

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239, 240, 249, 270 and 274

[Release Nos. 33-9052; 34-60280; IC-28817; File No. S7-13-09]

RIN 3235-AK28

Proxy Disclosure and Solicitation Enhancements

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules to enhance the compensation and corporate governance disclosures registrants are required to make about: Their overall compensation policies and their impact on risk taking; stock and option awards of executives and directors; director and nominee qualifications and legal proceedings; company leadership structure; the board's role in the risk management process; and potential conflicts of interest of compensation consultants that advise companies. The proposed amendments to our disclosure rules would be applicable to proxy and information statements, annual reports and registration statements under the Securities Exchange Act of 1934, and registration statements under the Securities Act of 1933 as well as the Investment Company Act of 1940. We are also proposing amendments to transfer from Forms 10-Q and 10-K to Form 8-K the requirement to disclose shareholder voting results. In addition, we are proposing amendments to our proxy rules to clarify the manner in which they operate and address issues that have arisen in the proxy solicitation process.

DATES: Comments should be received on or before September 15, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-13-09 on the subject line; or
- Use the Federal Rulemaking ePortal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-13-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: N. Sean Harrison, Special Counsel, at (202) 551-3430 or Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, in the Division of Corporation Finance; or with respect to questions regarding the proposed proxy solicitation amendments, Mark W. Green, Senior Special Counsel, or Nicholas P. Panos, Senior Special Counsel at (202) 551-3440, in the Division of Corporation Finance; or with respect to questions regarding investment companies, Marc Oorloff Sharma, Senior Counsel, Division of Investment Management, at (202) 551-6784, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Items 401,¹ 402,² and 407³ of Regulation S-K; ⁴ Rules 14a-2,⁵ 14a-4,⁶ and 14a-12;⁷ Schedule 14A⁸ and Forms 8-K,⁹ 10-Q,¹⁰ and 10-K¹¹ under the Securities Exchange Act of 1934 ("Exchange Act");¹² and Forms N-1A,¹³ N-2,¹⁴ and N-3,¹⁵ registration forms used by management investment companies to register under the Investment Company Act of 1940 ("Investment Company

Act")¹⁶ and to offer their securities under the Securities Act of 1933 ("Securities Act").¹⁷

I. Background and Summary

We are proposing a number of revisions to our rules that would improve the disclosure shareholders of public companies receive regarding compensation and corporate governance, and facilitate communications relating to voting decisions. During the past few years, shareholders have increasingly focused on corporate accountability, and have expressed the desire for additional information that would enhance their ability to make informed voting and investment decisions. Several rulemaking initiatives in recent years have focused on these themes. In addition to proposals that are largely focused on disclosure enhancements, we also are proposing some revisions to the rules governing the proxy solicitation process that would clarify the manner in which soliciting parties communicate with shareholders.

First, we are proposing revisions to our rules governing disclosure of executive and director compensation, director biographical information and qualifications, compensation consultants, and other matters. Over the past several years, we have engaged in a number of rulemaking initiatives designed to improve the presentation of information about executive officer and director compensation and relationships with the company, and thereby assist investors' ability to make more informed voting and investment decisions.¹⁸ The turmoil in the markets during the past 18 months has reinforced the importance of enhancing transparency, especially with regard to activities that materially contribute to a company's risk profile. We have decided to re-examine our disclosure rules to provide investors with important and relevant information upon which to base their proxy voting and investment decisions.

The amendments proposed today would add new disclosure requirements on several topics that are designed to enhance the information included in

¹⁶ 15 U.S.C. 80a-1 *et seq.*

¹⁷ 15 U.S.C. 77a *et seq.*

¹⁸ See Release No. 33-8340 (Nov. 24, 2003) [68 FR 69204] (adopting rule amendments to improve the disclosure regarding the nominating committee process of public companies and the ways by which security holders may communicate with boards at the companies in which they invest); Release No. 33-8732A (Aug. 29, 2006) [71 FR 53518] (adopting rule amendments that significantly revised the disclosure of executive officer and director compensation, related party transactions, director independence and the security ownership of officers and directors).

¹ 17 CFR 229.401.

² 17 CFR 229.402.

³ 17 CFR 229.407.

⁴ 17 CFR 229.10 *et al.*

⁵ 17 CFR 240.14a-2.

⁶ 17 CFR 240.14a-4.

⁷ 17 CFR 240.14a-12.

⁸ 17 CFR 240.14a-101.

⁹ 17 CFR 249.308.

¹⁰ 17 CFR 249.308a.

¹¹ 17 CFR 249.310.

¹² 15 U.S.C. 78a *et seq.*

¹³ 17 CFR 239.15A and 274.11A.

¹⁴ 17 CFR 239.14 and 274.11a-1.

¹⁵ 17 CFR 239.17a and 274.11b.

proxy and information statements,¹⁹ including information about the relationship of a company's overall compensation policies to risk, director and nominee qualifications, company leadership structure, and the potential conflicts of interests of compensation consultants. We believe that some of our current disclosure requirements on these topics could be improved to elicit more informative disclosure for investors. In addition, the proposals would improve Summary Compensation Table reporting of stock and option awards. We are proposing to change the manner in which stock and option awards are reported both in the Summary Compensation Table²⁰ and Director Compensation Table.²¹ We believe the current method for presenting this information may have inadvertently resulted in investor confusion. The proposed amendments would require disclosure in these tables of the aggregate grant date fair value of awards computed in accordance with Financial Accounting Standards Board (FASB) Statement of Financial Accounting Standards No. 123 (revised 2004) *Share-Based Payment* (FAS 123R), instead of the dollar amount recognized for financial statement reporting purposes. We also propose to accelerate the timing of the reporting of information regarding voting results, so that investors have access to this important information on a more timely basis.

Finally, we are proposing amendments to Exchange Act Rules 14a-2, 14a-4 and 14a-12 to clarify certain issues relating to the solicitation of proxies and the granting of proxy authority.²² In 1992, we adopted significant amendments to the proxy rules intended to remove unnecessary impediments to the solicitation of proxy authority and to allow management and other persons seeking proxy authority more efficiently and effectively to

communicate with shareholders.²³ Since that time, we have become aware of a few interpretive issues regarding the rules governing proxy solicitations, particularly solicitations by shareholders and other non-management parties. We believe the proposed revisions will provide certainty in how the rules operate and facilitate the proxy solicitation process.

If the amendments proposed in this release are adopted, we anticipate that they would be effective for the 2010 proxy season.

II. Discussion of the Proposed Amendments

A. Enhanced Compensation Disclosure

1. Compensation Discussion and Analysis Disclosure

In 2006, we amended our executive compensation disclosure rules to require a new principles-based, narrative discussion that provides an overview of a company's compensation program for its principal executive officer, principal financial officer and the three most highly compensated executive officers, other than the principal executive officer and principal financial officer, and that provides an analysis of the material elements of the company's compensation for these named executive officers.²⁴ This Compensation Discussion and Analysis ("CD&A") requirement is designed to elicit disclosure about the material elements of the company's compensation for the named executive officers, and is intended to put into perspective for investors the tabular compensation data required by our rules.²⁵

¹⁹ Release No. 34-31326 (Oct. 16, 1992) [52 FR 48276] ("1992 adopting release").

²⁰ See Release No. 33-8732A (Aug. 29, 2006) [71 FR 53518]; Release No. 33-8765 (Dec. 22, 2006) [71 FR 78338].

²¹ Shortly after implementation of the CD&A requirements, in the spring of 2007, the Commission staff undertook a review of the proxy statements of 350 public companies in an effort to both evaluate compliance with the revised rules and provide guidance on how companies could enhance their disclosures in this area. The staff prepared a report of its observations of the CD&A disclosures of these companies. In the report, the staff described the principal comments they had issued to the companies that were subject to the review. Overall, the staff noted at the time that companies appeared to have generally made a good faith effort to comply with the new rules, and investors had benefited from the new disclosures. At the same time, the staff's comments highlighted areas where it believed companies may need to provide additional or clearer disclosure in future filings. Furthermore, the staff emphasized in its report that companies should provide security holders and investors with a more robust discussion of the basis and the context for granting different types and amounts of executive compensation, and that companies should continue thinking about

In addition to the compensation policies for the named executive officers, a company's broader compensation policies and arrangements for other employees may also be important. It has been suggested that, at some companies, compensation policies have become disconnected from long-term company performance because the interests of management and some employees, in the form of incentive compensation arrangements, and the long-term well-being of the company are not sufficiently aligned.²⁶ Critics have argued that, in some cases, the structure and the particular application of incentive compensation policies can create inadvertent incentives for management and employees to make decisions that significantly, and inappropriately, increase the company's risk, without adequate recognition of the risks to the company.²⁷ Companies, and in turn investors, may be negatively impacted where the design or operation of their

how the CD&A can be better organized and presented for both the lay reader and the professional, in order to make the disclosure as useful and meaningful to security holders and investors as possible. U.S. Securities and Exchange Commission, Division of Corporation Finance, *Staff Observations in the Review of Executive Compensation Disclosure*, (2007) at <http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm>.

²⁶ See, for example, Financial Stability Forum, *FSF Principles of Sound Compensation Practices 1* (Apr. 2, 2009) (noting that "[h]igh short-term profits led to generous bonus payments to employees without adequate regard to the longer-term risks they imposed on their firms"), at http://www.financialstabilityboard.org/publications/r_0904b.pdf. The report also noted that "below the level of the executive suite, most employees view the performance of the firm as a whole as being almost independent of their own actions. Actions by other employees or business units are seen as determining the firm's fate. Similarly, stock performance might be driven by various exogenous factors. Thus, employees heavily discount the value of the stock and act to bring the cash component of bonus up." *Id.* at 11.

²⁷ See, for example, Calvin H. Johnson, *The Disloyalty of Stock and Stock Option Compensation*, 11 CONN. INS. L.J. 133 (2004-2005); Michael C. Jensen, et al., *Remuneration: Where we've been, how we got here, what are the problems, and how to fix them* (2004) (unpublished manuscript on file), available at <http://www.ssrn.com/abstract=561305>. The relationship between compensation incentives and risk also has been recognized in the legislation authorizing the Troubled Asset Relief Program ("TARP"). Specifically, Section 111(b) of the Emergency Economic Stabilization Act of 2008, as amended by Section 7001 of the American Recovery and Reinvestment Act of 2009, requires the Secretary of the Treasury to require each TARP recipient to meet appropriate standards for executive compensation and corporate governance that shall include "limits on compensation that exclude incentives for senior executive officers of the TARP recipient to take unnecessary and excessive risks that threaten the value of such recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding." See Pub. L. 111-5, § 7001, 123 Stat. 115, 517 (2009).

¹⁹ The proposed amendments to Regulation S-K would also be applicable to registration statements under the Securities Act, and in some cases also Form 10-K under the Exchange Act.

²⁰ Item 402(c) and 402(n) of Regulation S-K [17 CFR 229.402(c) and 229.402(n)].

²¹ Item 402(k) and 402(r) of Regulation S-K [17 CFR 229.402(k) and 229.402(r)].

²² The Commission has taken action in recent years in regard to proxy materials. For example, in 2007 we provided for the use of electronic proxy solicitations, and recently we proposed to revise our rules to facilitate inclusion of shareholder nominations in company proxy materials. See Release No. 34-56135 (July 26, 2007) [72 FR 42222] (shareholder choice regarding proxy materials); Release No. 33-9046 (June 10, 2009) [74 FR 29024] (proposed amendments to facilitate rights of shareholders to nominate directors).

compensation programs creates incentives that influence behavior inconsistent with the overall interests of the company. Indeed, one of the many contributing factors cited as a basis for the current market turmoil is that at a number of large financial institutions the short-term incentives created by their compensation policies were misaligned with the long-term well-being of the companies.²⁸ By contrast, well-designed compensation policies may enhance a company's business interests by encouraging innovation and appropriate levels of risk taking.²⁹

We are proposing to amend our CD&A requirements to broaden their scope to include a new section that will provide information about how the company's overall compensation policies for employees create incentives that can affect the company's risk and management of that risk. We believe investors would benefit from an expanded discussion and analysis about how the company rewards and incentivizes its employees to the extent it creates risk to the company. The proposed amendments would require a company to discuss and analyze its broader compensation policies and overall actual compensation practices for employees generally, including non-executive officers, if risks arising from those compensation policies or practices may have a material effect on the company.³⁰ In preparing this disclosure, we anticipate that companies will need to consider the level of risk that employees might be encouraged to take to meet their incentive compensation elements.³¹ We believe that disclosure

of a company's overall compensation policies in certain circumstances can help investors identify whether the company has established a system of incentives that can lead to excessive or inappropriate risk taking by employees.

Under the proposed amendments, the situations that would require disclosure will vary depending on the particular company and its compensation programs. We believe situations that potentially could trigger discussion and analysis include, among others, compensation policies and practices:

- At a business unit of the company that carries a significant portion of the company's risk profile;
- At a business unit with compensation structured significantly differently than other units within the company;
- At business units that are significantly more profitable than others within the company;
- At business units where the compensation expense is a significant percentage of the unit's revenues; or
- That vary significantly from the overall risk and reward structure of the company, such as when bonuses 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.

This is a non-exclusive list of situations where compensation programs may have the potential to raise material risks to the company. These are only examples; disclosure under the proposed rule amendment would only be required if the materiality threshold is triggered.

We believe that discussion and analysis of a company's broader compensation policies may be appropriate in these situations because the policies may create risk to the company that is not otherwise apparent from a discussion solely focused on executive compensation policies. For example, if a particular business unit that carries a significant portion of the company's overall risk is significantly more profitable than others within the company, compensation policies relevant to employees of that unit could be just as essential to the company's overall financial condition and performance as those of its senior executives. Similarly, in situations where particular business units compensate their employees significantly differently from other units or carry an overall risk and reward structure that varies significantly from the rest of the company, provided the

effects of the compensation policies may be material to the company, those differences should be disclosed and explained so that investors can more readily assess their significance and appropriateness.

Consistent with the principles-based approach of the CD&A, the proposed amendments provide several examples of the types of issues that would be appropriate for a company to discuss and analyze. We wish to emphasize, however, that the application of a particular example must be tailored to the facts and circumstances of the company and that the examples are non-exclusive. We believe that using illustrative examples will help to identify the types of disclosure that may be appropriate. A company must assess the importance to investors of the information that is identified by the example in light of the particular situation of the company. Examples of the issues that companies may need to address regarding the compensation policies or practices that may give rise to risks that may have a material effect on the company would include the following:

- The general design philosophy of the company's compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as such policies relate to or affect risk taking by those employees on behalf of the company, and the manner of its implementation;
- The company's risk assessment or incentive considerations, if any, in structuring its compensation policies or in awarding and paying compensation;
- How the company's compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw backs or imposing holding periods;
- The company's policies regarding adjustments to its compensation policies to address changes in its risk profile;
- Material adjustments the company has made to its compensation policies or practices as a result of changes in its risk profile; and
- The extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.
- The level of detail required will necessarily depend on the particular facts at a company and within various business units of a company.

²⁸ See, for example, Financial Stability Forum, FSF Report on Enhancing Market and Institutional Resilience 8 (Apr. 2008) (noting that "[c]ompensation schemes in financial institutions encouraged disproportionate risk-taking with insufficient regard to longer-term risks"), at http://www.financialstabilityboard.org/publications/r_0804.pdf. L. Story, *On Wall Street, Bonuses, Not Profits, Were Real*, N.Y. TIMES, Dec. 18, 2008.

²⁹ See, for example, U.S. Chamber of Commerce, *Letter to the Treasury Secretary*, (Feb. 9, 2009) (suggesting that "corporate governance policies must promote long-term shareholder value and profitability but should not constrain reasonable risk-taking and innovation"), at <http://www.uschamber.com/NR/rdonlyres/ej2mxgcl4qbguyozahqba4xzsiht7wyqxcdcjhsyfbvl4jwcurjanaskfm4up6xgxuf5c57ogpkxt44shucmryo3ja/ExecutiveCompensationSecretaryGeithnerFeb62009.pdf>.

³⁰ See proposed Item 402(b)(2) of Regulation S-K. If a company had a policy against providing compensation that encouraged imprudent risk-taking, but actually provided compensation that encouraged such behavior and the effect may be material on the company, disclosure under the new provision would be required.

³¹ To the extent that such risk considerations are a material aspect of the company's compensation policies or decisions for named executive officers,

the company is required to discuss them as part of its CD&A under the current rules.

Request for Comment

- Would expanding the scope of the CD&A to require disclosure concerning a company's overall compensation program as it relates to risk management and or risk-taking incentives provide meaningful disclosures to investors?

Should the scope of the amendments be limited in application to specific groups of employees, such as executive officers? Should it be limited to companies of a particular size, like large accelerated filers? Should it be limited to particular industries like financial services, including companies that have segments in such industries? Is the cost of tracking and disclosing the nature of the risk different at different types of companies or company segments and if so, should that be reflected in our rules?

- In light of the complexity of the issue and compensation programs generally, we recognize that it may be difficult to identify and describe which compensation structures may expose a company to material risks. We believe the listed examples are situations where compensation policies may induce risk taking behavior, and therefore, potentially have a material impact on the company. Are the listed examples appropriate issues for companies to consider discussing and analyzing? Are there any other specific items we should list as possibly material information? Are there any items that are listed that should not be? If so, why?

- Should other elements of compensation that may encourage excessive risk taking be highlighted in the CD&A?

- We have included a list of examples of the types of issues that would be appropriate for a company to discuss and analyze. Is that list appropriate? Rather than treat the list as examples, should we require discussion of each item?

- Are there other disclosure requirements that would provide more meaningful information about the effect of the registrant's compensation policies on its risk profile or risk management?

- Are there certain risks that are more clearly aligned with compensation practices the disclosure of which would be important to investors?

- If a company determines that disclosure under the proposed amendments is not required, should we require the company to affirmatively state in its CD&A that it has determined that the risks arising from its broader compensation policies are not reasonably expected to have a material effect on the company?

- Should smaller reporting companies, who are currently not

required to provide CD&A disclosure, be required to provide disclosure about their overall compensation policies as they relate to risk management?

2. Revisions to the Summary Compensation Table

The Item 402 amendments proposed today also would revise Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value of awards computed in accordance with FAS 123R.³² The proposed revised disclosure would replace currently mandated disclosure of the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with FAS 123R.³³

A significant objective of the broad executive compensation disclosure amendments we adopted in 2006 was to provide investors a single total figure that includes all compensation and is comparable across fiscal years and companies.³⁴ To accomplish this, we needed to include a dollar amount for option awards, which previously had been reported in the Summary Compensation Table as the number of securities underlying stock options granted.³⁵ When we initially adopted the 2006 amendments, we required Summary Compensation Table and Director Compensation Table disclosure of the aggregate grant date fair value of stock awards and option awards computed in accordance with FAS 123R, the same as we propose today.³⁶ Before those amendments became

³² Pursuant to FAS 168, the FASB Accounting Standards Codification has superseded all references to previous FASB standards for interim or annual periods ending on or after September 15, 2009. For purposes of facilitating comments, our proposals retain the well-known FAS 123R nomenclature. However, if we adopt the Summary Compensation Table and Director Compensation Table proposals, we expect in the final rules to update references accordingly.

