive officers].

- a. Was a petition under the bankruptcy code or any state insolvency law filed by or against, or a receiver, fiscal agent or similar officer appointed by a court for the business or property of (i) yourself, (ii) any partnership in which you were a general partner during or within two years before such event, or (iii) any corporation or business association of which you were an executive officer during or within two years before such event?

Answer: _____

- b. Were you convicted in a criminal proceeding, or are you the named subject of a criminal proceeding that is presently pending? Omit traffic violations and other minor offenses.

Answer: _____

- c. Were you the subject of any court order, judgment or decree, not subsequently reversed, suspended or vacated, which permanently or temporarily enjoined you from, or limited your participation in, any of the following activities:

- (i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any such person, or as an investment advisor, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activities?
- (ii) Engaging in any type of business practice?
- (iii) Engaging in any activity in connection with the purchase or sale of any security or commodity in connection with any violation of federal or state securities laws or federal commodities laws?

Answer: _____

- d. Were you the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any federal or state authority barring, suspending or otherwise limiting for more than 60 days your right to engage in any of the activities described in QUESTION c(i) above or your right to
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be associated with persons engaged in any such activities?

Answer: _____

e. Were you found by a court in a civil action or by the Securities and Exchange Commission or by the Commodities Futures Trading Commission to have violated any federal or state securities law or federal commodities law where such judgment or finding has not subsequently been reversed, suspended or vacated?

Answer: _____

f. Were you found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodity Futures Trading Commission has not been subsequently reversed, suspended or vacated.

Answer: _____

g. Were you the subject of, or a party to, any Federal or State judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of: (i) Any Federal or State securities or commodities law or regulation; (ii) any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or (iii) any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity (Note: the foregoing does not apply to any settlement of a civil proceeding among private litigants).

Answer: _____

h. Were you the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (meaning any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of the Exchange Act) the Municipal Securities Rulemaking Board), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act (7 U.S.C. 1(a)(29))¹, or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member.

Answer: _____

If you answered "yes" to any of the foregoing questions, please give the details on a separate sheet and attach it to this Questionnaire.

¹ The term "registered entity" means— (A) a board of trade designated as a contract market under section 7 of the Commodity Exchange Act; (B) a derivatives transaction execution facility registered under section 7a of the Commodity Exchange Act; (C) a derivatives clearing organization registered under section 7a-1 of the Commodity Exchange Act; (D) a board of trade designated as a contract market under section 7b-1 of the Commodity Exchange Act; and (E) with respect to a contract that the Commodity Futures Trading Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

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