



## Proxy Disclosure Enhancements Transition

**Last Update: January 20, 2010**

Proxy Disclosure Enhancements, Release Nos. 33-9089, 34-61175, IC-29092 (Dec. 16, 2009), amends Regulation S-K Items 401, 402 and 407, effective February 28, 2010. These Compliance and Disclosure Interpretations comprise the Division's interpretations of how this effective date applies to the filing of proxy statements, Form 10-Ks, Form 8-Ks, Securities Act registration statements and Exchange Act registration statements at or around the time of the effective date. The bracketed date following each C&DI is the latest date of publication or revision.

### 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]

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The Division of Investment Management has issued transition guidance for registered investment companies at

<http://www.sec.gov/divisions/investment/guidance/icproxydisclosuretransition.htm>.

<http://www.sec.gov/divisions/corpfin/guidance/pdetinterp.htm>

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## **Excerpts from Regulation S-K C&DIs**

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 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 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 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]

#### 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]