³³ In proposing these changes to the Summary Compensation Table and Director Compensation Table, we do not suggest that recognizing share-based compensation costs over the periods during which employees perform the related services is an inappropriate measure for financial statement reporting. Instead, we simply acknowledge that the aggregate grant date fair value measure is more useful to the users of executive compensation disclosure and would facilitate CD&A disclosure.

³⁴ See Release No. 33-8732A in note 24 above at 53170. We recognized that the timing for disclosing different elements of compensation in the Summary Compensation Table disclosure varies depending on the form of the compensation.

³⁵ See Release No. 33-6962 (Oct. 16, 1992) [57 FR 48126].

³⁶ See Release No. 33-8732A in note 24 above at 53172. This approach was consistent with the timing of option and stock awards disclosure that had applied in the Summary Compensation Table since 1992.

effective, however, we reconsidered the issue based on concerns that the actual amounts ultimately paid out could differ from the amounts initially reported in the tables. In December 2006, we adopted the current disclosure requirements for the stock award and option award columns as Interim Final Rules and solicited comment.³⁷ In the same rulemaking, we amended the Grants of Plan-Based Awards Table to require disclosure of the FAS 123R grant date fair value of the individual equity awards granted to named executive officers in the last completed fiscal year.³⁸

Since the adoption of these current disclosure requirements, we have received comments from a variety of sources that the information that investors would find most useful and informative in the Summary Compensation Table and Director Compensation Table is the full grant date fair value of equity awards made during the covered fiscal year.³⁹ This is because investors may consider compensation decisions made during the fiscal year—which usually are reflected in the full grant date fair value measure, but not the financial statement recognition measure—to be material to voting and investment decisions.⁴⁰ Disclosure of full grant date fair value permits investors to better evaluate the amount of equity compensation awarded. Investors have noted that disclosure in the Summary Compensation Table of how much equity compensation the company decides to award during a fiscal year is more informative to voting and

³⁷ See Release No. 33-8765 in note 24 above.

³⁸ Item 402(d)(2)(viii) of Regulation S-K.

³⁹ See, for example, letters regarding File No. S7-03-06 from Ken Belcher (Dec. 28, 2006); Andrew H. Dral (Dec. 30, 2006); Council of Institutional Investors (Jan. 25, 2007); American Federation of Labor and Congress of Industrial Organizations (Jan. 29, 2007); Teachers Insurance and Annuity Association of America (Jan. 16, 2007); CALSTRS (Jan. 16, 2007); Leggett & Platt, Inc. (Apr. 23, 2007); and CFA Institute for Financial Market Integrity (Dec. 20, 2007). These comment letters are available at <http://www.sec.gov/rules/proposed/s70306.shtml>. In its May 5, 2009, meeting with the staff of the Division of Corporation Finance, the Joint Committee on Employee Benefits of the American Bar Association also recommended that we revise Summary Compensation Table disclosure of stock awards and option awards to report aggregate grant date fair value.

⁴⁰ See letter regarding File No. S7-03-06 from Council of Institutional Investors (Jan. 25, 2007) (stating that “the Summary Compensation Table should disclose the decisions of the compensation committee in the applicable year * * * [This] methodology is consistent with the objective of providing investors with the tools needed to evaluate the annual decisions of the compensation committee[.]”). See also letter regarding File No. S7-03-06 from Leggett & Platt, Inc. (Apr. 23, 2007) (stating that “[t]his is clearly the information most investors want”).

investment decisions than the dollar amount recognized for financial statement reporting purposes.⁴¹ Investors have commented that because full grant date fair value is indicative of which executives the company intends to compensate most highly, it is a more useful measure to include in the Summary Compensation Table as a component of total compensation.⁴² Because total compensation is also the basis for determining which executives, in addition to the principal executive officer and principal financial officer, are the named executive officers whose compensation is reported,⁴³ the full grant date fair value measure will better align the identification of named executive officers with company compensation decisions. Summary Compensation Table disclosure of the full grant date fair value measure also can facilitate companies' ability to provide a CD&A that clearly and concisely explains and analyzes material compensation policies and decisions.⁴⁴

Some companies have recognized the importance of full grant date fair value information to investors and have provided an "alternative" Summary Compensation Table—substituting full grant date fair value numbers in the Stock Awards and Option Awards

columns—in addition to the Summary Compensation Table disclosure prescribed by the current rules.⁴⁵ Because companies generally consider the full grant date fair value of these awards in making compensation decisions, they may include such an "alternative" table in the CD&A to illuminate their decisionmaking process. Some users of executive compensation disclosure also independently substitute grant date fair value information from the Grants of Plan-Based Awards Table for the financial statement recognition-based numbers disclosed in the Summary Compensation Table.⁴⁶

Further, correlating Stock Awards and Option Awards disclosure to financial statement recognition can result in the disclosure of a negative number in the relevant column.⁴⁷ Such a negative

number currently flows through to the Total Compensation column, reducing the amount of total compensation reported. Because decreases in stock price affect the financial reporting of the value of stock options, using the financial statement recognition measure to disclose stock and option awards can result in disclosure of negative total compensation to principal executive officers or principal financial officers, confusing investors.⁴⁸

Because total compensation also determines identification of some named executive officers, where a company experiences significant volatility in its stock price, such as the significant decreases during 2008, the current rules may also cause the list of named executive officers to change more frequently from year to year due to factors unrelated to the company's compensation decisions.⁴⁹ This can potentially exclude from executive compensation disclosure executives that the company considers the most highly compensated based on its compensation decisions, including its decisions with respect to equity awards.⁵⁰ One reason for the adoption of the financial statement recognition model was the potential to distort identification of named executive officers when a single large grant, to be earned for services to be performed over multiple years, affects the list of named executive officers in the Summary Compensation Table, even though the executive may earn a consistent level of compensation over the award's term.⁵¹ Our experience with the current rules, however, leads us to believe that it is more meaningful to shareholders if company compensation decisions—including the decision to grant such a large award—

⁴⁵ Some compensation experts have also suggested adding an alternative Summary Compensation Table if the mandated Summary Compensation Table "distorts" the compensation of an executive. See Frederick D. Lipman & Steven E. Hall, *Executive Compensation Best Practices* 50–52 (2008).

⁴⁶ See Moody's Investors Service, *A User's Guide to the SEC's New Rules for Reporting Executive Pay* (Apr. 2007), available at <http://www.law.yale.edu/documents/pdf/CBL/AUsersGuidetotheSECPayDisclosures102762.pdf>, and (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987914) ("Moody's uses the full Statement 123(R) grant date fair value of stock awarded and options granted, as disclosed in the grants of plan-based awards table, instead of the figures disclosed in the SCT stock awards and options awards columns.").

⁴⁷ Correlating Stock Awards and Option Awards reporting to financial statement recognition often can involve negative adjustments to the numbers reported. In particular:

- Awards classified as "liability awards" under FAS 123R (such as an award that is cash settled) are initially measured at grant date fair value, but for purposes of financial statement recognition are re-measured at each financial statement reporting date through the date the awards are settled.

- Under FAS 123R, compensation cost for awards containing a performance-based vesting condition is disclosed only if it is probable that the performance condition will be achieved. If achievement of the performance condition subsequently is no longer considered probable, the amount of compensation cost previously disclosed in the Summary Compensation Table is reversed in the period when it is determined that achievement of the condition is no longer probable.

In addition, pursuant to the Instruction to Item 402(c)(2)(v) and (vi) and the Instruction to Item 402(n)(2)(v) and (vi), the compensation cost reported for stock and option awards in the Summary Compensation Table does not include the estimate of forfeitures related to service-based vesting conditions used for FAS 123R financial statement recognition because this estimate is not considered meaningful in reporting the compensation of individual named executive officers. Instead, compensation cost for awards with service-based vesting is disclosed assuming that a named executive officer will perform the service required for the award to vest. If the named executive officer fails to do so and forfeits the award, the amount of compensation cost previously disclosed in the Summary Compensation Table is deducted in the period when the award is forfeited.

⁴¹ See letter regarding File No. S7–03–06 from Teachers Insurance and Annuity Association of America (Jan. 16, 2007) ("Our view is that executive compensation disclosure and financial reporting are separate and distinct. We believe that reporting the aggregate fair value of awards in the Summary Compensation Table is important to give an accurate representation of the compensation committee's actions and intentions in any given reporting period"). See also letter from American Federation of Labor and Congress of Industrial Organizations in note above ("By spreading out the disclosure of the value of equity awards over a number of years, the total impact of executive compensation decisions will be concealed from shareholders and the public").

⁴² See letter from American Federation of Labor and Congress of Industrial Organizations in note 39 above ("The methodology used to calculate total compensation in the Summary Compensation Table is extremely important to shaping behavior by compensation committees and investors. Shareholders will evaluate the disclosed total compensation figure when voting in director elections and when asked to ratify equity award plans. Directors will shape their executive compensation decisions to reflect these shareholder views. For this reason, the total compensation figure should represent the current decisions made regarding executive compensation in the most recent fiscal year.").

⁴³ Pursuant to Instruction 1 to Items 402(a)(3) and Instruction 1 to Item 402(m)(2), this determination is made by reference to total compensation for the last completed fiscal year.

⁴⁴ Summary Compensation Table disclosure of the dollar amount recognized for financial statement reporting purposes can frustrate this objective because it can result in lengthy, complex CD&A explanations of the FAS 123R recognition model. See *The Corporate Counsel*, Mar.–Apr. 2009, at 3–4.

⁴⁸ See G. Morgenson, *Weird and Weirder Numbers on Pay Reports*, N.Y. TIMES, Mar. 11, 2007.

⁴⁹ See letter regarding File No. S7–03–06 from the HR Policy Association (Jan. 29, 2007) ("The Amended Rules also will increase the annual variability of the composition of the NEOs based on accounting rules rather than compensation programs. * * * Consistency with financial accounting does not justify re-introducing such variability into the table, especially with respect to a core element of compensation such as equity compensation that cannot be excluded in determining total compensation.").

⁵⁰ See letter regarding File No. S7–03–06 from Ernst & Young (Jan. 29, 2007) (generally supporting the current rules yet stating that "[w]e recommend that the SEC adopt an approach that also excludes the effects of any negative amounts, regardless of their source in the determination of the NEOs. We believe that such an approach would result in more consistency from year to year in the identity of the NEOs included in the SCT. Further, the NEOs determined in this fashion would more likely be those executives that the compensation committee regards as the most highly compensated.").

⁵¹ See Release No. 33–8765 in note 24 above at 78340 (citing letter from Fenwick & West LLP).

rather than factors unrelated to those decisions, cause the named executive officers to change.

A further significant reason for adopting the current rules was concern that disclosing the full grant date fair value would overstate compensation earned related to service rendered for the year, and that actual amounts earned later could be substantially different.⁵² However, companies have recognized that the current rules also have the potential to over-report compensation for a given year.⁵³ To the extent that both methods possess this potential, we believe that reporting based on the full grant date fair value method is more informative because it better reflects compensation decisions. If a company does not believe that full grant date fair value reflects a named executive officer's compensation, it can provide appropriate explanatory narrative disclosure.

While we continue to recognize that no one approach to disclosure of stock and option awards addresses all the issues regarding disclosure of equity compensation, our experience and the comment letters received since adoption of the current requirements lead us to believe that the goals of clear, concise and meaningful executive compensation disclosure would be better served by amending the Summary Compensation Table and Director Compensation Table to report stock awards and option awards based on aggregate grant date fair value. Among other things, because presentation of aggregate grant date fair value would include the incremental fair value of options repriced during the fiscal year, the effect of option repricings on total compensation would be clearer. Further, because smaller reporting companies do not provide a Grants of Plan-Based Awards Table, the current rules do not require them to provide any disclosure of the grant date fair value of awards made in the fiscal year (although they are currently required to provide the Summary

Compensation Table). The proposals thus would make this information available to smaller reporting company investors.

The amendments we propose also would:

- Rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table⁵⁴ and corresponding footnote disclosure⁵⁵ to the Director Compensation Table because these disclosures may be considered duplicative of the aggregate grant date fair value disclosure to be provided in the Summary Compensation Table under the proposals; and
- Amend Instruction 2 to the salary and bonus columns of the Summary Compensation Table to provide that registrants will not be required to report in those columns the amount of salary or bonus forgone at a named executive officer's election, and that non-cash awards received instead are reportable in the column applicable to the form of award elected. With this amendment, the Summary Compensation Table disclosure would reflect the form of compensation ultimately received by the named executive officer.⁵⁶

Request for Comment

- Is the proposed Summary Compensation Table reporting of equity awards a better approach for providing investors clear, meaningful, and comparable executive compensation disclosure consistent with the objectives of providing concise analysis in CD&A and a clear understanding of total compensation for the year? Would the proposals facilitate better informed investment and voting decisions?
- The proposal contemplates that the Summary Compensation Table would report the aggregate grant date fair value of stock awards and option awards granted *during* the relevant fiscal year, just as the Grants of Plan-Based Awards Table reports each grant of an award made to a named executive officer in the last completed fiscal year. Should the Summary Compensation Table instead

report the aggregate grant date fair value of equity awards granted for services in the relevant fiscal year, even if the awards were granted *after* fiscal year end? Explain why or why not. For example, could such an approach be applied in a manner inconsistent with the purposes of our compensation disclosure rules, for example by distorting the determination of named executive officers? If we change our approach with respect to the Summary Compensation Table, should the Grants of Plan-Based Awards Table be amended correspondingly to conform to the scope of awards reported in that table?

- If the Summary Compensation Table is amended as proposed, should the Grants of Plan-Based Awards Table disclosure of the full grant date fair value of each individual award be retained, rather than rescinded as proposed? Should the Grants of Plan Based Awards Table continue to disclose the incremental fair value with respect to individual awards that were repriced or otherwise materially modified during the last completed fiscal year? If so, why? If disclosure of grant date fair value of individual awards is retained, should it also be made applicable to smaller reporting companies?

As described above, one reason for adopting the financial statement recognition model was the potential for distortion in identifying named executive officers when a single large grant, to be earned by services to be performed over multiple years, affects the list of named executive officers in the Summary Compensation Table, even though the executive earns a consistent level of compensation over the award's term. Are multi-year grants a common practice, so that they would introduce significant year-to-year variability in the list of named executive officers if the proposed amendments are adopted relative to the variability under the current rules? If so, how should our rules address this variability?

- Under the proposal, all stock and option awards would be reported in the Summary Compensation Table at full grant date fair value, including awards with performance conditions. Would the proposal discourage companies from tying stock awards to performance conditions, since the full grant date fair value would be reported without regard to the likelihood of achieving the performance objective? If the proposal is adopted, is any disclosure other than that already currently required (e.g., in the Compensation Discussion and Analysis, the Grants of Plan-Based Awards Table, and the Outstanding

⁵² See Release No. 33-8765 in note 24 above. See also Release No. 33-8765, in note 24 above at 78340 (citing letters of U.S. Chamber of Commerce (Apr. 7, 2006); Ernst & Young LLP (Apr. 10, 2006)).

⁵³ See Frederick D. Lipman & Steven E. Hall in note 45 above (stating that "[w]hen shareholders look at the 'Total' column for a 2007 or a subsequent year proxy statement, the executive's compensation would include the allocable share of the 2005 option grant under FAS 123R. This figure could substantially inflate the 'Total' column for 2007 or subsequent years, leading unsophisticated shareholders or financial writers to the conclusion that this amount was received in 2007, when in fact the option grants were received in 2005. If 2007 were a particularly bad year financially for the company or for shareholders' stock values, there could be a hue and cry that this was another example of excessive CEO compensation").

⁵⁴ See Item 402(d)(2)(viii) of Regulation S-K and Instruction 7 to Item 402(d).

⁵⁵ Current Instruction to Item 402(k)(2)(iii) and (iv) of Regulation S-K.

⁵⁶ This proposed amendment would apply to General Instruction 2 to Item 402(c)(2)(iii) and (iv) and General Instruction 2 to Item 402(n)(2)(iii) and (iv). The current versions of these Instructions, which require such forgone salary or bonus to be reported in the Salary or Bonus column, as applicable, were adopted in Release No. 33-8765 to reflect that the original terms of the award, which would have compensated the named executive officer in cash, are not within the scope of FAS 123R.

Equity Awards at Fiscal Year-End Table) needed to clarify that the amount of compensation ultimately realized under a performance-based equity award may be different?

- As proposed, Instruction 2 to the salary and bonus columns would be revised to provide that any amount of salary or bonus forgone at the election of a named executive officer pursuant to a program under which a different, non-cash form of compensation may be received need not be included in the salary or bonus column, but instead would need to be reported in the appropriate other column of the Summary Compensation Table. Should this approach cover elections to receive salary or bonus in the form of equity compensation only if the opportunity to elect equity settlement is within the terms of the original compensatory arrangement, so that the original arrangement is within the scope of FAS 123R? Why or why not?

- The Commission also has received a rulemaking petition requesting that we revise Summary Compensation Table disclosure of stock and option awards a different way.⁵⁷ Instead of reporting the aggregate grant date fair value of awards granted during the year, as we propose, the petition's suggested approach would report the annual change in value of awards, which could be a negative number if market values decline. For restricted stock, restricted stock units and performance shares, the reported amount would be the change in stock price from year-end to year-end. For stock options, it would be the change in the in-the-money value over the same period. Would the approach suggested by the rulemaking petition be easy to understand or difficult to understand? Would the information provided under the suggested approach be useful to investors? In particular, would investors be able to evaluate the decision making of directors with respect to executive compensation if the value of equity compensation on the date of the compensation decision is not disclosed, but instead investors are provided information regarding changes in value of the compensation, which changes occur after the compensation decision is made? Would it enhance or diminish the ability of companies to explain in CD&A the relationship between pay and company performance? Would it be more or less informative to voting and investment decisions than the aggregate grant date fair value approach we

⁵⁷ See May 26, 2009, rulemaking petition submitted by Ira T. Kay and Steven Seelig, Watson Wyatt Worldwide, File No. 4-585, at <http://www.sec.gov/rules/petitions/2009/petn4-585.pdf>.

propose? Would it be a better measure for computing total compensation, including for purposes of identifying named executive officers? Are there any other ways of reporting stock and option awards that would better reflect their compensatory value? If so, please explain. For example, are there any potential amendments to the Grants of Plan-Based Awards Table or the Outstanding Equity Awards at Fiscal Year-End Table that we should consider to better illustrate the relationship between pay and company performance?

- The Summary Compensation Table requires disclosure for each of the registrant's last three completed fiscal years,⁵⁸ and with respect to smaller reporting companies, for each of the registrant's last two completed fiscal years.⁵⁹ Regarding transition, our goal is to facilitate year-to-year comparisons in a cost-effective way. To this end, we are considering whether to require companies providing Item 402 disclosure for a fiscal year ending on or after December 15, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table, so that the Stock Awards and Option Awards columns would present the applicable full grant date fair values,⁶⁰ and Total Compensation would be recomputed correspondingly. If a person who would be a named executive officer for the most recent fiscal year (2009) also was disclosed as a named executive officer for 2007, but not for 2008, we expect to require the named executive officer's compensation for each of those three fiscal years to be reported pursuant to the proposed amendments.⁶¹ However, we would not require companies to include different named executive officers for any preceding fiscal year based on recomputing total compensation for those years pursuant to the proposed amendments or to amend prior years' Item 402 disclosure in previously filed Forms 10-K or other filings. Would recomputation of prior years included in the 2009 Summary Compensation Table to substitute aggregate grant date fair value numbers for the financial statement recognition numbers

⁵⁸ See Item 402(c)(1) of Regulation S-K.

