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# Proxy Disclosures Under New SEC Rules: Countdown to Compliance

## Complying with New Corporate Governance and Compensation Disclosure Mandates

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Bonnie A. Barsamian, Partner, **Dechert**, New York  
Laura D. Richman, Counsel, **Mayer Brown**, Chicago  
Laurence S. Lese, Partner, **Duane Morris**, Washington, D.C.  
Mark Borges, Principal, **Compensia, Inc.**, Corte Madera, Calif.

**Thursday, February 4, 2010**

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# Proxy Disclosures under the New SEC Rules: Complying with the New Corporate Governance Mandates

February 4, 2010

Presented by:

Bonnie Barsamian  
Partner, Co-Chair of Corporate Finance

Dechert  
LLP

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# Overview

On December 16, 2009, the SEC adopted final rules intended to enhance disclosure regarding corporate governance and compensation matters in proxy statements and other reports<sup>1</sup>.

- ➔ Focus on disclosure regarding risk and risk oversight, director and director nominee qualifications, board leadership structure, potential conflicts of interest of compensation consultants, and other compensation matters.
- ➔ New rules effective February 28, 2010.

<sup>1</sup> The new rules can be found at <http://www.sec.gov/rules/final/2009/33-9089.pdf>

# Overview

The role and functioning of the board of directors and board committees will be impacted by

- expanded governance-related disclosure on:
  - directors and director nominees
  - the leadership structure of a company, and
  - the board's role in a company's risk management process...and
- expanded compensation-related disclosure on:
  - the relationship between a company's compensation practices and risk, and
  - the role and independence of compensation consultants

# Governance and Director Qualifications

# Director and Director Nominees

- Expanded director and director nominee disclosure
  - ✓ Qualifications and experience
    - Discuss the specific experience, qualifications, attributes or skills of each director and director nominee that led to the conclusion that such person should serve as a director in light of the company's business and structure
  - ✓ Past directorships and legal proceedings
    - Disclosure of public company directorships in past 5 years (currently, only disclosure of current directorships is required)
    - Certain legal proceedings in past 10 years (currently 5 years). Legal proceedings requiring disclosure has been expanded to include fraud in connection with any business proceedings based on securities or banking laws, and disciplinary actions imposed by stock exchanges or SRO's

# Director and Director Nominees

- Diversity

- ✓ Must now disclose whether and how the board or the nominating committee considers diversity when selecting board nominees
- ✓ If the board or nominating/governance committee has a diversity policy for considering board nominees, the company must describe how the policy is implemented and how its effectiveness is assessed
- ✓ SEC purposely did not define “diversity”. Companies may define diversity in different ways – differences of viewpoints, professional experience, education and skills may contribute to board diversity as well as race, gender and natural origin

# Director and Director Nominees

## Recommendations:

- The nominating/governance committee or the board should:
  - discuss and determine the skills, experience and background that it would wish to have represented on the board;
  - review the skills, experience and background of current directors and prospective nominees against those goals set by the nominating/governance committee of the board.
- The company's annual director and officer questionnaires should be updated to address the new director and director nominee disclosure.
- The board or the nominating/governance committee should consider if and how they consider diversity issues when selecting director nominees

# Board Leadership Structure

- New disclosure about company leadership structure
  - Describe the leadership structure of the board and why the company believes that it is the best structure for it
  - Whether and why CEO and board chair positions are separated or combined
  - Whether and why the company has a lead independent director and the role that the lead independent director plays in the leadership of the board
  - Intended to increase transparency as to how a board functions

# Board Leadership Structure

## **Recommendations:**

- The board or its governance committee should evaluate the company's leadership structure to determine what structure promotes board oversight and is best-suited for the company.
- This should include a review of whether and why the CEO and board chair positions should be combined or separated, and whether and why the company should have a lead independent director. The board or its governance committee should define the duties of the non-executive chair or the lead outside director, as appropriate.

