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ANALYSIS: SEC ADOPTS EXPANDED GOVERNANCE AND EXECUTIVE COMPENSATION DISCLOSURE

By Edward P. Smith, Esq., Chadbourne & Parke LLP

TOPICS: Regulatory: Financial Services , Regulatory: Disclosure , Region: U.S. , Industry: Other

Westlaw Business Note: Edward Smith is a featured expert for our upcoming webinar The Proxy Landscape for 2010: Corporate Governance and Compensation Issues, which will take place on January 13, 2010.

The Securities and Exchange Commission adopted final rules on December 16, 2009 to expand corporate governance and executive compensation disclosure in proxy statements and other filings.

Effective Date. The rules are effective for definitive proxy statements filed on or after February 28, 2010.

Compensation Policies and Risk. The new rules require disclosure of compensation policies and practices covering all employees (not just executives) if the risks arising from such policies and practices "are reasonably likely to have a material adverse effect on the company." This is a higher standard than the "may have a material effect on the company" standard in the proposed rule. This disclosure will be separate from the CD&A.

Stock and Option Awards. The value of stock and option awards will now be reported in the summary compensation and director compensation tables at their aggregate grant date fair value. The previous rule required disclosure of the annual accounting expense. The new rule will also require companies to recompute the information for all the years shown in the tables. Performance awards, however, are to be reported based on the probable outcome of the performance conditions, with footnote disclosure of the award value in the event of maximum performance.

Director and Nominee Qualifications. Disclosure is now required annually of the qualifications and experience of directors and nominees that led to the conclusion that the director or nominee should serve as a director. Disclosure is also required of public company directorships held during the prior five years (rather than only current directorships) and of legal and administrative proceedings involving the director or nominee for the past ten years (rather than only five years). The types of disclosable legal proceedings also expanded.

Board Diversity. Disclosure is required of whether, and if so how, the nominating committee considers diversity in selecting directors. If a company has a diversity policy, disclosure is required of how the policy is implemented and how the effectiveness of the policy is assessed. Diversity may include such factors as professional experience, education, gender, race or national origin.

Board Leadership Structure and Role in Risk Oversight. The new rules require a description of the board's leadership structure, including the rationale for combining or separating the CEO and board chairperson positions. If the CEO and board chairperson positions are combined,

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the company must disclose whether it has a lead director and the role of the lead director. The company must also describe the board's role in the risk oversight of the company.

Compensation Consultants. The new rules require disclosure of fees paid to compensation consultants and their affiliates if they provide services relating to executive or director compensation as well as additional services if the payments for the additional services for the year exceed $120,000.

Accelerated Reporting of Stockholder Votes. The new SEC rules require disclosure of the results of any stockholder vote on Form 8-K within four business days after the date of the stockholder meeting. The previous rule required reporting of stockholder votes on Form 10-Q or Form 10-K.

**Edward P. Smith is a partner in the corporate practice at Chadbourne & Parke LLP in New York. His experience covers mergers and acquisitions, joint ventures, spin-offs, capital market transactions and other corporate transactions and advice. Mr. Smith also advises on executive compensation and employee benefits matters, including incentive and other executive compensation plans, employment agreements, stock option and other equity compensation arrangements and issues arising under ERISA and Sections 409A and 162(m) of the Internal Revenue Code. He is reachable at 212-408-5371 or esmith@chadbourne.com*

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