⁵⁹ See Item 402(n)(1) of Regulation S-K.

⁶⁰ This amount would be computed based on the individual award grant date fair values reported in that year's Grants of Plan Based Award Table.

⁶¹ However, a smaller reporting company, which is required to provide disclosure only for the two most recent fiscal years, could provide Summary Compensation Table disclosure only for 2009 if the person was a named executive officer for 2009 but not for 2008.

previously reported for those years cause companies practical difficulties? Is there a better approach that would preserve the objective of year-to-year comparability on a cost-effective basis as a transitional matter?

B. Enhanced Director and Nominee Disclosure

We are proposing amendments to Item 401 of Regulation S-K to expand the disclosure requirements regarding the qualifications of directors and nominees, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings involving directors, nominees and executive officers. Specifically, we are proposing to require disclosure detailing for each director and nominee for director the particular experience, qualifications, attributes or skills that qualify that person to serve as a director of the company as of the time that a filing containing this disclosure is made with the Commission, and as a member of any committee that the person serves on or is chosen to serve on (if known), in light of the company's business and structure.⁶²

Item 401 currently requires only brief biographical information about directors and nominees for the past five years, and Item 407 requires general disclosure about director qualification requirements at a company. The proposed amendments to Item 401 would expand the information required about individual directors and supplement the current director qualification disclosures in Item 407 of Regulation S-K. These revisions are aimed at helping investors determine whether a particular director and the entire board composition is an appropriate choice for a given company as of the time that a filing containing this disclosure is made with the Commission.⁶³

Companies today face ever-increasing challenges from the business and social environments in which they operate. As recent market events have demonstrated, the capacity to assess risk and respond to complex financial and

⁶² We last adopted substantive revisions to the disclosure concerning the background of directors, executive officers and control persons in 1984, when we amended Item 401 of Regulation S-K to require disclosure of legal proceedings involving Federal commodities laws and applied the disclosure requirements to promoters and control persons of newly public companies. See Release No. 33-6545 (Aug. 9, 1984) [49 FR 32762].

⁶³ See, for example, Richard Leblanc & James Gillies, *Inside the boardroom: How boards really work and the coming revolution in corporate governance*, (2005) (noting that an effective board "must have a set of directors who collectively have all the competencies required by the board to fulfill its duties.").

operational challenges can be important attributes for directors of public companies. Moreover, developments such as the enactment of the Sarbanes-Oxley Act of 2002⁶⁴ and corporate-governance related listing standards of the major stock exchanges⁶⁵ also have brought about significant changes in the structure and composition of corporate boards, such as requiring directors to have particular knowledge in areas such as finance and accounting. We believe that the director qualification disclosure requirements in Item 407 have resulted in more general information being provided about the qualifications of the board as a whole, but not more specific discussions of the background and skills of individual directors.

The proposed amendments are designed to provide investors with more meaningful disclosure to help them in their voting decisions by better enabling them to determine whether and why a director or nominee is a good fit for a particular company, and to allow companies flexibility in disclosing material information on the background and specific qualifications of each director and nominee, including information that goes beyond the five-year biographical requirement of Item 401. We are proposing that, for each director or nominee, disclosure be included that discusses the specific experience, qualifications or skills that qualify that person to serve as a director and committee member. The types of information that may be disclosed include, for example, information about a director's or nominee's risk assessment skills and any specific past experience that would be useful to the company, as well as information about a director's or nominee's particular area of expertise and why the director's or nominee's service as a director would benefit the company at the time at which the relevant filing with the Commission is made. This expanded disclosure would apply to incumbent directors, to nominees for director who are selected by a company's nominating committee, and to any nominees put forward by other proponents. Regardless of who has nominated the director, we believe a discussion of why the particular person is qualified to serve on

the company's board would be useful to investors.

In addition to the expanded narrative disclosure regarding director and nominee qualifications, we are proposing two additional changes to our director and nominee biographical disclosure requirements. First, we are proposing to require disclosure of any directorships held by each director and nominee at any time during the past five years at public companies, and second, we are proposing to lengthen the time during which disclosure of legal proceedings is required from five to 10 years. With respect to other directorships held by directors or nominees, Item 401 requires disclosure of any current director positions held by each director and nominee in any company with a class of securities registered pursuant to Section 12 of the Exchange Act,⁶⁶ or subject to the requirements of Section 15(d) of that Act,⁶⁷ or any company registered as an investment company under the Investment Company Act. We believe that expanding this disclosure to include membership on corporate boards of those companies for the past five years (even if the director or nominee no longer serves on that board) would allow investors to better evaluate the relevance of a director's or nominee's past board memberships, or professional or financial relationships that might pose potential conflicts of interest (such as membership on boards of major suppliers, customers, or competitors).

Item 401 requires disclosure of specified legal proceedings over the past five years involving directors, executive officers, and persons nominated to become directors that are material to an evaluation of the ability or integrity of any director, director nominee or executive officer.⁶⁸ In 1994, we

⁶⁶ 15 U.S.C. 78l.

⁶⁷ 15 U.S.C. 78o(d).

⁶⁸ Under Item 401(f), the registrant must disclose any of the following events that occurred during the past five years and that are material to an evaluation of the director, director nominee or executive officer:

(1) A petition under Federal bankruptcy laws or any State insolvency law. A petition under the Federal bankruptcy laws or any State insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was a general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing;

(2) Such person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Such person was the subject of any order, judgment, or decree, not subsequently reversed,

proposed rules that would have increased the reporting period for legal proceedings from five to ten years.⁶⁹ Because the legal proceedings listed in Item 401 reflect upon an individual's competence and character to serve as a public company official, we believe it is appropriate to extend the required reporting period from five to ten years in order to give investors more extensive information regarding an individual's competence and character.⁷⁰

The disclosures that would be required under the proposed amendments to Item 401 would appear in proxy and information statements on Schedules 14A and 14C, annual reports on Form 10-K and the registration

suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining him from, or otherwise limiting, 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 of the foregoing, or as an investment adviser, 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 activity; (ii) Engaging in any type of business practice; or (iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or State securities laws or Federal commodities laws;

(4) Such person was 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 the right of such person to engage in any activity described in paragraph (f)(3)(i) of this section, or to be associated with persons engaged in any such activity;

(5) Such person was found by a court of competent jurisdiction in a civil action or by the Commission to have violated any Federal or State securities law, and the judgment in such civil action or finding by the Commission has not been subsequently reversed, suspended, or vacated;

(6) Such person was 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.

The instruction to Item 401(f) indicates that if any event specified in Item 401(f) has occurred and information in a filing is omitted on the grounds that it is not material, the registrant may furnish to the Commission, at the time of filing, as supplemental information and not as part of the registration statement, report, or proxy or information statement, materials to which the omission relates, a description of the event and a statement of the reasons for the omission of the information.

⁶⁹ Release No. 33-7106 (Nov. 1, 1994) [59 FR 55385].

⁷⁰ Consistent with the current disclosure requirement regarding legal proceedings, the proceedings required to be disclosed under the proposal would not need to be disclosed if they are not material to an evaluation of the director or director nominee. See 17 CFR 229.401(f).

⁶⁴ Pub. L. 107-204, 116 Stat. 745 (2002).

⁶⁵ In 2003, we approved revisions to the listing standards of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD") that, among other things, imposed new independent director requirements and enhanced independence standards. See Self-Regulatory Organizations; NYSE and NASD; Order Approving Proposed Rule Changes Relating to Corporate Governance, Release No. 34-48445 (Nov. 12, 2003) [68 FR 64154].

statement on Form 10 under the Exchange Act, as well as in registration statements under the Securities Act.

Currently, Item 407(c)(2)(v) of Regulation S-K requires disclosure of any specific minimum qualifications that a nominating committee believes must be met by a nominee for a position on the board.⁷¹ We are interested in understanding whether investors and other market participants believe that diversity in the boardroom is a significant issue. As indicated below, we are requesting comment on whether additional disclosure in this area should be required.

We also are proposing to apply the expanded disclosure requirements regarding director and nominee qualifications, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings involving directors, nominees, and executive officers to management investment companies that are registered under the Investment Company Act (“funds”). We believe investors in funds would, for the same reasons as investors in operating companies, find this information useful. The proposal would amend the disclosures in Schedules 14A and 14C to apply these expanded requirements to fund proxy and information statements where action is to be taken with respect to the election of directors.⁷² We are also proposing to amend Forms N-1A, N-2, and N-3 to require that funds include the expanded disclosures regarding director qualifications and past directorships in their statements of additional information.⁷³

⁷¹ Management investment companies that are registered under the Investment Company Act are subject to the disclosure requirements of Item 407(c)(2)(v) of Regulation S-K pursuant to Item 22(b)(15)(ii)(A) of Schedule 14A. See 17 CFR 240.14a-101, Item 22(b)(15)(ii)(A). Management investment companies typically issue shares representing an interest in a changing pool of securities, and include open-end and closed-end companies. An open-end company is a management company that is offering for sale or has outstanding any redeemable securities of which it is the issuer. A closed-end company is any management company other than an open-end company. See Section 5 of the Investment Company Act [15 U.S.C. 80a-5].

⁷² See proposed Item 22(b)(3)(i) of Schedule 14A (qualifications); proposed Item 22(b)(4)(ii) of Schedule 14A (directorships); proposed Item 22(b)(11) of Schedule 14A (legal proceedings).

⁷³ See proposed Items 17(b)(3)(ii) & 17(b)(10) of Form N-1A; proposed Items 18.6(b) & 18.17 of Form N-2; proposed Items 20(e)(ii) & 20(o) of Form N-3. Form N-1A is used by open-end management investment companies. Form N-2 is used by closed-end management investment companies. Form N-3 is used by separate accounts, organized as management investment companies, which offer variable annuity contracts.

Request for Comment

- Would the proposed amendments provide investors with important information regarding directors and nominees for director? Are there any additional changes that we should make to further improve the disclosures about director and nominee qualifications?

- If Item 401 is amended as proposed, should the disclosure currently required by Item 407(c)(2)(v) of Regulation S-K regarding disclosure of any minimum qualifications that a nominating committee believes must be met by someone nominated by the committee for a position on the board, be retained? Does the disclosure elicited by Item 407(c)(2)(v) provide useful information that would supplement the information provided pursuant to the proposed amendment to Item 401?

- Should we amend Item 407(c)(2)(v) to require disclosure of any additional factors that a nominating committee considers when selecting someone for a position on the board, such as diversity? Should we amend our rules to require additional or different disclosure related to board diversity?

- Would director qualification disclosure for all of a company’s board committees be useful to investors, or should the disclosures be focused on membership of certain key committees, such as the audit, compensation and nominating/governance committees?

- Should we require the proposed director qualification disclosure less frequently than annually? Even though the overall composition of a board may change, is it sufficient to require this disclosure only when a director is first nominated or periodically, such as every three years? Should the disclosure be required only when the director is standing for election, or should it be required each year, as proposed, in order to facilitate shareholders’ assessments of the quality of the board as a whole?

- Would it be helpful to investors if we required companies to list and describe all committees of the board similar to the current disclosure requirements for audit, compensation and nominating/governance committees? Would it also be helpful if we required disclosure of whether the board (or a committee) periodically conducts an evaluation of the performance of the board as a whole, the committees of the board and/or each individual director?

- Should we require disclosure of other directorships for more than the past five years? If so, for how long?

- Could requiring more director and nominee qualification disclosure in any

way hinder a company’s ability to find potential candidates for the board? If so, explain how.

- Should the current five-year disclosure period for legal proceedings be maintained? Should it be longer than proposed, for example for fifteen or twenty years? Should there be no time limit? Would it be more appropriate to require disclosure of legal proceedings for longer periods with respect to certain types of legal proceedings—for example, criminal fraud convictions, civil or administrative actions based on fraud involving securities, commodities, financial institutions, insurance companies or other businesses? If so, for what period or periods and why?

- Are there additional legal proceeding disclosures that reflect on a director’s, executive officer’s, or nominee’s character and fitness to serve as a public company official that should be required to be disclosed? For example, should we expand the current requirements to require disclosure of:

- Any civil or administrative proceedings resulting from involvement in mail fraud, or wire fraud;

- Any judicial or administrative findings, orders or sanctions based on violations of Federal or State securities, commodities, banking or insurance laws and regulations or any settlement to such actions;

- Any disciplinary sanctions imposed by a stock, commodities or derivatives exchange or other self-regulatory organization; or

- Situations where the director, nominee, or executive officer was a general partner of any partnership or served as a director or executive officer of any corporation subject to any Federal or State agency receivership?

- Should we continue, as proposed, to permit companies to exclude disclosure of director, director nominee or executive officer legal proceedings, when the registrant concludes that the information would not be material to an evaluation of the ability or integrity of the director, director nominee or executive officer, or should this disclosure be required in all cases?

- Should we make any special accommodations in the proposed amendments to Item 401 for smaller reporting companies? If so, what accommodations should be made and why?

- Should the proposed amendments regarding director and nominee qualifications, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings apply to registered management investment companies? If so, where should each of the disclosures be

required (e.g., proxy statements, statements of additional information, and/or shareholder reports)? Does the disclosure requirement need to be modified in any way to make it more appropriate for registered management investment companies?

C. New Disclosure About Company Leadership Structure and the Board's Role in the Risk Management Process

We are proposing a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A that would require disclosure of the company's leadership structure and why the company believes it is the best structure for it at the time of the filing. This proposed disclosure would appear in proxy and information statements. Under the proposed amendments, companies also would be required to disclose whether and why they have chosen to combine or separate the principal executive officer and board chair positions. In some companies, the role of principal executive officer and board chairman are combined, and a lead independent director is designated to chair meetings of the independent directors. Those companies would also be required to disclose whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the leadership of the company. In proposing this requirement, we note that different leadership structures may be suitable for different companies depending on factors such as the size of a company, the nature of a company's business, or internal control considerations, among other things. Regardless of the type of leadership structure selected by a company, the disclosure would provide investors with insights about why the company has chosen that particular leadership structure.

In making voting and investment decisions, investors should be provided with meaningful information about the corporate governance practices of companies.⁷⁴ One important aspect of a company's corporate governance practices is its board's leadership structure. Our proposed amendments to Item 407 are not intended to influence a company's decision regarding its board leadership structure. Disclosure of

board leadership structure and why the company believes this is the best structure will increase the transparency for investors into how boards function.

We also are proposing to require additional disclosure in proxy and information statements about the board's role in the company's risk management process. Companies face a variety of risks, including credit risk, liquidity risk, and operational risk. Similar to disclosure about the leadership structure of a board, disclosure about the board's involvement in the risk management process should provide important information to 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. Given the role that risk and the adequacy of risk oversight have played in the recent market crisis, we believe it is important for investors to understand the board's, or board committee's role in this area. For example, how does the board implement and manage its risk management function, through the board as a whole or through a committee, such as the audit committee?⁷⁵ Such disclosure might address questions such as whether the persons who oversee risk management report directly to the board as whole, to a committee, such as the audit committee, or to one of the other standing committees of the board; and whether and how the board, or board committee, monitors risk. We believe that this disclosure will provide key insights into how a company's board perceives and manages a company's risks.

We also are proposing that registered management investment companies provide the new Item 407 disclosure about leadership structure and the board's role in the risk management process in proxy and information statements.⁷⁶ Similar to the transparency provided to investors in corporate issuers, we believe that providing this disclosure to investors in investment companies should enable them to consider their management structure preference, if any, when deciding where to invest.⁷⁷ We have,

however, tailored the proposal to the management structure of funds. Accordingly, we propose to require that a fund disclose whether the board chair is an "interested person" of the fund, as defined in Section 2(a)(19) of the Investment Company Act.⁷⁸ If the board chair is an interested person, a fund would be required to disclose whether it has a lead independent director and what specific role the lead independent director plays in the leadership of the fund. We are also proposing to require similar disclosure in statements of additional information filed as part of registration statements on Forms N-1A, N-2, and N-3.⁷⁹

Request for Comment

- Are the proposed amendments to Item 407 appropriate? Are there additional disclosure requirements that should also be included in these proposed requirements?
- Are there certain considerations that would affect the company's leadership structure that should be highlighted in the proposed amendment? If so, explain.
- Are there any additional disclosures about a company's leadership that would be helpful to investors?
- Should we require disclosure of the specific duties performed by the board's chair or independent lead director?

disclosure requirement for corporate issuers. In another context and for other purposes, the Commission previously considered a number of issues, including disclosure, regarding fund governance that we are not addressing here. See Investment Company Governance, File No. S7-03-04.

⁷⁸ 15 U.S.C. 80a-2(a)(19).

⁷⁹ See proposed Item 17(b)(1) of Form N-1A; proposed Item 18.5(a) of Form N-2; proposed Item 20(d)(i) of Form N-3. We are proposing to require this disclosure in the statement of additional information because not all funds hold annual meetings for the election of directors.

A large number of funds are organized as entities in jurisdictions which do not require funds to hold an annual shareholder meeting to elect directors. See, for example, Md. Code Ann., Corps. & Ass'ns Code § 2-501(b) (2009) (law exempts funds from annual meeting requirement in any year that the fund is not required to act upon the election of directors under the Investment Company Act); Del. Code Ann. tit. 12, § 3806 (2009) (statutory trust law structure has the effect of generally not requiring shareholder meetings). See also Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421 (1988) (noting that the organizational and operational requirements of Massachusetts business trusts are not specified by statute, and a fund's essential structure is contained in the trust agreement, which generally includes a provision eliminating the need for annual shareholder meetings to elect directors). Closed-end funds registered on national securities exchanges, however, are required to hold an annual meeting to elect directors under the rules of the exchanges. See, for example, AMEX Company Guide § 704; New York Stock Exchange Listed Company Manual § 302.00.

⁷⁴ See, for example, National Association of Corporate Directors, *Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies*, (Mar. 2009) ("Every board should explain, in proxy materials and other communications with shareholders, why the governance structures and practices it has developed are best suited to the company.")

⁷⁵ Section 303A of the NYSE's Listed Company Manual provides that the audit committee of companies listed on the exchange must "discuss guidelines and policies to govern the process by which risk assessment and management is undertaken."

⁷⁶ See proposed Item 22(b)(11) of Schedule 14A.

⁷⁷ In the context of this rulemaking, we believe it is appropriate to propose to require disclosure about fund management that is similar to the

- Should we require disclosure of other board structure matters, such as how a company determines the number of independent directors to have on its board, and/or how a company determines the size of the board?

- Are there competitive or proprietary concerns about the level of detail about the company's risk management structure and function that the proposed rule should account for? If so, please identify these concerns and explain how they should be accounted for.

- Should we make any special accommodations in these proposed amendments for smaller reporting companies? If so, what accommodations should be made and why?