# Disclosure of Voting Results

- Accelerated reporting of shareholder vote results
  - Within 4 business days on a Form 8-K (rather than in Form 10-Q & 10-K, as is currently required)

# Risk and Risk Oversight

# The Role of the Board - Risk Oversight

- New disclosure about the board's role in the oversight of a company's risk management process
  - Intended to inform investors about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company
  - Must describe the extent of the board's role in oversight of risk, but companies have the flexibility to describe how the board administers risk oversight. Disclosures may include, for example, (1) whether risk management oversight is a board or a committee function, (2) risk reporting process, (3) whether and how board or committee monitors risk
  - Risks may be credit risk, liquidity risk, operational risk

# The Role of the Board - Risk Oversight

## Recommendations:

- The board should review the principal risks facing the company (including those identified as risk factors in the company's SEC filings) and engage in on-going discussions regarding such risks and risk management.
- The board should discuss with the company's CEO and CFO the company's processes for risk identification, risk management and risk reporting to the board.
- The board should specifically determine whether the board, a standing committee of the board or a newly established committee, should be charged with the responsibility of overseeing specific types of risk.
- Board committees should consider the risks within their purview and report such risks and related risk management to the board (e.g. audit committee should report on risks relating to or arising from financial and disclosure controls and procedures, and accounting and other financial matters).

# Compensation as it Relates to Risk

- Purpose of new required disclosure is to provide material information concerning how the company compensates and incentivizes its employees in manner that may create risks that are reasonably likely to have a material adverse effect on the company
- Disclosure requirement kicks in to the extent that risks arising from a company's compensation policies and practices for its employees (not just management) are reasonably likely to have a material adverse effect on the company
  - Examples of situations that may trigger disclosure include compensation policies or practices at a business unit:
    - ✓ that carries a significant portion of company's risk profile
    - ✓ where compensation is structured differently than other units
    - ✓ that is much more profitable than other business units
    - ✓ where compensation expense is a significant portion of the unit's revenues

# Compensation as it Relates to Risk

## Recommendations:

- The company's compensation committee should review the company's compensation practices and whether they create risks that are reasonably likely to have a material adverse effect on the company. This review should include consideration of:
  - whether incentives created by the company's compensation programs would reasonably be expected to lead management or other employees to take imprudent risks, and
  - The time frames applicable to the timing and payment of incentives (e.g. does the timing of bonuses encourage related risk)

# Compensation

# Compensation Consultants

- New disclosure to allow shareholders to better assess incentives or conflicts of interest that a compensation consultant may have in recommending executive compensation.
- If the board or compensation committee has hired the consultant to advise on executive and director compensation and the consultant or its affiliates also provided other services to the company or its affiliates in excess of \$120,000 during the last fiscal year, then:
  - ➡ disclose the aggregate fees for the executive or director compensation services and the aggregate fees for the additional services
  - ➡ disclose whether the decision to engage the consultant or its affiliates for the additional services was made or recommended by management
  - ➡ disclose whether the compensation committee or the board approved such other additional services

# Compensation Consultants

- If the board or compensation committee has *not* hired a compensation consultant but management has hired a compensation consultant to advise on executive and director compensation, and the consultant or its affiliates also provided other services to the company in excess of \$120,000 during the last fiscal year, then:
  - ➡ disclose the aggregate fees for the executive or director compensation services and the aggregate fees for the additional services
- Disclosure not required if the board and management have different compensation consultants, even if management's consultant provides additional services to the company
- Executive compensation services do not include consulting on broad-based plans that do not discriminate in favor of executive officers or directors and are generally available to all employees, providing information that is not customized for the company or which is customized on parameters not developed by the consultant

# Compensation Consultants

## Recommendations:

- The compensation committee should review and consider the role and independence of the company's compensation consultants. This review should include, among other things, consideration of:
  - who selects and engage the consultant
  - who determines the consultant's scope of work
  - the role of the consultant in compensation program design
  - who decides the consultant's fees
  - who reviews the consultant's findings