- The proposals address risk management oversight by the board of directors as a part of the corporate governance disclosures required in proxy and information statements. We are considering whether we should revise our existing disclosure requirements, such as in Items 303⁸⁰ and 305⁸¹ of Regulation S-K, to require additional disclosure regarding a registrant's risk management practices in other registrant filings, such as annual and quarterly reports? Should we consider proposing additional requirements? If so, what additional or different disclosure requirements should we consider proposing?

- Should we, as proposed, require a registered management investment company to provide disclosure about its leadership structure and the board's role in the risk management process? Are there alternative disclosures relating to a fund's leadership structure and board involvement in the risk management process that would be more helpful to investors? If we require each of the disclosures, where should such disclosures appear (e.g., proxy statements, statements of additional information, and/or shareholder reports)?

- As proposed, funds would be required to include the proposed disclosure in registration statements filed on Forms N-1A, N-2, and N-3. Should we differentiate between open-end and closed-end funds? For example, should we omit this requirement from Form N-2 because closed-end funds generally hold annual shareholder meetings pursuant to exchange requirements and their shareholders will receive this disclosure in annual proxy or information statements?

D. New Disclosure Regarding Compensation Consultants

In 2003, we amended Regulation S-K to require new disclosures regarding compensation committees similar to the disclosures required regarding audit and nominating committees of the board of directors.⁸² In addition, in 2006, we amended Item 407 to require registrants to describe, among other things, any role played by compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether they are engaged directly by the compensation committee or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.⁸³

Many companies engage compensation consultants to make recommendations on appropriate executive compensation levels, to design and implement incentive plans, and to provide information on industry and peer group pay practices.⁸⁴ These services can benefit companies, such as by providing management and the board current information about compensation trends or any regulatory requirements related to executive compensation.

The services offered by compensation consultants, however, are often not limited to recommending executive compensation plans or policies. Many compensation consultants, or their affiliates, provide a broad range of additional services, such as benefits administration, human resources consulting and actuarial services.⁸⁵ The fees generated by these additional services may be more significant than the fees earned by the consultants for their executive compensation services.⁸⁶

⁸² See Release No. 33-8340 (Nov. 24, 2003) [68 FR 69204].

⁸³ CFR 229.407(e)(3)(iii).

⁸⁴ See, for example, J. Creswell, *Pressing for Independent Advice from Consultants*, N.Y. TIMES, Apr. 8 2007.

⁸⁵ See, for example, Rulemaking Petition No. 4-558 (May 12, 2008), at <http://www.sec.gov/rules/petitions.shtml>.

⁸⁶ In December 2007, the U.S. House of Representatives Committee on Oversight and Government Reform issued a report on the role played by compensation consultants at large, publicly-traded companies. The report found that the fees earned by compensation consultants for providing other services often far exceed those earned for advising on executive compensation, and that on average companies paid compensation consultants over \$2.3 million for other services and less than \$220,000 for executive compensation advice. See Staff of House Comm. on Oversight and Government Reform, 110th Cong., Report on Executive Pay: Conflicts of Interest Among Compensation Consultants (Comm. Print 2007).

The provision of such additional services by compensation consultants or their affiliates may create the appearance, or risk, of a conflict of interest that may call into question the objectivity of the consultants' executive pay recommendations. Increasingly, some investors are becoming concerned that the executive compensation services provided by compensation consultants may be influenced by the provision of these additional services.⁸⁷

Presently, companies are not required to disclose the fees paid to compensation consultants and their affiliates for executive compensation consulting or other services, or to describe services that are not related to executive or director compensation. We are proposing amendments to Item 407 of Regulation S-K to require disclosure about the fees paid to compensation consultants and their affiliates when they play any role in determining or recommending the amount or form of executive and director compensation, if they also provide other services to the company. In addition, the proposed amendments would require a description of any additional services provided to the company by the compensation consultants and any affiliates of the consultants. These disclosures are intended to enable investors to assess any incentives a compensation consultant may have in recommending executive compensation and better assess the compensation decisions made by the board.

Under the proposed amendments to Item 407, if a compensation consultant or its affiliates played a role in determining or recommending the amount or form of executive or director compensation, and also provided additional services, then the company would be required to disclose the following:⁸⁸

- The nature and extent of all additional services provided to the company or its affiliates during the last fiscal year by the compensation

⁸⁷ See Rulemaking Petition No. 4-558 in note 85 above. See also letters regarding File No. S7-03-06 from CalPERS, CalSTRS, New York State Common Retirement System, Florida State Board of Administration, New York City Pension Funds, PGGM, ABP, Hermes, Universities Superannuation Scheme, UniSuper, London Pensions Fund Authority, F&C Asset Management, Co-operative Insurance Society, Illinois State Board of Investment, Ontario Teachers Pension Plan, Public Sector and Commonwealth Super, and Railpen Investments (Apr. 10, 2006); CFA Institute for Financial Market Integrity (Apr. 13, 2006); and Denise Nappier, Connecticut State Treasurer (Apr. 10, 2006) at <http://www.sec.gov/rules/proposed/s70306.shtml>.

⁸⁸ See proposed Item 407(e)(3)(iii) of Regulation S-K.

⁸⁰ 17 CFR 229.303.

⁸¹ 17 CFR 229.305.

consultant and any affiliates of the consultant;

- The aggregate fees paid for all additional services, and the aggregate fees paid for work related to determining or recommending the amount or form of executive and director compensation;
- Whether the decision to engage the compensation consultant or its affiliates for non-executive compensation services was made, recommended, subject to screening or reviewed by management; and
- Whether the board of directors or the compensation committee has approved all of these services in addition to executive compensation services.

These new requirements would apply to all services provided by a compensation consultant and its affiliates if the compensation consultant plays any role in determining or recommending the amount or form of executive or director compensation. The proposed amendments would not apply to those situations in which the compensation consultant's only role in recommending the amount or form of executive or director compensation is in connection with consulting on broad-based plans that do not discriminate in favor of executive officers or directors of the company, such as 401(k) plans or health insurance plans. For example, if a company retains a compensation consultant to assist it in developing a 401(k) plan in which all salaried employees, including executives, will be eligible to participate on the same terms, and the compensation consultant provides other services to the company that are not related to determining or recommending the level of executive or director compensation, the new disclosure requirements would not apply to the services provided by that compensation consultant.⁸⁹ When a compensation consultant's only services that touch on the form or amount of executive or director compensation are limited to broad-based, non-discriminatory plans, even though executives or directors may be eligible to participate in them, we do not believe that these services give rise to the type of potential conflict of interest intended to be addressed by our proposed revisions.⁹⁰

⁸⁹ On the other hand, if a consultant provides other services involving executive or director compensation, and also provides services regarding broad-based, non-discriminatory plans, the new disclosure requirements would be applicable to all services provided by the consultant or its affiliates.

⁹⁰ We also propose to amend Item 407 along the same lines to clarify that the existing disclosure requirements are not triggered for a compensation

Request for Comment

- Will this disclosure help investors better assess the role of compensation consultants and potential conflicts of interest, and thereby better assess the compensation decisions made by the board?
 - Would the disclosure of additional consulting services and any related fees adversely affect the ability of a company to receive executive compensation consulting or non-executive compensation related services? If so, how might we achieve our goal while minimizing that impact?
 - Are there competitive or proprietary concerns that the proposed disclosure requirements should account for? If so, how should the amendments account for them if the compensation consultant provides additional services?
 - Are there additional disclosures regarding the potential conflicts of interest of compensation consultants that should be required? For example, would requiring disclosure of any ownership interest that an individual consultant may have in the compensation consultant or any affiliates of the compensation consultant that are providing the additional services to the company help provide information about potential conflicts? If so, why?
 - The proposed disclosure requirement calls for disclosure of services during the prior year. Should we also require disclosure of any currently contemplated services in order to capture a situation where the compensation consultant provides services related to executive pay in one year and in the next year receives fees for other services? If so, should we require that fees for the currently contemplated services be estimated? Is there a better way to require that information, for instance through the date of the filing? Should we require disclosure for the prior three years?
 - Is the proposed exclusion for consulting services that are limited to broad-based, non-discriminatory plans appropriate? Should we consider any other exclusions for services that do not give rise to potential conflicts of interest? If so, describe them.
 - Should we establish a disclosure threshold based on the amount of the fees for the non-executive compensation related services, such as above a certain dollar amount or a percentage of income or revenues? If so, how should the threshold be computed?

consultant whose only services with regard to executive or director compensation are limited to these types of broad-based, non-discriminatory plans.

- Would disclosure of the individual fees paid for non-executive compensation related services provided by the compensation consultants be more useful to investors than disclosure of the aggregate fees paid for non-compensation related service provided as proposed?

- Would disclosure about the fees paid to compensation consultants and their affiliates help highlight potential conflicts of interest on the part of these compensation consultants and their affiliates? Is fee disclosure necessary to achieve this goal, or would it be sufficient to require disclosure of the nature and extent of additional services provided by the compensation consultant and its affiliates? Should disclosure only be required for fees paid in connection with executive compensation related services?
 - Should we make any special accommodations in the proposed amendments to Item 407(h) for smaller reporting companies? If so, what accommodations should be made and why?
 - Are there other categories of consultants or advisors whose activities on behalf of companies should be disclosed to shareholders? If so, what kind of disclosure would be appropriate?

E. Reporting of Voting Results on Form 8-K

We are proposing to transfer the requirement to disclose vote results from Forms 10-Q and 10-K to Form 8-K. Currently, Item 4 in Part II of Form 10-Q and Item 4 in Form 10-K require the disclosure of vote results of any matter that was submitted to a vote of shareholders during the fiscal quarter covered by either the Form 10-Q or Form 10-K with respect to the fourth fiscal quarter. Under the proposals, we would add a new Item 5.07 to Form 8-K to require a company to disclose on the Form 8-K the results of a shareholder vote, and to have that information filed within four business days after the end of the meeting at which the vote was held. If the proposal is adopted, we would delete the requirement from Forms 10-Q and 10-K.

We believe that more timely disclosure of the voting result of an annual or special meeting would benefit investors and the markets. While quarterly and annual reports generally reflect historical information, we are concerned that the delay between the end of an annual or special meeting and when the voting result of the meeting is disclosed in a Form 10-Q or 10-K may make the information less useful to

investors and the markets. Depending on the date of the shareholder meeting, it could take a few months before the vote is disclosed in a Form 10-Q or 10-K. Because matters submitted for a shareholder vote at an annual or special meeting often involve issues that directly impact shareholder interests—for example, the composition of the board, executive compensation policies, or changes in shareholder rights—we believe more timely disclosure of those voting results is appropriate. In short, we believe that if a matter is important enough to submit to a vote at a meeting of shareholders, it likely is important enough to warrant current reporting of the results on Form 8-K.

We understand that technological advances in shareholder communications and the growing use of third-party proxy services have increased the ability of companies to tabulate vote results and disseminate this information on a more expedited basis than is currently required. However, we recognize that in situations such as contested elections, companies may not have definitive vote results within four business days after the meeting. We have included an instruction to the proposed item that states that if the matter voted upon at the meeting relates to a contested election of directors and the voting results are not definitively determined at the end of the meeting, companies should disclose on Form 8-K the preliminary voting results within four business days after the preliminary voting results are determined, and file an amended report on Form 8-K within four business days after the final voting results are certified. We think it is important for investors to have at least preliminary voting results because the certification process may take a longer amount of time.

Request for Comment

- To what extent would requiring the reporting of voting results on Form 8-K provide more timely information to investors and the markets?
- Are there any possible adverse consequences to requiring the disclosure of preliminary voting results in a contested election when the outcome is not final? For example, could the preliminary disclosure affect the final outcome?
- Should the filing period under Form 8-K for the reporting of voting results be longer than four business days? Should we require the reporting of preliminary voting results? Are there unique difficulties or significant costs in finalizing voting results at smaller reporting companies that would warrant

a longer filing period for those companies? What factors should we consider in deciding whether to make the filing period longer? Are there situations other than contested elections that might warrant a longer filing period?

- Are there alternative methods to disseminate this information to investors sooner or within a similar time frame that would be more effective or appropriate?
- We are moving and accelerating the disclosure requirement but not proposing any other revisions to the disclosures that are currently required by Item 4 of Form 10-Q and Form 10-K. Are there any changes to the requirements as to what should be disclosed that we should consider? For instance, since disclosure must be provided for all matters voted, on including a separate tabulation for the election of each director, should we eliminate the portion of Instruction 4 that provides when paragraph (b) need not be answered?
- Would the proposal impose any significant costs or difficulties on companies? If so, what type and amount of costs? Are these short-term or one-time costs to adjust a company's reporting procedures, or long-term, ongoing costs?
- Would the proposal create any special burdens for smaller reporting companies? If so, would scaled disclosure be appropriate for these companies and how should it be accomplished? Alternatively, should these requirements be phased in for smaller reporting companies?
- Would the accuracy of disclosure of voting results be affected as a result of a Form 8-K filing requirement?
- Section 13a-11(c) under the Exchange Act provides that “[n]o failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8-K shall be deemed to be a violation of” Section 10(b) of the Exchange Act or Rule 10b-5 thereunder. Should we amend Section 13a-11(c) to include proposed Item 5.07 in this list of Items with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5? Similarly, should we amend General Instruction I.A.3(b) of Form S-3 to add proposed Item 5.07 to the corresponding list of Items on Form 8-K with respect to which a company's failure timely to file the Form 8-K will not result in the loss of S-3 eligibility? Why or why not?

F. Proxy Solicitation Process

We are proposing revisions to our rules governing the proxy solicitation process to provide clarity and address issues that have arisen. We believe these proposals, if adopted, would provide greater certainty to soliciting parties, help shareholders receive timely and complete information and facilitate shareholder voting.

Specifically, the amendments would provide that:

- An unmarked copy of management's proxy card that is requested to be returned directly to management is not a “form of revocation” under Exchange Act Rule 14a-2(b)(1)⁹¹ so that a person who furnishes such a duplicate proxy card is not disqualified from relying on the exemption provided by that rule;
- A person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited for Exchange Act Rule 14a-2(b)(1)(ix)⁹² to disqualify the person from relying on the Exchange Act Rule 14a-2(b)(1) exemption;
- A person soliciting in support of nominees who, if elected, would constitute a minority of the board may seek authority to vote for another soliciting person's nominees in addition to or instead of the issuer's nominees to round out its short slate consistent with Exchange Act Rule 14a-4(d)(4)'s limitations on proxy authority;⁹³
- The “reasonable specified conditions” under which the shares represented by a proxy will not be voted under Exchange Act Rule 14a-4(e) must be objectively determinable;⁹⁴ and
- The participant information required by Exchange Act Rule 14a-12(a)(1)(i)⁹⁵ must be filed under cover of Schedule 14A in a proxy statement or other soliciting materials no later than the time the first soliciting communication is made.

1. Exchange Act Rule 14a-2(b)(1) Introductory Text

Exchange Act Rule 14a-2(b)(1) exempts from the generally applicable disclosure, filing and most other requirements of the proxy rules solicitations by shareholders or other non-management parties who are not seeking proxy authority and do not have a substantial interest in the subject matter of the solicitation. When the

⁹¹ 17 CFR 240.14a-2(b)(1).

⁹² 17 CFR 240.14a-2(b)(1)(ix).

⁹³ 17 CFR 240.14a-4(d)(4).

⁹⁴ 17 CFR 240.14a-4(e).

⁹⁵ 17 CFR 240.14a-12(a)(1)(i).

Commission adopted this rule in 1992, we stated that the purpose of the rule was to remove obstacles to the free and unrestrained expression of views by disinterested shareholders who do not seek authority for themselves.⁹⁶ Accordingly, the exemption is unavailable to, among others, a person who “furnish[es] or otherwise request[s], or act[s] on behalf of a person who furnishes or requests, a form of revocation.”⁹⁷

Over time, questions have arisen related to the scope of the term “form of revocation,” in particular, whether a person otherwise qualified to rely on the exemption would be providing a “form of revocation” and, therefore, be ineligible to rely on the exemption if the person provided a solicited shareholder with an unmarked copy of management’s proxy card and asked that the card be returned directly to management. Consistent with the purpose underlying the exemption, we believe that a person providing a solicited shareholder with an unmarked copy of management’s proxy card requested to be returned directly to management would not be seeking authority for itself.⁹⁸ As a result, this action would not be providing a “form of revocation” within the meaning of the rule even if a solicited shareholder’s use of that proxy card resulted in a revocation of the shareholder’s prior vote. We acknowledge that the U.S. Court of Appeals for the Second Circuit has concluded that in the case of a proxy vote to authorize a proposed merger under Delaware law, a duplicate of management’s proxy card, when included in a mailing opposing a proposed merger, was a form of revocation under the rule.⁹⁹

We propose to clarify the rule to align with our view by amending it to provide expressly that a “form of revocation” does not include an unmarked copy of management’s proxy card that the soliciting shareholder requests be returned directly to management.¹⁰⁰ This amendment would aid efforts by persons not seeking proxy authority to

facilitate voting by shareholders sharing their views on matters submitted for shareholder approval—such as in a “just vote no” campaign—without having to incur the costs and efforts of conducting a fully-regulated proxy solicitation and provide shareholders a convenient opportunity to indicate their votes after hearing those views without having to request another proxy card from management.¹⁰¹

Request for Comment

- Is the proposed amendment appropriate, or should a form of proxy provided in this setting be treated as a form of revocation, thereby disqualifying the soliciting person from relying upon the exemption?

- Should a soliciting person that provides an unmarked copy of management’s proxy card be required to file a Notice of Exempt Solicitation¹⁰² even if the person does not meet the thresholds for filing such notice under Exchange Act Rule 14a–6(g)?¹⁰³ Should such a soliciting person be required to file and provide to solicited persons any other information about itself, such as any relationships with the registrant or its affiliates, the amount of shares it holds, whether such person intends to hold its shares through the date of the meeting at which the vote will take place, or other information?

- Should the determination as to whether an unmarked management proxy card is a “form of revocation” depend on whether a non-management soliciting person requests that shareholders return the proxy card directly to management, as proposed, or should this treatment be available even if the card is returned to the soliciting person?

- Would the proposed amendment have an effect on shareholder communications in general or the practices of shareholders and companies with regard to unmarked proxy cards in particular?

- Would the proposed amendment raise concerns under applicable State law?

2. Exchange Act Rule 14a–2(b)(1)(ix)

Exchange Act Rule 14a–2(b)(1)(ix) provides that the Rule 14a–2(b)(1)

¹⁰¹ Providing shareholders with a marked copy of a proxy card would be inconsistent with the availability of the Rule 14a–2(b)(1) exemption because it would be an attempt to indirectly solicit proxy authority. Providing shareholders with a marked copy of a proxy card in a non-exempt solicitation would be impermissible because it would violate the requirement of Rule 14a–4(b) [17 CFR 240.14a–4(b)] to provide shareholders the opportunity to specify a choice.

¹⁰² 17 CFR 240.14a–103.

¹⁰³ 17 CFR 240.14a–6(g).

exemption is not available to “[a]ny person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person’s employment with the registrant.” A question has arisen as to whether this limitation applies only when both the person is a security holder of the class being solicited and the benefit relates to or is derived from such holdings, or is generally applicable to any person with a substantial interest as described in the rule. We believe the nature of the “substantial interest” contemplated by the rule is broader, and propose to amend the rule to clarify this point.¹⁰⁴

If a soliciting person has a substantial interest in the matter, we believe shareholders should have the benefit of the disclosure required by our rules when deciding how to vote. We do not believe it is appropriate to limit this disclosure obligation to cases when the soliciting party is a shareholder.¹⁰⁵ Otherwise, a solicited holder may not have sufficient information to make an informed voting decision if the holder is not aware of the soliciting person’s substantial interest in the matter. Consistent with our intent to limit the exemption to disinterested persons and to provide clarity and certainty to those wishing to rely on the exemption, we propose to amend the rule to clarify that a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited for a person to be disqualified from relying on the exemption.

Request for Comment

- Does the proposed amendment clearly specify when the Rule 14a–2(b)(1) exemption would be unavailable? Is additional detail necessary to understand when the

¹⁰⁴ In adopting this provision, the Commission noted in the 1992 adopting release that the substantial interest “standard is similar to that used in Item 5 of Schedule 14A, which requires specified persons conducting solicitations to describe briefly any substantial interest in the matter to be acted upon, other than an interest as a shareholder.” Specifically, Item 5 required at the time of the 1992 adopting release and requires now a description of “any substantial interest, direct or indirect, by security holdings or otherwise, * * * in any matter to be acted upon, other than elections to office.”

¹⁰⁵ For example, a soliciting party could have a significant financial interest in the subject matter of a solicitation without owning any shares of the company whose shareholders are solicited if the solicitation relates to a merger with a company that the soliciting party wishes to acquire.

⁹⁶ 1992 adopting release in note 23 above.

⁹⁷ Exchange Act Rule 14a–2(b)(1).

⁹⁸ Indeed, the soliciting person has not foreclosed any voting option available to the shareholder.

⁹⁹ See *Mony Group, Inc. v. Highfields Capital Mgmt. L.P.*, 368 F.3d 138 (May 13, 2004). The Second Circuit reversed the district court’s decision that, consistent with the staff’s views, the unmarked copy of management’s proxy card was not a “form of revocation” within the meaning of Exchange Act Rule 14a–2(b)(1). See *Mony Group, Inc. v. Highfields Capital Mgmt. L.P.*, 2004 U.S. Dist. LEXIS 1840 (S.D.N.Y., Feb. 11, 2004).

¹⁰⁰ This clarification is consistent with advice the staff informally has provided in response to related inquiries since the rule was adopted.

exemption would be unavailable? If so, please provide examples of details that would be helpful.

- Would the proposed amendment inappropriately narrow or broaden the scope of the Rule 14a-2(b)(1) exemption and, if so, how?

3. Exchange Act Rule 14a-4(d)(4)

Exchange Act Rule 14a-4(d)(1) requires that, in order to solicit authority to vote for the election of a person to office, the person must be a bona fide nominee who consents to being named in the soliciting person's proxy statement and to serving if elected. Exchange Act Rule 14a-4(d)(4) is an exception to the bona fide nominee requirement. This exception permits a person soliciting support for nominees who, if elected, would constitute a minority of the board of directors (commonly referred to as a "short slate"), to round out its short slate of nominees up to the total number of director positions then subject to election by seeking authority to vote for nominees named in the registrant's proxy statement.¹⁰⁶ We adopted the exception in 1992 to permit a form of proxy that allows persons soliciting in support of a short slate to exercise their State law right to nominate and run independently their own nominees and vote for both company and shareholder nominees.¹⁰⁷ The current form of the rule expressly permits rounding out a short slate by seeking authority to vote for nominees named in the registrant's proxy statement, but does not address nominees named in other soliciting persons' proxy statements.

Recently, however, questions have arisen regarding non-management groups that each sought to solicit support of a short slate and wished to round out its short slate with nominees named in the other group's and the registrant's proxy statement.¹⁰⁸ We

propose to revise the rule so the short slate rounding exception to the bona fide nominee requirement is available whether a non-management soliciting person attempts to round out its short slate by seeking authority to vote for nominees named in the registrant's or any other persons' proxy statements.

Our intention in adopting the short slate exception was to eliminate unnecessary impediments to short slate elections and ameliorate "the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors," especially those seeking minority representation.¹⁰⁹ We recognized the need to address an unintended consequence of the "bona fide nominee" rule that effectively forced security holders to choose between voting for the management slate in order to exercise their full voting rights or voting for a less than full complement of directors.¹¹⁰ Under the current rule, however, only the registrant's nominees may be used to fill out the non-management slate and, as a result, are effectively advantaged, as security holders may vote for them on two or more proxy cards where non-management nominees can only be voted for on one. To modify the rule as we propose is, therefore, consistent with our intention in adopting the rule.

The proposed exception would be available only when non-management parties are not acting together. Persons acting together may incur reporting obligations under Sections 13(d)¹¹¹ and 13(g)¹¹² of the Exchange Act. In this regard, a non-management person who actively recommends or whose proxy solicitor actively recommends nominees in addition to those for whom the non-management person expressly solicits support would be considered to be soliciting in support of both sets of nominees for purposes of determining whether the non-management person were soliciting in support of nominees who, if elected, would constitute more than a minority of the board.¹¹³ Similarly, a non-management person would be considered to be soliciting in support of not only the nominees for

whom it expressly solicits support but also the nominees for whom any other non-management person solicits support if the non-management persons are not acting independently of one another. Accordingly, a non-management soliciting person that seeks to round out its short slate with any nominee named in another non-management person's proxy statement would be required by the proposed rule to represent in its proxy statement that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a group as determined under Section 13(d)(3)¹¹⁴ and in Regulation 13D-G¹¹⁵ with the other non-management person.

When a non-management person actively recommends or solicits proxies in support of another person's nominees in addition to those for whom the person expressly solicits support and identifies by name in its proxy statement, that person may be a participant within the meaning of Instruction 3(a)(vi) to Item 4 of Schedule 14A in the other person's solicitation. Being a participant in the other person's solicitation potentially may result in the person soliciting in support of a total number of persons that would not constitute a minority of the board of directors if elected. Therefore, a non-management soliciting person that seeks to round out its short slate with any nominee named in another non-management person's proxy statement would also be required by the proposed rule to represent in its proxy statement that it is not a participant in the other non-management person's solicitation.

Request for Comment

- Are there different policy or practical concerns we should take into consideration when a short slate is rounded out with other persons' nominees rather than with the registrant's nominees alone? Would the proposed amendment increase the risk that a person would attempt to appear to be eligible for the short slate rounding exception even though the person, as a practical matter, was alone, or in combination with one or more other non-management persons, soliciting in support of more than a short slate? Are there appropriate safeguards in the rule to address this concern?

- As proposed, amended Exchange Act Rule 14a-4(d)(4) would only permit a soliciting person to round out a short slate with both a registrant's and other persons' nominees so long as the

¹⁰⁶ See Exchange Act Rule 14a-4(d)(4).

¹⁰⁷ 1992 adopting release in note 23 above at 48288.

¹⁰⁸ See Eastbourne Capital, L.L.C., SEC No-Action Letter (Mar. 30, 2009) and Icahn Associates Corp., SEC No-Action Letter (Mar. 30, 2009) at <http://www.sec.gov/divisions/corpfin/cf-noaction.shtml>. The Division issued a letter to each of two non-management groups stating that, based on the facts and representations presented, and conditioned on the two groups' acting and continuing to act independently of each other, the Division would not recommend enforcement action under Exchange Act Rule 14a-4(d)(4) and Section 14(a) of the Exchange Act [15 U.S.C. 78m(a)] if the group solicited votes for its own short slate and sought the authority to round out its short slate by voting for nominees of the other group as well as management's nominees. While the Division would continue to consider issuing such letters in the absence of the adoption of the proposed amendment, only the parties to whom the letters were addressed can rely upon them.

¹⁰⁹ 1992 adopting release in note 23 above at 48288.

¹¹⁰ 1992 adopting release in note 23 above at 48287-48288.

¹¹¹ 15 U.S.C. 78m(d).

¹¹² 15 U.S.C. 78m(g).

¹¹³ A non-management person and its proxy solicitor would not be actively recommending nominees in addition to those for whom the person expressly solicits support if the person and proxy solicitor only state the person's intention to vote for another person's nominees or expected nominees other than those specifically named on the person's proxy card.

¹¹⁴ 15 U.S.C. 78m(d)(3).

¹¹⁵ 17 CFR 240.13d-1 *et seq.*

soliciting person does not form a group with the other persons as determined under Section 13(d)(3) and in Regulation 13D-G and is not a participant in the other persons' solicitations. Are these restrictions appropriate? Should Rule 14a-4(d)(4) impose other conditions or limitations on the availability of the proposed amendment to the short slate exception? For example, should a soliciting person be permitted to seek authority to vote for the nominees of other non-management persons only if the other non-management persons are seeking minority representation on the board? Should the Commission limit use of the rule to situations where a soliciting person will need to use its proxy authority to vote for one or more of the registrant's nominees? For example, should it be limited to require a soliciting person to use its proxy authority to vote for at least a specified number of the registrant's nominees or at least the number of management nominees that would constitute a majority?

- It is possible that permitting a soliciting person to round out its short slate with other persons' nominees instead of or in addition to a registrant's nominees under amended Rule 14a-4(d)(4), as proposed, could lead to a change in a majority of a board. What are the concerns, if any, about the possible effects of a change in a majority of a board, including the triggering of takeover defensive measures, such as poison pills, and other change in control provisions, such as those found in loan agreements, leases and employment agreements? What are the issues, if any, associated with a change in a majority of a board where a company is subject to the standards of a national securities exchange or a national securities association, including exchange rules regarding director independence and board and committee composition standards?

- Would the proposed amendment encourage shareholders to run more short slates? In particular, is it likely that such shareholders will run more short slates, possibly targeting particular companies, knowing that other shareholders may also run short slates, with the intent that, where another shareholder targets the same company, each shareholder can then round out its own short slate with one or more nominees from the other shareholder's slate, and thus increase the likelihood of displacing management nominees and potentially increasing each shareholder's negotiating power with management? Does the proposed rule adequately prevent shareholders from

relying upon the provision when they are acting in concert with other shareholders? While the current rule distinguishes between a person soliciting support for its nominees named in its proxy statement and seeking proxy authority to vote for a registrant's nominees, does a meaningful difference exist between these actions if a soliciting person is permitted, as proposed, to round out its slate with a non-management person's nominees?

- The amended rule, as proposed, would require a person to include in its proxy statement representations regarding the restrictions on forming a group and acting as a participant. Are these representations necessary, or should the amended rule merely include the restrictions as conditions to reliance on the rule?

- Rule 14a-4(d)(4) currently, and as proposed to be amended, would permit a non-management person to round out its short slate with one or more shareholder nominees named in the registrant's proxy statement regardless of whether the non-management person nominated such shareholder nominees and regardless of how the shareholder nominees came to be named in the registrant's proxy statement.¹¹⁶ Should we amend Rule 14a-4(d)(4) to make it unavailable to some or all shareholder nominees named in the registrant's proxy statement and, if so, why and how? For example, should the rule be unavailable where such a shareholder nominee was nominated by the non-management person, a person with whom the non-management person has formed or intends to form a group under Section 13(d)(3) and Regulation 13D-G or a person in whose solicitation the non-management person is a participant?

- Should we amend Rule 14a-4(d)(4) so the exception it provides to the Rule 14a-4(d)(1) bona fide nominee requirement extends to non-management persons who do not have their own nominees for whom to solicit support but seek authority to vote for nominees named in the registrant's or other persons' proxy statements?

4. Exchange Act Rule 14a-4(e)

Exchange Act Rule 14a-4(e) requires that a proxy statement or form of proxy provide that the shares represented by the proxy be voted "subject to reasonable specified conditions." When

¹¹⁶ We currently have pending rule proposals related to shareholder nominees that, if adopted, could result in a registrant being required to include shareholder nominees in its proxy statement under specified circumstances. See Release No. 33-9046 in note 22 above.

the Commission adopted the rule, it stated that it previously had taken the position that the solicitation of proxies constitutes an implied representation by the persons making the solicitation that the shares represented by the proxy will be voted and that the rule was amended in order to make this representation more explicit.¹¹⁷

As the Commission stated in 1992, "[p]rior to a shareholder granting the legal power to someone else—whether management or an outsider—to vote his or her stock, the shareholder needs to know what matters will be voted on, and how the recipient of the proxy intends to vote the shareholder's shares."¹¹⁸ Similarly, a shareholder needs to know whether the recipient of a proxy will only vote the shareholder's shares subject to some condition. We believe that in order for there to be "reasonable specified conditions," the conditions must be objectively determinable to enable the shareholder to make an informed decision in regard to granting proxy authority and confirm that any later withholding of shares from voting is consistent with the authority granted.¹¹⁹ In addition, if the conditions were not objectively determinable, the recipient of the proxy could seek to exercise a degree of discretion that would be inconsistent with Rule 14a-4(c)'s limits on when a proxy can confer discretionary authority.¹²⁰ Accordingly, we propose to amend Rule 14a-4(e) to clarify that the reasonable specified conditions must be objectively determinable.

Request for Comment

- Will specifying that reasonable specified conditions must be objectively

¹¹⁷ Release No. 34-4185 (Nov. 5, 1948) [13 FR 6680].

¹¹⁸ 1992 adopting release in note 23 above at 48277.

¹¹⁹ In a related context, we have stressed that conditions must be objective for shareholders to be able to understand what they are being asked to do. In 2000, we published our views on the disclosure and dissemination of "mini-tender" offers that result in the bidder holding five percent or less of the outstanding securities of a company. There, we stated that "[i]t is important for security holders to be able to evaluate the genuineness of the [tender] offer" and "[w]e believe therefore that a tender offer can be subject to conditions only where the conditions are based on objective criteria, and the conditions are not within the bidder's control." See Release No. 34-43069 (July 24, 2000) [65 FR 46581].

¹²⁰ 17 CFR 240.14a-4(c). The conditions would not be objectively determinable, for example, if voting the shares was subject to the proxy holder concluding in its sole discretion that it would not be advisable to vote the shares. The conditions would be objectively determinable, for example, if voting the shares was subject to a third party's filing with the Commission, within seven days before the scheduled date for the meeting for which proxies were solicited, a Schedule TO [17 CFR 240.14d-100] for a tender offer for over half of the issuer's shares.

determinable have any harmful effect on proxy solicitation practices?

- Does the phrase “objectively determinable” achieve the objective of clarifying the conditions shareholders should know about before giving their proxies or deciding to revoke their proxies?

5. Exchange Act Rule 14a–12(a)(1)(i)

Exchange Act Rule 14a–12 permits a solicitation to be made before furnishing security holders with a proxy statement meeting the requirements of Exchange Act Rule 14a–3(a)¹²¹ if, among other requirements, each written communication that is part of the solicitation contains specified participant information. Rule 14a–12(a)(1)(i) requires such information to include the identity of the participants in the solicitation and a description of their direct or indirect interests or a legend advising security holders where they can obtain that information.

Questions have arisen regarding when and how the participant information to which the legend refers must be filed. The Commission amended Exchange Act Rule 14a–12 in 1999 to, among other things, provide that participant information could be provided directly in written materials as historically required or, as a new alternative, indirectly through the legend described above.¹²² In affording the option to provide participant information indirectly through a legend, we intended to offer a convenience but did not intend to permit the participant information to be provided later than it would be if provided directly in the written materials. If the legend is to give meaningful information to shareholders, the information referenced in the legend must be available when the soliciting person uses the soliciting material with the legend. Accordingly, we propose to amend the rule to clarify that the required participant information must be filed under cover of Schedule 14A as part of a proxy statement or other soliciting materials no later than the time the first soliciting communication is made. It is not sufficient to provide the information in a document filed later.

Request for Comment

- Does the proposed amendment adequately clarify the need to have the participant information to which a legend refers on file no later than when the written material containing the

legend is first sent or given to security holders?

- Does the proposed amendment adequately clarify how the participant information must be filed?
- Does the requirement to have the participant information on file no later than when the written material containing the legend is first sent or given to security holders create practical difficulties for parties soliciting proxies? If so, to what extent does the requirement impede the ability to solicit and how much of a delay in providing the participant information would be needed to avoid impeding that ability? If the requirement was revised to permit any such delay, what would be the effect of the delay on the ability of solicited shareholders to make a voting decision?

G. Transition

We anticipate that if the proposed amendments are adopted, compliance with the amendments would begin in the 2010 proxy season following their publication in the **Federal Register**.

Request for Comment

- Would this compliance schedule be workable?
- Are any special transition provisions necessary for any aspects of the proposed amendments? If so, please explain what would be needed and why.
- Would any of the proposed amendments to Regulation S–K present any particular difficulty or expense in preparing?

H. Other Requests for Comment

The Commission is exploring other ways in which we could improve proxy disclosures. We invite interested persons to submit comments on the advisability of pursuing any or all of the following possible reforms, as well as to provide other approaches that we might consider to achieve our goals. We expect to benefit from the comments we receive before deciding whether to propose changes.

- Are there any disclosures required in the proxy statement that we should consider proposing to eliminate in light of the proposed amendments?
- Are there other initiatives we should consider in order to improve the disclosure in proxy statements, particularly with regard to disclosure regarding executive compensation? For instance should we propose requiring disclosure of the compensation paid to each executive officer, not just the named executive officers? Should we consider proposing to eliminate the instruction that provides that

performance targets can be excluded based on the potential adverse competitive effect on the company of their disclosure? Alternatively, should we consider proposing to revise the CD&A to require disclosure of performance targets on an after-the-fact basis, after the performance related to the award is measured, such as three or more fiscal years later, whether or not the disclosure may result in competitive harm?

- Under current Item 407(e)(5) of Regulation S–K, the Compensation Committee Report must state whether the committee: (1) Has reviewed and discussed the CD&A with management; and (2) recommended to the board of directors that the CD&A be included in the company’s annual report and the proxy or information statement. Although the CD&A is considered “filed”, the Compensation Committee Report is “furnished.”¹²³ Because it is furnished, the Compensation Committee Report does not have the same liability as the CD&A and other information that is “filed.” For example, it is not incorporated by reference or otherwise considered a part of the company’s Form 10–K, registration statements and other filings, and is not covered by the principal executive officer and principal financial officer certifications required under Exchange Act Rules 13a–14¹²⁴ and 15d–14.¹²⁵ Should we consider proposing to amend this rule to make the CD&A be a part of the Compensation Committee Report? Why or why not? If we make the CD&A part of the Compensation Committee Report, should the Compensation Committee Report be “filed”? If we were to make the CD&A part of the Compensation Committee Report, are there any requirements to the CD&A that we should change?

- Should we consider requiring disclosure regarding whether a member of the compensation committee has expertise in compensation matters and whether the committee has the resources to hire its own independent legal counsel?

- Some investors may want more information regarding whether compensation arrangements are reasonably designed to create incentives among executives to increase long-term enterprise value. Should we consider supplementing any of the tabular and

¹²³ For a discussion of the differences between the Compensation Committee Report and the CD&A, see Section II.3. “Filed” status of Compensation Discussion and Analysis and the “Furnished” Compensation Committee Report in Release 33–8732A.

¹²⁴ 17 CFR 240.13a–14.

¹²⁵ 17 CFR 240.15d–14.

¹²¹ 17 CFR 240.14a–3(a).