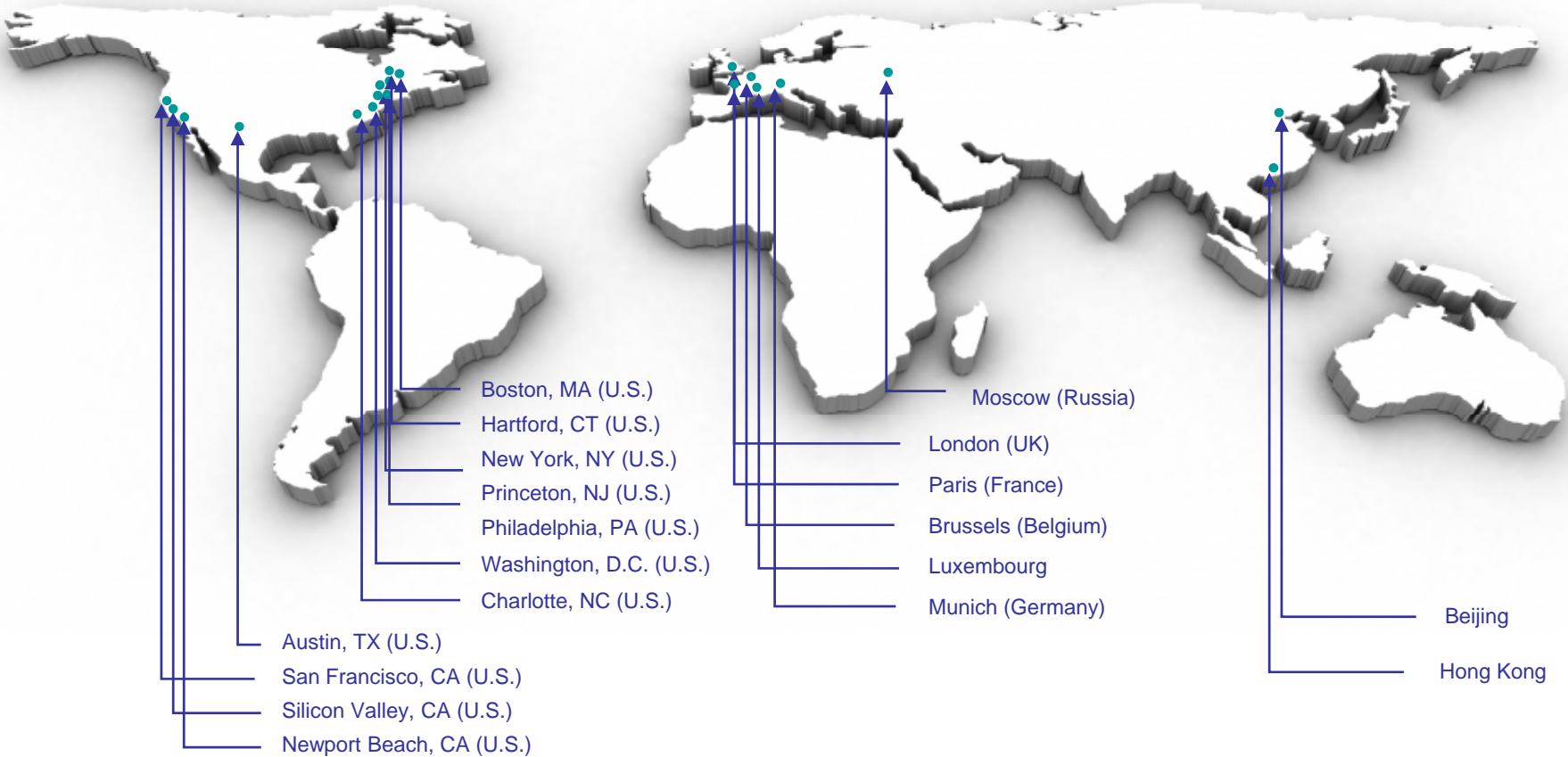
# Reporting Stock and Option Awards

- The new disclosure rules eliminate the annual expense reporting currently applicable to stock and option awards. Instead, companies must report the aggregate grant date fair value of awards granted during the year
- Companies must recalculate the compensation in the Summary Compensation Table for prior awards based on grant date fair value (but company is not required to add or remove NEO's)
- Additionally, the grant date fair value for performance based stock and option awards is to be based on the “probable outcome” determined as of the grant date, of the applicable performance conditions

# Bonnie A. Barsamian

- Bonnie A. Barsamian is a partner in the New York office of Dechert LLP, and is co-head of the firm's corporate finance practice. Ms. Barsamian focuses her practice in corporate transactional and securities law, counseling clients in securities offerings and other corporate finance transactions, merger and acquisition transactions, and corporate governance matters.
- Ms. Barsamian was designated as one of the top capital markets lawyers in the United States in the 2006, 2007, 2008 and 2009 editions of *Chambers USA*, a leading referral guide based on the opinions of peers and clients. In recent editions, she has been praised as a "stand-out figure" who is "unflappable," "exceptionally bright, tough and has all the answers." She has also been recognized by *Chambers* as a "notable practitioner" her work on REITs, and was described as "well versed in corporate transactional and securities law." In addition, Ms. Barsamian is recognized for her work in a range of capital market areas, including debt and equity offerings, by *The Legal 500* (U.S.), where she is described as having "a great understanding of the capital markets and the industry" and is credited as a "driving force" and "key player" in Dechert's corporate finance practice. She is also recognized as a leading dealmaker in The Lawdragon 500 Leading Dealmakers. Ms. Barsamian is frequently sought after as an expert commentator by major media.
- She regularly represents issuers and investment banks in public and private securities offerings and other corporate finance transactions and advises public and private companies, special committees, and financial advisers in U.S. and cross border merger and acquisition transactions. Ms. Barsamian's experience covers a broad range of industries, especially the real estate investment trust (REIT), media and entertainment, and industrial and consumer products sectors. Ms. Barsamian's extensive experience representing both leading underwriters and issuers makes her uniquely positioned to counsel her clients. Representative capital markets transactions on which she has recently advised include:
  - Goldman, Sachs & Co., JP Morgan, Morgan Stanley, RBC Capital Markets, Bear, Stearns & Co., and other investment banks, in multiple offerings of common stock, preferred stock, and convertible preferred stock by Entertainment Properties Trust
  - H&E Equipment Services in its market-leading \$226 million initial public offering and subsequent \$250 million Rule 144A high yield offering through Credit Suisse Group and UBS Investment Bank
  - Interactive Brokers Group, an automated global electronic market maker and broker, in its \$1.2 billion initial public offering
  - Griffon Corporation in a \$240 million rights offering of common stock to fund future growth of the company
  - RBC Capital Markets as financial advisor in the \$125.6 million combined rights offering and convertible preferred stock PIPE by Allis-Chalmers Energy Inc.
  - Lehman Brothers, Merrill Lynch, and Wachovia in a \$450 million financing of first-lien, second-lien "covenant light" notes by Spanish Broadcasting System--one of the largest of its kind
- She has also represented other issuers such as Hearst-Argyle Television Inc., Armstrong World Industries, Cytogen Corporation, Claridge Hotel & Casino in public offerings of equity and debt; and investment banks including Morgan Stanley, RBC Capital Markets, Credit Suisse, JP Morgan, and Citigroup, among others, in numerous capital-raising transactions. In addition, she has advised on numerous high-profile M&A transactions, including the merger of two financial services companies to create the largest NYSE specialist firm; the \$1.85 billion acquisition by Hearst-Argyle Television of the television broadcast group of Pulitzer Publishing Company; the \$1.15 billion tender offer by Armstrong World Industries for Triangle Pacific Corporation; and other acquisition, divestiture, recapitalization, and change-in-control transactions.
- Ms. Barsamian is a graduate of Amherst College (B.A., 1986) and the University of Chicago Law School (J.D., 1989), where she was a member of *The University of Chicago Law Review*. She is a member of the Bars of New York, Massachusetts, and the District of Columbia.

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# Proxy Disclosures Under New SEC Rules: Countdown to Compliance

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February 4, 2010

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## Director Disclosures—Specific Qualifications

- For each director or person nominated or chosen to become a director
  - Company must detail the specific experience, qualifications, attributes and skills that led to the conclusion that the person should serve as a director
  - Disclosures are to be made in light of the company's business and structure at the time of filing
- New disclosures are in addition to existing requirement regarding the specific minimum qualifications and specific qualities or skills used by the nominating committee

## Director Disclosures—Specific Qualifications (Cont'd)

- New rule does *not* specify particular information that should be disclosed
- Consider discussing the following attributes:
  - Risk assessment
  - Financial reporting/auditing experience
  - CEO or other leadership experience
  - Industry specific experience
  - International experience
  - Public policy experience
  - Academic experience
  - Legal or regulatory experience