¹²² See Release No. 33–7760 (Oct. 22, 1999) [64 FR 61408].

narrative disclosure requirements to require additional disclosure about whether or not a company has “hold to retirement” and/or claw back provisions and if not, why not?

- Are investors interested in disclosure of whether the amounts of executive compensation reflect any considerations of internal pay equity? For example, would investors find such disclosure relevant in considering the motivation and effectiveness of broad based compensation plans? Should we consider proposing additional requirements to address this? For instance, should we consider proposing required disclosure regarding internal pay ratios of a company, such as disclosure of the ratio of the total compensation of the named executive officers, or total compensation of each individual named executive officer, to the total compensation of the average non-executive employee of the company?

- In order to give investors a better understanding of the breadth and depth of a company’s focus on compensation, should we require disclosure regarding the total number of compensation plans a company has and the total number of variables in all of its compensation plans? Are there other ways to convey the complexity and significance of all of a company’s plans?

- Should we consider proposing to supplement the required disclosure of tax gross-up arrangements that the company has for the named executive officers to include a requirement to disclose and quantify the savings to each executive?

General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

III. Paperwork Reduction Act

A. Background

Certain provisions of the proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).¹²⁶ We are submitting the proposed amendments to the Office

of Management and Budget (OMB) for review in accordance with the PRA.¹²⁷ The titles for the collection of information are:

- (1) “Regulation 14A and Schedule 14A” (OMB Control No. 3235–0059);
- (2) “Regulation 14C and Schedule 14C” (OMB Control No. 3235–0057);
- (3) “Form 10–K” (OMB Control No. 3235–0063);
- (4) “Form 10–Q” (OMB Control No. 3235–0070);
- (5) “Form 10” (OMB Control No. 3235–0064);
- (6) “Form S–1” (OMB Control No. 3235–0065);
- (7) “Form S–4” (OMB Control No. 3235–0324);
- (8) “Form S–11” (OMB Control No. 3235–0067);
- (9) “Form 8–K” (OMB Control No. 3235–0060);
- (10) “Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations” (OMB Control No. 3235–0158);
- (11) “Form N–1A” (OMB Control No. 3235–0307);
- (12) “Form N–2” (OMB Control No. 3235–0026);
- (13) “Form N–3” (OMB Control No. 3235–0316); and
- (14) “Regulation S–K” (OMB Control No. 3235–0071).

The regulations, schedules and forms were adopted under the Securities Act and the Exchange Act, except for Forms N–1A, N–2, and N–3, which we adopted pursuant to the Securities Act and the Investment Company Act, and Rule 20a–1, which we adopted pursuant to the Investment Company Act. The regulations, forms and schedules set forth the disclosure requirements for periodic reports; registration statements; and proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending the form or schedule constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the proposed amendments would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

As discussed in more detail above, the proposed amendments to Items 401, 402(b) and 407 of Regulation S–K would

increase existing disclosure burdens for proxy and information statements, annual reports on Form 10–K, and registration statements on Forms 10, S–1, S–4, and S–11 by requiring:

- New disclosure and analysis of how a company’s overall compensation policies for employees create incentives that can affect the company’s risk and management of that risk if it may have a material effect on the company;

- New disclosure of the qualifications of directors and nominees for director, and the reason why a company or other proponent believes each director or nominee is qualified to serve as a director of the company at the time at which the relevant filing with the Commission is made, and as a member of any committee that the person serves on or is chosen to serve on, in light of the company’s business and structure;

- Additional disclosure of any directorships held by each director and nominee at any time during the past five years at public companies;

- Lengthening the time during which disclosure of legal proceedings involving a company’s directors, nominees for director and executive officers is required from five to 10 years;

- New disclosure about a company’s board leadership structure and the board’s role in the risk management process;

- New disclosure about the fees paid to compensation consultants and their affiliates when they play any role in determining or recommending the amount or form of executive and director compensation, if they also provide other services to the company. In addition, new disclosure of any additional services provided to the company by the compensation consultants and any affiliates of the consultants; and

- Transferring the requirement for companies to disclose the results of shareholder votes on Forms 10–Q or 10–K to Form 8–K.

The proposed amendments to Forms N–1A, N–2, and N–3 would increase existing disclosure burdens for such forms by requiring:

- New disclosure of the qualifications of directors and nominees for director, and the reason why a company or other proponent believes each director or nominee is qualified to serve as a director of the company at the time at which the relevant filing with the Commission is made, and as a member of any committee that the person serves on or is chosen to serve on, in light of the company’s business and structure;

- Additional disclosure of any directorships held by each director and

¹²⁶ 44 U.S.C. 3501 *et seq.*

¹²⁷ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

nominee at any time during the past five years at public companies; and

- New disclosure about a company's board leadership structure and the board's role in the risk management process.

At the same time, the proposals would not increase existing disclosure burdens for proxy and information statements, annual reports on Form 10-K, and registration statements on Forms 10, S-1, S-4 and S-11 by:

- Revising Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value of such awards, computed in accordance with FAS 123R, rather than the dollar amount recognized for financial statement purposes for the fiscal year in accordance with FAS 123R; and
- Eliminating the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table and corresponding footnote disclosure to the Director Compensation Table.

The proposed amendments to the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table are intended to provide investors with clearer and more meaningful executive compensation disclosure, to facilitate informative and concise Compensation Discussion and Analysis disclosure of company policies and decisions regarding named executive officers' compensation, and to provide investors with a clearer view of the annual compensation earned by executives and directors consistent with the timing of current actions regarding plan awards, including the effect on total compensation of decisions to reprice option awards.

Together, the proposed amendments to the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table will simplify executive compensation disclosure because companies no longer will need to report two separate measures of equity compensation in their compensation disclosure. For purposes of Item 402 disclosure, companies no longer will need to explain or analyze a second, separate measure of equity compensation that is based on financial statement recognition rather than compensation decisions. In addition, we believe it is likely that these proposals will make companies' identification of named executive officers more consistent from year to year, providing investors more meaningful disclosure and reducing executive compensation tracking

burdens in determining which executive officers are the most highly compensated.

The proposed amendments to the rules governing the proxy solicitation process would not increase any existing disclosure burden. We believe these proposals, if adopted, would provide certainty to soliciting parties and facilitate communications with shareholders. The proposed amendments to Exchange Act Rules 14a-2(b)(1), 14a-2(b)(1)(ix), 14a-4(e) and 14a-12(a)(1)(i) merely would clarify existing requirements. As a result, these amendments would not affect any existing disclosure burden. The proposed amendment to Rule 14a-4(d) would make the short slate rounding exception to the bona fide nominee requirement available whether a non-management soliciting person attempts to round out its short slate by seeking authority to vote for nominees named in the registrant's proxy statement, as currently permitted, or seeks to round out its short slate with nominees named in one or more other persons' proxy statements. Consequently, the proposed amendment to Rule 14a-4(d) simply would provide more flexibility to non-management persons that seek to round out their short slates and, as a result, would not increase any existing disclosure burden.¹²⁸

B. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed disclosure amendments would increase the burdens and costs for companies that would be subject to the proposed amendments. We estimated the average number of hours a company would spend completing the forms and the average hourly rate for outside professionals. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, and the nature of their operations. We believe that some companies will experience costs in excess of this average in the first year of compliance with proposals and some companies may experience less than the average costs.

¹²⁸ The proposed amendment to Exchange Act Rule 14a-4(d)(4) would require that a non-management soliciting person that attempts to round out its short slate by seeking authority to vote for nominees named in another non-management person's proxy statement provide specified representations to the effect that it is not acting together with any such other non-management person. The required representations would not, however, affect any existing disclosure burden in more than a negligible way.

We estimate no annual incremental increase in the paperwork burden for companies to comply with the proposed amendments to the Summary Compensation Table, Director Compensation Table, and Grants of Plan-Based Awards Table. We base this estimate on the fact that the amended approach would require disclosure of information that is collected to comply with financial reporting requirements, and will not impose additional burdens compared to the burdens associated with applying the currently required disclosure. We also base this estimate on the likelihood that, by eliminating factors unrelated to company compensation decisions, the proposed amendments will make companies' identification of named executive officers more consistent from year to year, thereby potentially reducing the burden of tracking the compensation of all executive officers in order to determine which executive officers are the most highly compensated.

For purposes of the PRA, we estimate the annual incremental paperwork burden for all companies (other than registered management investment companies) to prepare the disclosure that would be required under our proposals to be approximately 247,773 hours of company personnel time and a cost of approximately \$47,413,161 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing the disclosure, filing documents and retaining records.

We derived the above estimates by estimating the total amount of time it would take a company to prepare and review the proposed disclosure requirements. This estimate represents the average burden for all companies, both large and small. Our estimates have been adjusted to reflect the fact that some of the proposed amendments would be required in some but not all of the above listed documents, and would not apply to all companies.

With respect to reporting companies (other than registered management investment companies), all of the proposed revisions to Regulation S-K would be required in proxy and information statements; however, only the proposed revisions to Items 401 and 402 of Regulation S-K would be required in Forms 10, 10-K, S-1, S-4 and S-11. Furthermore, the proposed amendments to CD&A would not be applicable to smaller reporting companies because under current CD&A reporting requirements these companies are not required to provide CD&A in their Commission filings. Based on the number of proxy filings we received in

the 2008 fiscal year, we estimate that approximately 3,922 domestic companies are smaller reporting companies that have a public float of less than \$75 million. With respect to registered management investment companies, the proposed revisions would be reflected in certain Regulation S-K items, Schedule 14A, and Forms N-1A, N-2 and N-3.

Our annual burden estimates are also based on other assumptions. First, we assumed that the burden hours of the proposed amendments would be comparable to the burden hours related to similar disclosure requirements under current reporting requirements, such as the disclosure of audit fees and non-audit services,¹²⁹ CD&A and executive compensation reporting,¹³⁰ and the disclosure of the activities of nominating committees.¹³¹ Second, we assumed that substantially all of the burdens associated with the proposed amendments to Items 401 and 402 of Regulation S-K would be associated with Schedules 14A and 14C as these would be the primary disclosure documents that CD&A would be prepared and presented.¹³² For each reporting company (other than registered management investment companies), we estimated that the proposed amendments would impose on average the following incremental burden hours:

- Sixteen hours for the proposed amendments to CD&A;
- Four hours for the proposed enhanced director and nominee disclosure;
- Six hours for the proposed disclosures about company leadership structure and the board's role in risk management;
- Four hours for the proposed disclosures regarding compensation consultants; and
- One hour for the proposed reporting of voting results on Form 8-K.

With respect to registered management investment companies, we estimated that the proposed amendments would impose on average the following incremental burden hours:

- Four hours for the proposed enhanced director and nominee

disclosure in proxy statements and three hours for such proposed disclosure in registration statements;¹³³ and

- Six hours for the proposed disclosures about company leadership structure and the board's role in risk management.

1. Proxy and Information Statements

For purposes of the PRA, in the case of reporting companies (other than registered management investment companies) we estimated the annual incremental paperwork burden for proxy and information statements under the proposed amendments would be approximately 14 hours per form for companies that are smaller reporting companies, and 30 hours per form for companies that are either accelerated or large accelerated filers. In the case of registered management investment companies, we estimate the annual incremental paperwork burden for proxy and information statements under the proposed amendments would be approximately ten hours per form. These estimates include the time and the cost of preparing disclosure that has been appropriately reviewed by management, in-house counsel, outside counsel, and members of the board of directors.

2. Exchange Act Periodic Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Form 10-K under the proposed amendments would be approximately 1 hour per form. This estimate includes the time and the cost of preparing disclosure that has been appropriately reviewed by management, in-house counsel, outside counsel, and members of the board of directors.

3. Securities Act Registration Statements and Exchange Act Registration Statements

For purposes of the PRA, in the case of reporting companies (other than registered management investment companies) we estimate the annual incremental paperwork burden for Securities Act registration statements under the proposed amendments would be approximately 20 hours per form.¹³⁴

For registered management investment companies, we estimate that the annual incremental paperwork burden under the proposed amendments to Forms N-1A, N-2, and N-3 would be approximately 9 hours per form. These estimates include the time and the cost of preparing disclosure that has been appropriately reviewed by management, in-house counsel, outside counsel, and members of the board of directors.

The tables below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports; quarterly reports; current reports; proxy and information statements; Form 10; Forms S-1, S-4, S-11, N-1A, N-2, and N-3; and Regulation S-K.¹³⁵ The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a company to prepare and review the proposed disclosure requirements. For the Exchange Act reports on Form 10-K, 10-Q, and Form 8-K, and the proxy and information statements we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of \$400 per hour. For the registration statements on Forms S-1, S-4, S-11, N-1A, N-2, and N-3, and the Exchange Act registration statement on Form 10, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of \$400 per hour. There is no change to the estimated burden of the collections of information under Regulation S-K because the burdens that this regulation imposes are reflected in our revised estimates for the forms. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

¹²⁹ Release No. 33-8183 (Jan. 28, 2003) [68 FR 6006] (which we estimated to be two hours).

¹³⁰ Release No. 33-8732A in note 24 above (which we estimated to be 95 hours). For purposes of the proposed amendments to CD&A, we adjusted this number downward in recognition that the 95 hours included, among other things, the estimated burdens of the preparation and review of additional tabular and related narrative disclosures required by Item 402 of Regulation S-K.

¹³¹ Release No. 33-8340 (Nov. 24, 2003) [68 FR 69204] (which we estimated to be three hours).

¹³² The burden estimates for Form 10-K assume that the proposed amendments to Items 401 and 402 of Regulation S-K would be satisfied by either including the information directly in an annual report or incorporating the information by reference from the proxy statement or information statement on Schedule 14A or Schedule 14C. Our PRA estimates include an estimate 1 hour burden in the Form 10-K and schedules to account for the incorporation of the information that would be required under proposed amendments to Items 401 and 402 of Regulation S-K.

¹³³ We estimated that the disclosure burden for registration statements on Forms N-1A, N-2, and N-3 is less than for proxy statements because the proposed disclosure relating to involvement in legal proceedings for the past 10 years applies only to proxy statements and not to registration statements.

¹³⁴ We calculated the 20 hours by adding 16 hours for the proposed amendments to CD&A to 4 hours for the proposed enhanced director and nominee disclosure.

¹³⁵ Figures in both tables have been rounded to the nearest whole number.

TABLE 1.—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR ANNUAL REPORTS; QUARTERLY REPORTS; PROXY AND INFORMATION STATEMENTS

	Number of responses ¹³⁶	Incremental burden hours/form	Total incremental burden hours	75% Company	25% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*\$400
10-K	13,545	1	13,545	10,159	3,386	\$1,354,500
10-Q ¹³⁷	32,462	(1)	(7,300)	(5,475)	(1,825)	(730,000)
8-K ¹³⁸	115,795	1	115,795	86,846	28,949	11,579,500
Form 10 ¹³⁹	238	20	4,760	1,190	3,570	1,428,000
Sch. 14A ¹⁴⁰	7,300					
Accel. Filers	3,378	30	101,340	76,005	25,335	10,134,000
SRC Filers	3,922	14	54,908	41,181	13,727	5,490,800
Sch. 14C	680					
Accel. Filers	315	30	9,440	7,080	2,360	1,415,984
SRC Filers	365	14	5,115	3,836	1,279	511,472
Rule 20a-1	1,225	10	12,250	9,188	3,062	1,225,000
Reg. S-K	N/A	N/A	N/A	N/A	N/A	N/A
Total			317,153	235,485		32,667,261

TABLE 2.—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR REGISTRATION STATEMENTS

	Number of responses ¹⁴¹	Incremental burden hours/form	Total incremental burden hours	25% Company	75% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*\$400
Form S-1	768	20	15,360	3,840	11,520	\$4,608,000
Form S-4	619	20	12,380	3,095	9,285	3,714,000
Form S-11	100	20	2,000	500	1,500	600,000
Form N-1A	1,935	9	17,415	4,354	13,061	5,224,500
Form N-2	205	9	1,845	461	1,384	553,500
Form N-3	17	9	153	38	115	45,900
Reg. S-K	N/A	N/A	N/A	N/A	N/A	N/A
Total			49,153	12,288		14,745,900

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;

- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on

any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs,

¹³⁶ The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2008 fiscal year, except for Form 8-K. The number of responses for Form 8-K reflects the number of Form 8-Ks filed during the 2008 fiscal year plus an additional 7,371 filings.

¹³⁷ We calculated the reduction in the burden hours for Form 10-Q based on the number of proxy statements filed with the Commission during the 2008 fiscal year. We assumed that there would be, at a minimum, an equal number of Form 10-Qs filed to report the voting results from a meeting of shareholders. The reduction reflects the proposed deletion of the disclosure of voting results from the form.

¹³⁸ We have included an additional 7,300 responses to Form 8-K to reflect the additional Form 8-Ks that would be filed to report final voting results. We have also included an additional 71 Form 8-Ks to reflect the number of Form 8-Ks that would be filed to report preliminary voting results which we based on the actual number of proxy statements involving contested elections that were filed with the Commission during the 2008 fiscal year.

¹³⁹ The burden allocation for Form 10 uses a 25% internal to 75% outside professional allocation.

¹⁴⁰ The estimates for Schedule 14A and Schedule 14C are separated to reflect our estimate of the burden hours and costs related to the proposed

amendments to CD&A which would be applicable to companies that are either accelerated or large accelerated filers, but not applicable to companies that are smaller reporting companies. We estimate that 3,378 Schedule 14A responses were filed by accelerated or large accelerated filers, and 315 Schedule 14C responses were filed by accelerated or large accelerated filers.

¹⁴¹ The number of responses reflected in the table equals the actual number of forms filed with the Commission during the 2008 fiscal year, except for Forms N-1A and N-3. The number of responses for Forms N-1A and N-3 reflect the number of open-ended management investment companies registered with the Commission.

Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, with reference to File No. S7-13-09. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-13-09 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549-0213. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

IV. Cost-Benefit Analysis

A. Introduction

We are proposing amendments to enhance the disclosures with respect to a company's overall compensation policy and its impact on risk taking, director and nominee qualifications and legal proceedings, company leadership structure and the board's role in the risk management process, and the interests of compensation consultants. In addition, we are proposing amendments to transfer the requirement to disclose voting results from Forms 10-Q and 10-K to Form 8-K.

We also are proposing amendments to the disclosure requirements for executive and director compensation to require stock awards and option awards reporting based on a measure that will represent the aggregate grant date fair value of the compensation decision in the grant year, rather than the current rule, which allocates the grant date fair value over time commensurate with financial statement recognition of compensation costs.

Finally, we also are proposing amendments to Exchange Act Rules 14a-2, 14a-4, and 14a-12 to provide clarity and address issues that have arisen in regard to the proxy solicitation process. These amendments, discussed in detail above,¹⁴² and their potential consequences that could result in benefits and costs are as follows.