## Director Disclosures—Specific Qualifications (Cont'd)

- Cannot provide this disclosure on a group basis for directors or nominees sharing similar characteristics
  - Insufficient to disclose that a group of directors are each an audit committee financial expert or a current or former CEO of a major company
- Consider adding as part of director biographies
  - Emphasizing particular aspects of the director's resume
  - Characterizing the skills attained from particular work experience
- Could include this disclosure in section discussing nominating procedures as long as directors' qualifications are discussed individually

## Director Disclosures—Specific Qualifications (Cont'd)

- No need to disclose specific experience, qualifications, attributes or skills that qualify a person to serve as a committee member
  - Skills relevant to committee service may be relevant as part of the specific qualifications considered for board service
- In a proxy contest, proponent also has to comply with the specific qualifications disclosure requirement in its proxy materials

## Director Qualifications—Staggered Boards

- When a board is staggered, there will be directors who do not stand for re-election in any given year
- Even in this case the relevant time period for the specific qualifications is as of the time that the filing containing the disclosure is made
- Consider implementing a disclosure control to address the determination with respect to directors not up for re-election

## Director Disclosures—Gathering the Information

- Discussions with chair of nominating committee or committee as a whole
- Including a question in the D&O questionnaire
- Completing a skills matrix
- Whatever method is used, give the board members an opportunity to see the new disclosures
  - Their own descriptions
  - Descriptions of the other directors

## Director Qualifications—Board or Committee Action

- The new disclosure requirement asks what led to the conclusion that each director or nominee should serve as a director
- There should be some Board or committee action relating to this requirement
  - Agenda item
  - Resolution
- While companies presumably were already considering specific qualifications in the nominating process, it would be helpful to have a written record to back up the disclosure

## Director Qualifications-precedent

- Proxy contest proxy statements may serve as a source for precedent
- Covidien filed a proxy statement in January with descriptions of specific qualifications following each biography, such as:
  - With his years of managerial experience, both at Eaton and at General Electric, Mr. Arnold brings to the Board of Directors demonstrated management ability at senior levels. His position as Chief Operating Officer of the Eaton Industrial sector gives Mr. Arnold critical insights into the operational requirements of a large company. In addition, in previously serving on the Audit Committee of another public company, Mr. Arnold gained valuable experience dealing with accounting principles and financial reporting rules and regulations, evaluating financial results and generally overseeing the financial reporting process of a large corporation.

# Board Diversity

- Disclose whether and, if so, how a nominating committee or the board considers diversity in identifying nominees for director
- If either the nominating committee or the board has a board diversity policy, disclose
  - how this policy is implemented
  - how the nominating committee or the board assesses the effectiveness of its policy

## Board Diversity (Cont'd)

- Rule does not define diversity
- Adopting Release expressly recognizes:
  - “companies may define diversity in various ways, reflecting different perspectives” and that “some companies 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.”

## Board Diversity (Cont'd)

- Some companies may have a free standing board diversity policy
- Many companies address the diversity of skills and backgrounds sought for board members in their corporate governance guidelines
  - Consider whether this constitutes a board diversity policy
  - To the extent it does, additional disclosures are required
- Some companies may adopt a formal board diversity policy or amend their corporate governance guidelines before their proxy statements are distributed this year

## Board Diversity (Cont'd)

- Some companies may disclose that they have no formal diversity policy, with a description of attributes generally considered that relate to diversity
- Emphasize that all directors represent all shareholders, even in the context of diversity
- Board diversity disclosure was not in the original proposal so advise board or nominating committee that this new disclosure is coming

# Additional Board and Executive Officer Disclosures

- Disclosure public company directorships held by directors over the past 5 years (not just current directorships) need to be disclosed, even if not currently held
  - Be sure to address this in the D&O questionnaire
  - Useful to collect information regarding dates of service and committee memberships
- Time period for involvement in legal proceedings expanded to 10 years (from 5 years)
  - Be sure to address this in the D&O questionnaire
  - This requirement applies to executive officers as well as directors

## Expanded Legal Proceedings

- Any federal or state judicial or administrative order, judgment, decree or finding not subsequently reversed, suspended or vacated, that results from involvement in mail or wire fraud or fraud in connection with any business entity
- Any federal or state judicial or administrative order, judgment, decree or finding not subsequently reversed, suspended or vacated, based on violations of federal or state securities or commodities law or regulation, or any law or regulation respecting financial institutions or insurance companies
- Any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or a self-regulatory organization

## Expanded Legal Proceedings (Cont'd)

- Disclosure is not required in response to wire or business entity fraud or securities, commodities, financial institution or insurance law or regulation with respect to any settlement of civil proceedings among private litigants
- None of these proceedings need be disclosed if they are not material to an evaluation of the ability or integrity of a director, nominee or executive officer
  - This is consistent with the current requirements for disclosure of legal proceedings

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# SEC Proxy Disclosure Enhancements of December 2009

**Laurence S. Lese**

**Partner**

**February 4, 2010**

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# SEC Proxy Disclosure Enhancements of December 2009

SEC adopts amendments to proxy disclosure regulations -  
December 16, 2009 – Release Nos. 33-9089, 34-61175

## Effectiveness of amendments – generally February 28, 2010

- Issuers w/ FYs ending before December 20, 2009
  - Not subject to enhancements, even if 2009 Form 10-K & related proxy statement filed on or after February 28, 2010
  - Must comply WRT 2010 Form 10-K & related proxy statement

## Effectiveness of amendments – generally February 28, 2010

- Issuers w/ FYs ending on or after December 20, 2009
  - 2009 Form 10-K & related proxy statement must comply if filed on or after February 28, 2010
  - If definitive proxy statement filed on or after February 28, 2010, must comply, even if Form 10-K or prelim proxy filed before February 28, 2010

## Enhanced Compensation Disclosure

- New Item 402(s) of Reg. S-K – company (other than smaller reporting company) must discuss & analyze compensation if those compensation policies & practices create risks that are *reasonably likely* to have a *material adverse effect* on the company
- Disclosure not limited to executive officers
- Disclosure intended to elicit disclosure about incentives in company's compensation policies & practices most relevant to investors

## Enhanced Compensation Disclosure

- Disclosure not required to affirmatively disclose that risks arising from its broader compensation policies are not reasonably expected to have material adverse effect
- Disclosure & analysis not to be in CD&A, but in compensation or corporate governance section of proxy statement & Form 10-K

## Enhanced Compensation Disclosure

- Disclosure should include:
  - General design philosophy of company's policies & practices, relating to or affecting risk taking by those employees who are so incentivized
  - Company's risk assessment or incentive considerations, if any, in structuring its compensation policies & practices
  - How registrant's compensation policies and practices relate to realization of risks resulting from actions of employees
  - Registrant's policies regarding adjustments to its compensation policies & practices to address changes in its risk profile
  - Extent to which company monitors its compensation policies & practices to determine whether its risk management objectives are being met with respect to incentivizing its employees

## Enhanced Compensation Disclosure

- Stock and option awards disclosure in SCT & DCT must be based on aggregate grant value of awards under FASB ASC Topic 718 (formerly FAS 123(r))
  - Replaces currently mandated disclosure of annual accounting expense of awards
  - Value of performance awards must be calculated based on the probable outcome of the performance condition(s) determined as of the grant date

## Enhanced Compensation Disclosure

- SCT & DCT must include footnote, if applicable, reporting the maximum value that can be earned under a performance award, assuming the highest level of the performance condition(s) is probable
- Companies with fiscal years ending on or after December 20, 2009 must recalculate amounts included in each table for prior FYs presented in table based on new standard

## Enhanced Director & Nominee Disclosure

- Amended Item 401 of Reg. S-K requires annual disclosure for each director & nominee of particular experience, qualifications, attributes or skills that led board to conclude that person should serve as a director
  - SEC states that amendments will provide investors with more meaningful disclosure to help them determine whether & why a director or nominee is an appropriate choice for company
  - No requirement for disclosure of director’s or nominee’s “risk assessment skills”
  - But if such skills were part of consideration that led the board or proponent to conclude that person should serve as a director, this should be disclosed

## Enhanced Director & Nominee Disclosure

- Must disclose any directorships at public companies & registered investment companies held by each director or nominee at any time during the past five years (even if the director no longer serves on that board)
- Lengthens from 5 to 10 years period of time for which disclosure of legal proceedings is required & expands types of legal proceedings that must be disclosed