1. Exchange Act Rule 14a-2(b)(1)

We propose to clarify the introductory text of Exchange Act Rule 14a-2(b)(1) by revising it to provide specifically that a "form of revocation" does not include an unmarked copy of management's proxy card that the soliciting

shareholder requests be returned directly to management. As a result, a person otherwise qualified to rely on the exemption the rule provides still could rely on it if the person provided a solicited shareholder with an unmarked copy of management's proxy card and requested that the card be returned directly to management.¹⁴³ Consequently, the proposed amendment would provide certainty regarding the availability of the exemption in relation to this procedure. There may be persons who have different views or are uncertain about the application of the exemption to the procedure and would not, in the absence of the clarification, undertake it. As a result, the clarification may cause more persons to avail themselves of the procedure.¹⁴⁴

2. Exchange Act Rule 14a-2(b)(1)(ix)

We propose to clarify Exchange Act Rule 14a-2(b)(1)(ix) by revising it to provide specifically that a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited for a person to have a substantial interest in a matter that would disqualify the person from relying on the exemption Exchange Act Rule 14a-2(b)(1) otherwise would provide in regard to that matter. As a result, the proposed amendment would provide certainty regarding the fact that a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited for the person to have a substantial interest. There may be persons who have different views or are uncertain about this fact and would not, in the absence of the clarification, recognize that the exemption is not available and act accordingly. Consequently, the clarification may cause more persons to refrain from soliciting in the absence of an exemption or to solicit in compliance

¹⁴³ Rule 14a-2(b)(1) exempts from the generally applicable disclosure filing and most other requirements of the proxy rules solicitations by non-management persons who are not seeking proxy authority and do not have a substantial interest in the subject matter of the solicitation. The exemption is unavailable to, among others, a person who "furnish[es] or otherwise request[s], or act[s] on behalf of a person who furnishes or requests, a form of revocation."

¹⁴⁴ If more non-management persons use the procedure and provide solicited shareholders with more opportunities to vote as they suggest, then it is possible that these non-management persons will succeed more often in defeating management proposals. As a practical matter, however, it seems unlikely that many solicited shareholders would vote differently merely because they have more opportunities to vote as a non-management soliciting person suggests.

with all of the generally applicable proxy solicitation requirements.

3. Exchange Act Rule 14a-4(d)(4)

We propose to revise Exchange Act Rule 14a-4(d)(4) to provide that the short slate rounding exception to the bona fide nominee requirement would be available whether a non-management soliciting person attempts to round out its short slate by seeking authority to vote for nominees named in the registrant's proxy statement, as currently permitted, or seeks to round out its short slate with nominees named in any other persons' proxy statement.¹⁴⁵ As a result, the proposed amendment would end the situation under the current rule in which only the registrant's nominees may be used to fill out the non-management slate and, as a result, are effectively advantaged as security holders may vote for them on two or more proxy cards where non-management nominees can only be voted for on one. Consequently, the proposed amendment would provide additional flexibility to non-management persons with regard to the nominees with whom they seek to round out their short slates without their seeking a no-action letter from the staff.¹⁴⁶ The codified additional flexibility may cause more non-management soliciting persons to seek to round out their short slates with other non-management persons' nominees.¹⁴⁷

¹⁴⁵ Rule 14a-4(d)(1) requires that, in order to solicit authority to vote for the election of a person to office, the person must be a bona fide nominee, consenting to being named in the soliciting person's proxy statement and serving if elected. Rule 14a-4(d)(4) is an exception to the bona fide nominee requirement. This exception permits a person soliciting support of nominees who, if elected, would constitute a minority of the board of directors (commonly referred to as a "short slate"), to round out its short slate of nominees up to the total number of director positions then subject to election by seeking authority to vote for nominees named in the registrant's proxy statement.

¹⁴⁶ As discussed above, the Division of Corporation Finance has issued two no-action letters in regard to short slate rounding with persons named in a non-management person's proxy statement under circumstances generally the same as those contemplated by the proposed amendment. While the Division would continue to consider issuing such letters in the absence of the adoption of the proposed amendment, only the parties to whom the letters were addressed can rely upon them. See Eastbourne Capital, L.L.C. in note above; Icahn Associates Corp. in note 108 above.

¹⁴⁷ It is possible that more non-management soliciting persons will seek to round out their short slates with other non-management persons' nominees and, as a result, more non-management nominees and fewer management nominees will be elected. As a practical matter, however, it is unclear how often non-management persons would seek to round out their short slates in this manner and, if they did, whether they would attract enough votes to increase the number of successful non-management nominees and decrease the number of

¹⁴² See Part II.F above.

4. Exchange Act Rule 14a-4(e)

We propose to clarify Exchange Act Rule 14a-4(e) by revising it to provide specifically that the “reasonable specified conditions” under which the shares represented by a proxy will not be voted must be objectively determinable.¹⁴⁸ As a result, the proposed amendment would provide certainty regarding the fact that the “reasonable specified conditions” under which the shares represented by a proxy will not be voted must be objectively determinable. There may be persons who have different views or are uncertain about this fact and would not, in the absence of the clarification, recognize that the conditions must be objectively determinable and act accordingly. Consequently, the clarification may cause some persons to revise the conditions they otherwise would state to make them objectively determinable or refrain from soliciting because they do not wish to state objectively determinable conditions.

5. Exchange Act Rule 14a-12(a)(1)(i)

We propose to clarify Exchange Act Rule 14a-12(a)(1)(i) by revising it to provide specifically that when a soliciting communication is made before providing shareholders with a full proxy statement and that communication includes required participant information through a legend advising security holders where they can obtain the information, the information to which the legend refers must be filed under cover of Schedule 14A, as part of a proxy statement or other soliciting materials, no later than the time the first soliciting communication is made.¹⁴⁹ As a result, the proposed amendment would provide certainty regarding when the participant information to which the legend refers must be filed. There may be persons who have different views or are uncertain about this fact and would

successful management nominees. In this regard, we note that there appear to have been few instances in the past in which more than one non-management person sought to round out a short slate with respect to a single election of directors.

¹⁴⁸ Exchange Act Rule 14a-4(e) requires that a proxy statement or form of proxy provide that the shares represented by the proxy be voted “subject to reasonable specified conditions.”

¹⁴⁹ Exchange Act Rule 14a-12 permits a solicitation to be made before furnishing security holders with a proxy statement meeting the requirements of Rule 14a-3(a) if, among other requirements, each written communication that is part of the solicitation contains specified participant information. Rule 14a-12(a)(1)(i) requires such information to include the identity of the participants in the solicitation and a description of their direct or indirect interests or a legend advising security holders where they can obtain that information.

not, in the absence of the clarification, recognize that the participant information must be filed by the time the first soliciting communication is made. Consequently, the clarification may cause some persons to file the participant information earlier than they otherwise would or delay the start of a solicitation due to taking additional time to prepare and file the participant information.

B. Benefits

1. Disclosure Amendments

The proposed disclosure amendments are intended to enhance transparency of a company’s compensation policies and its impact on risk taking; director and nominee qualifications; company leadership structure and the role of the board in the risk management process; potential conflicts of interest of compensation consultants; and voting results at annual and special meetings.

a. Benefits Related to Expanded Compensation Discussion and Analysis Disclosure

Expanding the Compensation Discussion and Analysis to include a discussion of the company’s overall compensation program and how it relates to the company’s approach to risk management may benefit investors in several ways. Incentive schemes and other compensation for employees may affect risk-taking behavior in the company’s operations. To the extent that risks arising from a company’s overall compensation policies for employees generally may have a material effect on the company, investors will benefit through an enhanced ability to monitor it. They would also potentially benefit from the ability to use this additional information in allocating capital across companies, toward companies where employee incentives appear better aligned with operational success and investors’ appetite for risk. The new disclosure may also encourage the board and senior management to examine and improve incentive structures for management and employees of the company. These benefits should also lead to increased value to investors.

b. Benefits Related to Revisions to Summary Compensation Table Disclosure

As a result of the proposed Summary Compensation Table revision, companies would no longer need to prepare and report the allocation of equity awards’ grant date fair value over time commensurate with financial statement recognition of compensation

costs for executive and director compensation tabular reporting or as a footnote to the Director Compensation Table. Further, in preparing stock awards and option awards disclosure in the Summary Compensation Table and Director Compensation Table, companies no longer would need to incur additional costs to exclude the estimate for forfeitures related to service-based vesting used for financial statement reporting purposes. The elimination of costs of preparing and reporting this information is a benefit of the proposed amendments. The effects of the proposed amendments in making this information more readily available to investors may be useful to their voting and investment decisions.

Reporting stock awards and option awards in the Summary Compensation Table based on aggregate grant date fair value is designed to make it easier for investors to assess compensation decisions and evaluate the decisions of the compensation committee. For example, under the amendments the Summary Compensation Table values will correspond to awards granted for the fiscal year, potentially allowing companies to better explain in Compensation Discussion and Analysis how decisions with respect to these awards relate to other compensation decisions in the context of total compensation for the year. Further, the effect on total compensation of decisions to reprice options will be more evident because aggregate grant date fair value will be a component of total compensation reported in the Summary Compensation Table. However, because the proposals would eliminate the requirement to report the grant date fair value of individual awards in the Grants of Plan-Based Awards Table, there would not be disclosure of incremental fair value with respect to individual awards that were repriced or otherwise materially modified during the year, potentially limiting this benefit.

Under the proposed amendments, the identification of named executive officers based on total compensation for the last completed fiscal year will reflect the aggregate grant date fair value of equity awards granted in that year. As a result, the named executive officers other than the principal executive officer and principal financial officer may change. Investors may benefit from receiving compensation disclosure with respect to executives who would not have been named executive officers under the current rules. To the extent that this proposed change better aligns the identification of named executive officers with compensation decisions for

the year, it may make it easier for companies to track executive compensation for reporting purposes.

Smaller reporting companies are not required to provide a Grants of Plan-Based Awards Table or a Compensation Discussion and Analysis, but are required to provide a Summary Compensation Table. Investors in these companies may benefit from reporting stock awards and option awards based on full grant date fair value in the grant year, as opposed to the current reporting approach based on financial statement recognition of the awards.

c. Benefits Related to Enhanced Director and Nominee Disclosure

The proposed amendments to Item 401 of Regulation S-K would potentially benefit investors by increasing the amount and quality of information that they receive concerning the background and skills of directors and nominees for director, enabling investors to make better-informed voting and investment decisions. This increased information also may improve investor confidence because investors could determine more easily whether a particular director and the entire board composition is an appropriate choice for a given company at the time.

Disclosure of management's or other proponents' rationale for their nominees' membership on the board and on specific committees may benefit investors by enabling them to better assess the rationale in favor of a particular nominee. Investors would be able to adjust their holdings, allocating more capital to companies in which they believe board members are most likely to be able to effectively fulfill their duties to shareholders. In particular, in cases that do not meet investors' expectations, investors may respond by attempting to exert more influence on management or the board than would occur otherwise, thereby enhancing shareholder value.

Expanded disclosure of membership on previous corporate boards may also benefit investors by making it easier for them to evaluate whether nominees' past board memberships present potential conflicts of interest (such as membership on boards of major suppliers, customers, or competitors). Investors may also be able to more easily evaluate the performance, in both operations and governance, of the other companies on whose boards the nominees serve or have served. The public may also benefit from better understanding any potential positive or negative effects on corporate

performance resulting from directors serving on other boards.

Expanded disclosure of legal proceedings involving directors, nominees and executive officers, from the current five year requirement to ten years, would benefit investors by providing more information by which they could determine the suitability of a director or nominee.

d. Benefits Related to New Disclosure about Company Leadership Structure and the Board's Role in the Risk Management Process

Investors may benefit from new disclosure about company leadership structure. In particular, they may benefit from understanding management's explanation regarding whether or not the principal executive officer serves as chairman of the board and, in the case of registered investment management company, whether the chairman is an "interested person" of the fund. In deciding whether to separate principal executive officer and chairman positions, companies may consider several factors, including the effectiveness of communication with the board and the degree to which the board can exercise independent judgment about management performance, and shareholders may, in different cases, be best served by different decisions.

Disclosures of the board's role in the risk management process may also benefit investors. Expanded disclosure of the board's role in risk management may enable investors to better evaluate whether the board is exercising appropriate oversight of risk management. Investors would be able to adjust their holdings, allocating more capital to companies in which they believe the board is adequately focused on risks. Improved capital allocation will also benefit the financial markets by increasing market efficiency.

e. Benefits Related to New Disclosure Regarding Compensation Consultants

New disclosure regarding compensation consultants may benefit investors by illuminating potential conflicts of interest. Providing better, more complete information in cases where non-executive compensation services occur allows investors to determine for themselves whether there are concerns related to the compensation consultants' financial interests and objectivity. Compensation consultants may earn fees from other services to the company, including benefits administration, human resources consulting, and actuarial services. With an incentive to retain these additional revenue streams, they

may face incentives to cater, to some degree, to management preferences in recommending executive compensation packages. To the degree that these relationships are more transparent under the proposed amendments, investors benefit through their ability to better monitor the process of setting executive pay. This benefit may be limited to the degree that compensation consultants have potential conflicts of interest related to other material relationships with the company or other conflicts not specifically enumerated in the proposed amendments.

f. Benefits Related to Reporting of Voting Results on Form 8-K

The proposed amendments to Form 8-K would facilitate security holder access to faster disclosure of the vote results of a company's annual or special meeting. To find this information, investors no longer would need to wait for this information to be disclosed in a Form 10-Q or 10-K, which could be filed months after the end of the meeting.

2. Proxy Solicitation Process Amendments

We believe the proposed proxy solicitation process amendments may result in benefits as follows.

a. Exchange Act Rule 14a-2(b)(1) Introductory Text

The proposed amendment to the introductory text of Exchange Act Rule 14a-2(b)(1) may cause more persons to furnish an unmarked copy of management's proxy card requested to be returned directly to management.¹⁵⁰ Consequently, the proposed amendment may result in the benefit of aiding efforts by persons not seeking proxy authority to facilitate voting by shareholders sharing their views on matters submitted for shareholder approval—such as in a "just vote no" campaign—without having to incur the costs and efforts of conducting a fully-regulated proxy solicitation and provide shareholders a convenient opportunity to indicate their votes after hearing those views.

b. Exchange Act Rule 14a-2(b)(1)(ix)

The proposed amendment to Exchange Act Rule 14a-2(b)(1)(ix) may cause more persons to refrain from soliciting in the absence of an exemption or solicit in compliance with all of the generally applicable proxy solicitation requirements.¹⁵¹ To the extent such persons refrain from

¹⁵⁰ See Part IV.A.1 above.

¹⁵¹ See Part IV.A.2 above.

soliciting without an exemption, shareholders may benefit by not being called upon to make a voting decision in regard to a matter while possibly being unaware of the soliciting person's substantial interest in the matter. To the extent such persons solicit in compliance with all of the generally applicable proxy solicitation requirements, shareholders may benefit by having information regarding the soliciting person's substantial interest in the matter that they otherwise might not have.

c. Exchange Act Rule 14a-4(d)(4)

The proposed amendment to Exchange Act Rule 14a-4(d)(4) may cause more non-management soliciting persons to seek to round out their short slates with other non-management persons' nominees.¹⁵² The amendment's effective codification of a no-action position the staff has taken in the past may benefit non-management soliciting persons who wish to round out their short slates with other non-management persons' nominees by enabling them to avoid the cost of seeking a no-action letter. To the extent more non-management soliciting persons seek to round out their slates with other non-management persons' nominees, shareholders may benefit from having more choices in deciding for whom they will vote.

d. Exchange Act Rule 14a-4(e)

The proposed amendment to Exchange Act Rule 14a-4(e) may cause some persons to revise the conditions they otherwise would state to make them objectively determinable or refrain from soliciting because they do not wish to state objectively determinable conditions.¹⁵³ To the extent such persons revise the conditions they state to make them objectively determinable, solicited shareholders may benefit by being better able to make an informed decision in regard to granting proxy authority and confirm that any later withholding of shares from voting is consistent with the authority granted. To the extent such persons refrain from soliciting, shareholders may benefit from not being called upon to make a decision in regard to granting proxy authority or confirming that any later withholding of shares from voting is consistent with the authority granted where such decisions would be more difficult due to a lack of objectively determinable conditions.

e. Exchange Act Rule 14a-12(a)(1)(i)

The proposed amendment to Exchange Act Rule 14a-12(a)(1)(i) may cause some persons to file legend-referenced participant information earlier than they otherwise would or delay the start of a solicitation due to taking additional time to prepare and file the participant information.¹⁵⁴ To the extent such persons file the participant information sooner or delay the start of a solicitation until ready to file the participant information, shareholders may benefit from having the participant information with which they can begin to evaluate the solicitation from the time they first are solicited.

C. Costs

1. Disclosure Amendments

The proposed rules would impose new disclosure requirements on companies. Some of the proposed disclosures are designed to build upon existing requirements to elicit a more detailed discussion of overall compensation policy and its impact on risk taking, director and nominee qualifications and legal proceedings and the interests of compensation consultants. To the degree that the proposed amendments require collecting information currently available, costs related to information collection will be limited.

a. Costs Related to Expanded Compensation Discussion and Analysis Disclosure

Expanded Compensation Discussion and Analysis disclosure will increase costs to companies as the proposed amendments would impose additional information gathering and drafting requirements. We believe that there may be information gathering costs, even though the information required may be readily available because this information may need to be reported up from business units and analyzed. Using our PRA burden estimates, we estimate the aggregate annual cost of the proposed amendments to CD&A to be approximately \$29,950,652.¹⁵⁵ In addition, there may be costs in assessing

whether risk arising from compensation policies and practices may have a material effect on the company, and if they may, there will be cost in drafting the additional disclosure. This could include the cost of hiring additional advisors to assist in the analysis as well as potential liability if risk is not identified as having a material effect on the company.

b. Costs Related to Revisions to Summary Compensation Table Disclosure

Investors may face some costs related to revisions in executive compensation reporting. The proposed amendments would rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table and corresponding footnote disclosure in the Director Compensation Table. Although the Outstanding Equity Awards at Fiscal Year-End Table would continue to provide useful disclosure of the contractual terms of outstanding equity awards, the contribution of an individual grant to the aggregate grant date fair value of awards would not be disclosed under the proposed amendments. Investors will therefore be less able to determine the manner in which an individual grant affects the aggregate grant date fair value of equity awards granted in the year.

Grant date fair value guidelines under FAS 123R call for management to exercise judgment. For example, the valuation of stock options requires assumptions about stock volatility and choice among several valuation methods. For financial statement recognition purposes, this grant date fair value measure of compensation cost is expensed over the expected term of the option. Compensation cost for awards containing a performance-based vesting condition is recognized only if it is probable that the performance condition will be achieved. If achievement of the performance condition later is no longer considered probable, the amount of compensation cost previously recognized is reversed in the period when it is determined that achievement of the condition is no longer probable. In addition, awards that are classified as "liability awards" under FAS 123R (such as an award that is cash settled) are re-measured at each financial statement reporting date through the date the awards are settled. Some investors may believe that Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards measured based on financial statement recognition principles provides a clearer

¹⁵⁴ See Part II.A.5 above.

¹⁵⁵ This estimate is based on the estimated total burden hours of 86,683 (the annual responses for the schedules and forms that would include the proposed CD&A amendments multiplied by 16 hours), an assumed split of the burden hours between internal staff and external professionals with respect to proxy and information statements, an assumed 25%/75% split of the burden hours between internal staff and external professionals with respect to registration statements, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁵² See Part IV.A.3 above.