## Enhanced Director & Nominee Disclosure

- Amended Item 407 as to corporate governance requires a discussion of whether, and, if so, how, the nominating committee or board considered “diversity” in identifying director nominees
- SEC does not define “diversity” but, recognizing that companies may define diversity in various ways, reflecting different perspectives, allows companies to define diversity “in ways that they consider appropriate”

# Board Leadership Structure & Risk Oversight

- Amended Item 407 of Reg. S-K (& corresponding Item 7 of Schedule 14A of proxy rules) – company must disclose its board’s leadership structure & reasoning behind such structure
  - Company must disclose whether it has chosen to combine or separate principal executive officer & board chairman positions
  - Must disclose reasons why company believes that this board leadership structure is most appropriate structure for company
  - If company has combined roles of principal executive officer & board chairman, & a lead independent director is designated to chair meetings of independent directors, company must disclose whether & why it has a lead independent director & specific role lead independent director plays in leadership of company

# Board Leadership Structure & Risk Oversight

- Must discuss extent of board's role in oversight of risk:
  - How board administers its risk oversight function, such as through entire board or through a designated committee
  - Effect board's role has on board's leadership structure
  - SEC suggests that companies, where relevant, address whether individuals who supervise day-to-day risk management responsibilities report directly to board as a whole or to a board committee or how board or committee otherwise receives information from such individuals
  - SEC states that disclosure about board's involvement in oversight of risk management process should provide important information to investors about how company perceives role of its board & relationship between board & senior management in managing material risks facing company

## New Disclosure re Compensation Consultants

- Currently, Item 407 of Reg. S-K requires disclosure of role of a compensation consultant in determining or recommending amount or form of executive & director compensation
- To inform investors with information to enable them to better assess potential conflicts of interest that a compensation consultant may have in recommending executive compensation, & compensation decision made by board, amended Item 407 requires companies to disclose:
  - Whether board's compensation consultant provides other non-executive compensation consulting services to company

# New Disclosure re Compensation Consultants

*[continued]*

- If fees paid for additional services exceed \$120,000 during company's FY, compensation paid to consultant or its affiliates for executive & director compensation services & fees paid for other services
  - SEC states that extent of fees & provision of additional services by a compensation consultant or its affiliate may create risk of a conflict of interest that may call into question objectivity of consultant's advice & recommendations of executive compensation

# New Disclosure re Compensation Consultants

*[continued]*

- Whether decision to engage compensation consultant for non-executive compensation consulting services was made or recommended by management & whether board has approved these non-executive compensation consulting services
- If board has not engaged its own consultant, must disclose fees if there is a consultant providing executive compensation consulting services & non-executive compensation consulting services to company if fees for non-compensation consulting services exceed \$120,000 during company's FY

# New Disclosure re Compensation Consultants

*[continued]*

- SEC states that disclosure of consultant fees not required if board & management have different compensation consultants, even if management's consultant provides additional services to company (so long as board's consultant does not provide additional services to company)
- SEC states that this exception would be available without regard to whether management's consultant participates in board meetings
- Disclosure not required regarding fees paid for non-executive compensation consulting services to compensation consultants who provide only broad-based plans that do not discriminate in favor of executive officers or directors of company or additional limited information-providing services

## New Disclosure re Compensation Consultants

- SEC states amendments as adopted are intended to facilitate investors' consideration of whether compensation consultant, in providing advice, may have been influenced by desire to retain other engagements from company
- SEC further states that:
  - “this does not reflect a conclusion that we believe that a conflict of interest is present when disclosure is required under our new rule, or that a compensation committee or a company could not reasonably conclude that it is appropriate to engage a consultant that provides other services to the company requiring disclosure under our new rule

# New Disclosure re Compensation Consultants

*[continued]*

- “It also does not mean that we have concluded that there are no other circumstances that might present a conflict of interest for a compensation consultant retained by a compensation committee or company
- “Rather, the new disclosure is intended to provide context to investors for their evaluation purposes”

## Reporting Voting Results on Form 8-K

- To expedite timely reporting of shareholder voting results, amendments transfer requirement to disclose voting results from Forms 10-Q or 10-K to Form 8-K
- New Item 5.07 in Form 8-K requires preliminary or final shareholder voting results to be filed within four business days following end of meeting at which vote was held
- If final results cannot be reported in original Form 8-K, final results must be reported in amendment to original report within four business days after final voting results are known

# DuaneMorris<sup>®</sup>

**Laurence S. Lese**

Partner

**February 4, 2010**

Strafford

# Proxy Disclosures Under New SEC Rules

Mark A. Borges  
Compensia, Inc.  
February 4, 2010

# Summary Compensation Table Changes

- As revised, Item 402 now requires disclosure of the grant date fair value of the equity awards made during the covered fiscal year in the “Option Awards” and “Stock Awards” columns of the Summary Compensation Table and the Director Compensation Table.
- These amounts will reflect the grant date fair values calculated in accordance with the Financial Accounting Standards Board’s Accounting Standards Codification Topic 718 (formerly known as FAS 123R).
- Reverses previous requirement that equity awards be reported in SCT (and DCT) on basis of dollar amount of compensation expense recognized for financial reporting purposes during the covered fiscal year.
  - Companies must still report the grant date fair value amounts of stock and option awards granted during the last completed fiscal year in the Grants of Plan-Based Awards Table

# Summary Compensation Table Changes

- Companies should recognize that a newly-hired executive officer, or an executive officer receiving an extraordinary refresh award, may become one of the most-highly compensated executive officers for the fiscal year, and, thus, would be a “named executive officer” appearing in the compensation tables
- In the case of awards subject to performance conditions, “grant date fair value” is to be based on the probable outcome of the performance condition
  - This amount should be consistent with the grant date estimate of the probable amount to be recognized over an award’s requisite service period, excluding the effect of forfeitures
  - The maximum grant date fair value amount of an award must be disclosed in a footnote to the appropriate column

# Summary Compensation Table Changes

- SEC considered whether to require reporting of grant date fair value amounts on the basis whether an award was granted for services performed in the last completed fiscal year, but, ultimately, decided not to change the current reporting principle
  - As a result, equity awards are to be reported in the SCT (and DCT) for the fiscal year in which the awards are granted
- SEC considered whether to change the reporting of cash salary and bonus that is forgone in exchange for the receipt of non-cash compensation, but, ultimately, decided not to change the current reporting principle
  - As a result, must continue to report in the Salary and Bonus columns the amount of salary and bonus, respectively, that is forgone at the election of a named executive officer, with footnote disclosure of the receipt of non-cash compensation

# Compensation Consultant Conflicts

- As revised, Item 407(e) now requires disclosure of the fees paid to compensation consultants and their affiliates in specified circumstances.
- The goal is to provide disclosure about fees paid that may create a conflict of interest for the compensation consultant.

# Compensation Consultant Conflicts

- If the board of directors or compensation committee has its own compensation consultant, and this consultant (or its affiliates) also provides additional services to the company in an amount in excess of \$120,000, the company must disclose:
  - the aggregate compensation-related fees and the aggregate non-compensation-related fees;
  - whether the decision to engage the consultant (or its affiliates) to perform the non-compensation-related services was made, or recommended, by management; and
  - whether the board or compensation committee approved the non-compensated-related services performed by the consultant (or its affiliates)

# Compensation Consultant Conflicts

- If management uses a compensation consultant, and this consultant also provides additional services to the company in an amount in excess of \$120,000, the company must disclose the aggregate compensation-related fees and the aggregate non-compensation-related fees
  - Assumes that the board of directors or compensation committee has not engaged a compensation consultant
- No disclosure is required where the board of directors (or the compensation committee) and management have retained separate compensation consultants, as long as the board or compensation committee's consultant (or its affiliates) have not provided non-compensation-related services in excess of \$120,000 during the fiscal year
  - This exception appears to apply even if management's compensation consultant performs non-compensation-related services with an aggregate value in excess of \$120,000 during the fiscal year
- No disclosure is required where the non-compensation related services have an aggregate value of less than \$120,000 per year
- There are exceptions to this disclosure requirement where the only "compensation-related" services provided involve:
  - Providing non-customized compensation surveys, or
  - Work on broad-based employee plans

# Compensation Consultant Conflicts

- No disclosure is required where the non-compensation related services have an aggregate value of less than \$120,000 per year
- There are exceptions to this disclosure requirement where the only “compensation-related” services provided involve:
  - Providing non-customized compensation surveys, or
  - Work on broad-based employee plans

# Contact Information

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