¹⁵³ See Part IV.A.4 above.

understanding of compensation earned in the reporting period because it takes into account potential adjustments regarding such factors as term of the option and changes in market value over time. To the extent that an investor would prefer to also see disclosure of this measure for purposes of voting or investment decisions, the proposed amendments may entail a cost.

In particular, the required re-measurement of liability awards under the current rules may help to reveal situations in which companies grant awards that subsequently change in value. For example, if a company grants an option-based liability award under the proposed amendments, the impact of subsequent events on the stock price, and therefore on the award value, would not be reflected in the Summary Compensation Table in the current or subsequent year. In contrast, under the current rule, reported compensation in the next year could be higher or lower as the result of re-measurement. To the extent that investors prefer to see changes in value of liability award compensation decisions reflected in the Summary Compensation Table, presentation of grant date fair value in the table may represent a cost. This cost, however, is limited to the degree that changes in value of liability based awards are reflected elsewhere in the proxy statement or can be inferred from previously disclosed award terms. Additionally, awards classified as "equity awards" under FAS 123R are not re-measured, and therefore any changes in the value of such awards are not currently reflected in the Summary Compensation Table and will also not be reflected under the proposed amendments.

Under the proposed amendments to the Summary Compensation Table and as noted in the Benefits section, the identification of named executive officers based on total compensation for the last completed fiscal year will reflect the aggregate grant date fair value of equity awards granted in that year, so that some executives subject to executive compensation disclosure may be different.

Smaller reporting companies, which are not required to provide the Grants of Plan-Based Awards Table, may incur some costs on a transitional basis in switching from the currently required measure of stock awards and option awards to full grant date fair value reporting. We expect that any such additional costs will be limited by the fact that full grant date fair value information required under the proposals is also collected to comply with financial reporting purposes.

Because companies other than smaller reporting companies currently are required to report the grant date fair value of individual equity awards, we expect that they will incur only negligible costs in switching to the proposed Summary Compensation Table and Director Compensation Table disclosure requirements.

c. Costs Related to Enhanced Director and Nominee Disclosure

Companies may face some information gathering and reporting costs related to enhanced director and nominee disclosure. Using our PRA burden estimates, we estimate the aggregate annual cost to operating companies to be approximately \$11,775,000.¹⁵⁶ With respect to our PRA burden estimates for registered management investment companies, we estimate the aggregate annual cost to be approximately \$3,489,800.¹⁵⁷ Companies may also experience increased costs as it may be more difficult to find candidates willing to serve on boards if they do not want this information disclosed in a Commission filing. To the extent that information is available and verifiable, however, we expect that certain costs will be limited.

d. Costs Related to New Disclosure About Company Leadership Structure and the Board's Role in the Risk Management Process

Companies may face some costs related to new disclosure about company leadership structure. Disclosure of the board's role in the risk management process may have some similar costs. The information gathering costs are likely to be less significant than the costs to prepare the disclosure. Using our PRA burden estimates, we estimate the aggregate annual cost to operating companies to be approximately \$11,970,000.¹⁵⁸ With

¹⁵⁶ This estimate is based on the estimated total burden hours of 38,820 (the annual responses for the schedules and forms that would include the proposed enhanced director and nominee disclosure multiplied by 4 hours), an assumed 75%/25% split of the burden hours between internal staff and external professionals with respect to proxy and information statements, an assumed 25%/75% split of the burden hours between internal staff and external professionals with respect to registration statements, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁵⁷ This estimate is based on the estimated total burden hours of 11,371, an assumed 75%/25% split of the burden hours between internal staff and external professionals with respect to proxy statements, an assumed 25%/75% split of the burden hours between internal staff and external professionals with respect to registration statements, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁵⁸ This estimate is based on the estimated total burden hours of 47,880 (the annual responses for

respect to our PRA burden estimates for registered management investment companies, we estimate the aggregate annual cost to be approximately \$6,367,200.¹⁵⁹ Although the amendments are not intended to drive behavior, there may be possible costs if a company re-evaluates its leadership structure or the board's role in the risk management process.

e. Costs Related to New Disclosure Regarding Compensation Consultants

Companies may face some costs related to new disclosure about other services provided by compensation consultants and aggregate fees. Using our PRA burden estimates, we estimate the aggregate annual cost to be approximately \$7,980,000.¹⁶⁰ The costs to a company in contracting with compensation consultants could be increased under these amendments, and compensation consultants also may alter their mix of services. For instance, costs may increase if companies decide to contract with multiple different compensation consultants for services that had previously been provided by only one compensation consultant. Possible increased costs might include the costs associated with the time each new compensation consultant will need to learn about the company and decline in any economies of scale the compensation consultant may have factored into fees charged to the company. To the extent that fees for compensation consultants decline, rather than increase as a result of any improvement in competition under the proposed amendments, this represents a potential cost to compensation consultants, if any increase in the volume of business does not offset fee reductions.

f. Costs Related to Reporting of Voting Results on Form 8-K

Shareholders who are used to receiving this information in Form 10-Q filing may incur costs of adapting

Schedules 14A and 14C multiplied by 6 hours), an assumed 75%/25% split of the burden hours, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁵⁹ This estimate is based on the estimated total burden hours of 20,292, an assumed 75%/25% split of the burden hours between internal staff and external professionals with respect to proxy statements, an assumed 25%/75% split of the burden hours between internal staff and external professionals with respect to registration statements, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁶⁰ This estimate is based on the estimated total burden hours of 31,920 (the annual responses for Schedules 14A and 14C multiplied by 4 hours), an assumed 75%/25% split of the burden hours, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

their research practices to find this information in 8-K filings, which may involve searching through a number of filings. This adjustment may be costly, in particular, to those investors who process this information using automated systems. A separate filing to report the information and potentially report both preliminary and final voting results may also increase direct costs to companies for filing fees, filing creation, and report dissemination because it may require two Form 8-K filings. However, the cost for preparing a quarterly report on Form 10-Q would be less because this disclosure would not appear in that Form. Companies engaged in a contested election may face some additional information gathering and reporting costs related to reporting shareholder voting results on Form 8-K, as these companies would need to file a Form 8-K to report preliminary voting results in addition to reporting final vote results. Using our PRA burden estimates, we estimate the aggregate annual cost to be approximately \$1,842,750.¹⁶¹

2. Proxy Solicitation Process Amendments

We believe the proposed proxy solicitation process amendments may result in costs as follows.

a. Exchange Act Rule 14a-2(b)(1) Introductory Text

The proposed amendment to the introductory text of Exchange Act Rule 14a-2(b)(1) may cause more persons to furnish an unmarked copy of management's proxy card requested to be returned directly to management.¹⁶² If more persons avail themselves of that procedure, companies may increase soliciting activity in an effort to counterbalance its use and, as a result, incur additional costs.

b. Exchange Act Rule 14a-2(b)(1)(ix)

The proposed amendment to Exchange Act Rule 14a-2(b)(1)(ix) may cause more persons to refrain from soliciting in the absence of an exemption or solicit in compliance with all of the generally applicable proxy solicitation requirements.¹⁶³ To the extent such persons refrain from soliciting, shareholders may be denied the opportunity to consider such persons' views in making a voting

decision. To the extent such persons solicit in compliance with all of the generally applicable proxy solicitation requirements, they may incur greater costs than they otherwise would have.¹⁶⁴

c. Exchange Act Rule 14a-4(d)(4)

The proposed amendment to Exchange Act Rule 14a-4(d)(4) may cause more non-management soliciting persons to seek to round out their short slates with other non-management persons' nominees.¹⁶⁵ Consequently, companies may increase soliciting activity in an effort to counterbalance such rounding out and, as a result, incur additional costs.

d. Exchange Act Rule 14a-4(e)

The proposed amendment to Exchange Act Rule 14a-4(e) may cause some persons to revise the conditions they otherwise would state to make them objectively determinable or refrain from soliciting because they do not wish to state objectively determinable conditions.¹⁶⁶ To the extent such persons revise the conditions to make them objectively determinable or refrain from soliciting, shareholders may lose the opportunity to grant proxy authority to a person that might exercise some degree of discretion in a manner that could be beneficial to the shareholders. The inability to grant proxy authority to a person that might exercise some degree of discretion may cause some shareholders to decide to attend a meeting and, as a result, incur costs accordingly.

e. Exchange Act Rule 14a-12(a)(1)(i)

The proposed amendment to Exchange Act Rule 14a-12(a)(1)(i) may cause some persons to file legend-referenced participant information earlier than they otherwise would or delay the start of a solicitation due to taking additional time to prepare and file the participant information.¹⁶⁷ To the extent such persons file the participant information sooner, they may incur additional costs to accelerate the preparation and filing of the information. To the extent such persons delay the start of a solicitation until when ready to file the participant information, they may lose time during which the shareholders can consider the

solicitation and, thereby, reduce the likelihood of a successful solicitation.

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act also requires us,¹⁶⁸ when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b) of the Securities Act,¹⁶⁹ Section 3(f) of the Exchange Act,¹⁷⁰ and Section 2(c) of the Investment Company Act require us,¹⁷¹ when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposed amendments to Regulation S-K are intended to provide additional important information to investors about corporate boards and management structure; and the clarity of executive compensation available to investors and the financial markets. These proposals would enhance investors' understanding of how corporate resources are used, and enable shareholders to better evaluate the actions of the board of directors and executive officers in fulfilling their responsibilities.

The proposed disclosure amendments would enhance our reporting requirements. These proposed amendments are designed to enhance transparency of a company's compensation policies and its impact on risk taking; director and nominee qualifications; board leadership structure; the potential conflicts of

¹⁶¹ This estimate is based on the estimated 7,371 additional Form 8-K filings, an assumed 75%/25% split of one burden hour between internal staff and external professionals, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

¹⁶² See Part IV.A.1 above.

¹⁶³ See Part IV.A.2 above.

¹⁶⁴ We recently cited certain evidence that indicated the average cost to a soliciting shareholder engaged in a proxy contest is \$368,000. See Release No. 33-9046 in 22 above at 29073.

¹⁶⁵ See Part IV.A.3 above.

¹⁶⁶ See Part IV.A.4 above.

¹⁶⁷ See Part IV.A.5 above.

¹⁶⁸ 15 U.S.C. 78w(a)(2).

¹⁶⁹ 15 U.S.C. 77b(b).

¹⁷⁰ 15 U.S.C. 78c(f).

¹⁷¹ 15 U.S.C. 80a-2(c).

compensation consultants; and to provide investors with clearer and more meaningful executive compensation disclosure. The proposed amendments would also accelerate the reporting of the results of shareholder votes at a company's annual or special meeting. The proposed amendments should improve the ability of investors to make informed voting and investment decisions, and, therefore lead to increased efficiency and competitiveness of the U.S. capital markets.

The proposed disclosure amendments should also increase efficiency and competitiveness of the U.S. capital markets by providing investors with additional information on risk incentives and companies' risk management practices. This information could be used by investors in allocating capital across companies, toward companies where the risk incentives appear better aligned with an investor's appetite for risk. The new disclosure may also encourage competition amongst companies to demonstrate superior risk management practices and improved incentive structures for management and employees of the company.

The proposed disclosure amendments also may affect competition among compensation consultants. Additional disclosure of consulting fees may provide an informational advantage to firms and increase competition, as firms can use this information to bid for additional services and potentially negotiate lower rates.

The proposed amendments to our rules governing the proxy solicitation process are intended to provide clarity and address issues that have arisen. We believe these proposals would provide certainty to soliciting parties and facilitate communications with shareholders. Additional clarity and facilitated communications would promote efficiency.

We request comment on whether the proposed amendments would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)¹⁷² we solicit data to determine whether the proposed rule amendments constitute a "major" rule. Under SBREFA, a rule is considered

"major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commenters should provide empirical data on (a) the annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any effect on competition, investment or innovation. We request your comments on the reasonableness of this estimate.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act.¹⁷³ It relates to proposed revisions to the rules under the Securities Act, Exchange Act and Investment Company Act regarding executive compensation and corporate governance disclosures and the proxy solicitation process.

A. Reasons for, and Objectives of, the Proposed Action

These proposals are designed to enhance the executive compensation and corporate governance disclosures provided by companies, and clarify and address issues that have arisen in the proxy solicitation process. Specifically, in regard to disclosure, the proposals are intended to enhance the transparency of a company's compensation policies and its impact on risk taking; director and nominee qualifications; board leadership structure; the potential conflicts of compensation consultants; and to provide investors with clearer and more meaningful executive compensation disclosure. We are also proposing amendments to our proxy rules that would clarify the manner in which they operate and to eliminate potential obstacles to shareholder communication.

B. Legal Basis

We are proposing the amendments pursuant to Sections 3(b), 6, 7, 10 and 19(a) of the Securities Act; Sections 12, 13, 14(a), 15(d), and 23(a) of the Exchange Act, and Sections 8, 20(a), 24(a), 30, and 38 of the Investment Company Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."¹⁷⁴ The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157¹⁷⁵ and Exchange Act Rule 0-10(a)¹⁷⁶ defines a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,229 companies, other than registered investment companies, that may be considered small entities. The proposed amendments would affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act. In addition, the proposals also would affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. An investment company is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.¹⁷⁷ We believe that the proposals would affect small entities that are investment companies. We estimate that there are approximately 212 investment companies that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed disclosure amendments are designed to enhance the transparency of boards of directors, provide investors with a better understanding of the functions and activities of boards, and to provide investors with clearer and more meaningful compensation disclosure. These amendments would require small entities that are operating companies to provide:¹⁷⁸

¹⁷⁴ 5 U.S.C. 601(6).

¹⁷⁵ 17 CFR 230.157.

¹⁷⁶ 17 CFR 240.0-10(a).

¹⁷⁷ 17 CFR 270.0-10(a).

¹⁷⁸ The proposed requirements to discuss and analyze a company's overall compensation

¹⁷² 5 U.S.C. 603.

¹⁷³ 5 U.S.C. 601.

- Disclosure of the aggregate grant date fair value of equity awards computed in accordance with FAS 123R;
- Additional disclosure about compensation consultants employed by companies, including disclosure about the full scope of services provided by the consultants or its affiliates and the related fees for such services; and
- Disclosure of the results of shareholder votes on Form 8-K within four business days after the end of the meeting.

In addition, these amendments would require small entities that are operating companies or registered management investment companies to provide:

- Disclosure of the qualifications of directors and nominees for director, and a brief discussion of the specific experience, qualifications, attributes or skills that qualify that person to serve as a director for the company at that time, and as a member of any committee that the person serves on or is chosen to serve on, in light of the company's business and structure;

- Added disclosure regarding certain legal proceedings involving a company's directors, nominees for director and executive officers; and

- Disclosure about a company's board leadership structure and the board's role in the risk management process.

The proposed proxy rule amendments would provide certainty to soliciting parties and facilitate communications with shareholders and, as a result, would not impose any reporting or recordkeeping requirements on small entities. These proposed amendments would affect both large and small entities equally. The proposed proxy rule amendments set forth clear, uniform standards to aid companies and other soliciting parties in the process of soliciting proxies under our rules.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables

programs as they may have a material impact on risk management practices would not apply to smaller reporting companies.

that take into account the resources available to small entities;

- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S-K and the proposed amendments would not affect these requirements. Under Regulation S-K, small entities are required to provide abbreviated compensation disclosure with respect to the principal executive officer and two most highly compensated executive officers for the last two completed fiscal years. Specifically, small entities may provide the executive compensation disclosure specified in Items 402(l) through (r) of Regulation S-K, rather than the corresponding disclosure specified in Items 402(a) through (k) of Regulation S-K. Items 402(l) through (r) also do not require small entities to provide CD&A or the Grants of Plan-Based Awards Table. Therefore small entities would not be required to disclose their overall compensation practices. Other than the proposed amendments to the Grants of Plan-Based Awards Table, the remaining proposed disclosure requirements would apply to small entities to the same extent as larger issuers.

As noted above, the proposed amendments to CD&A would not apply to small entities. We are not proposing to expand the existing alternative reporting requirements under Item 402 of Regulation S-K, or establish additional different compliance requirements or an exemption from coverage of the proposed amendments for small entities. The proposed amendments would provide investors with greater transparency regarding director and nominee qualifications; board leadership structure and their role in the risk management process; potential conflicts of compensation consultants; and voting results at annual and special meetings. We do not believe these disclosures will create a significant new burden; we do, however, believe uniform, comparable disclosures across all companies will help shareholders and the markets.

The proposed amendments would clarify, consolidate and simplify the reporting requirements for all public companies including small entities. The proposed amendments would require clear and straightforward disclosure of director and nominee qualifications,

board leadership structure and the potential conflicts of interest of compensation consultants. We have used design rather than performance standards in connection with the proposed amendments for two reasons. First, based on our past experience, we believe the proposed revisions would be more useful to investors if there were specific disclosure requirements. The proposed disclosures are intended to result in more comprehensive and clear disclosure. Second, the specific disclosure requirements in the proposed amendments would promote consistent disclosure among all companies. We seek comment on whether we should exempt small entities from any of the proposed disclosures or scale the proposed amendments to reflect the characteristics of small entities and the needs of their investors.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on smaller entities;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Statutory Authority and Text of the Proposed Amendments

The amendments contained in this release are being proposed under the authority set forth in Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 14, 15(d) and 23(a) of the Exchange Act; and Sections 8, 20(a), 24(a), 30 and 38 of the Investment Company Act.

List of Subjects in 17 CFR Parts 229, 239, 240, 249, 270 and 279

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

2. Amend § 229.401 by:

- a. Revising paragraph (e)(1);
- b. In paragraph (e)(2) revising the phrase “Indicate any other directorships” to read “Indicate any other directorships held, including any other directorships held during the past five years,”;
- c. In paragraph (f), introductory text, revise the phrase “during the past five years” to read “during the past ten years”.

The revisions read as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

(e) *Business experience*—(1) *Background.* Briefly describe the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each person named in answer to paragraph (c) of Item 401, including: Each person’s principal occupations and employment during the past five years; the name and principal business of any corporation or other organization in which such occupations and employment were carried on; and whether such corporation or organization is a parent, subsidiary or other affiliate of the registrant. In addition, for each director or person nominated or chosen to become a director, briefly discuss the specific experience, qualifications, attributes or skills that qualify that person to serve as a director for the registrant at the time that the disclosure is made, and as a member of any committee that the person serves on or is chosen to serve on (if known), in light of the registrant’s business and

structure. If material, this disclosure should cover more than the past five years, and include information about the person’s risk assessment skills, particular areas of expertise, or other relevant qualifications. When an executive officer or person named in response to paragraph (c) of Item 401 has been employed by the registrant or a subsidiary of the registrant for less than five years, a brief explanation shall be included as to the nature of the responsibility undertaken by the individual in prior positions to provide adequate disclosure of his or her prior business experience. What is required is information relating to the level of his professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

3. Amend § 229.402 by:

- a. Redesignating paragraph (b)(1) introductory text and paragraphs (b)(1)(i) through (vi) as paragraphs (b)(1)(i) introductory text and (b)(1)(i)(A) through (F);
- b. Redesignating paragraph (b)(2) introductory text and paragraphs (b)(2)(i) through (xv) as paragraphs (b)(1)(ii) introductory text and (b)(1)(ii)(A) through paragraph (b)(1)(ii)(O);
- c. Redesignating the Instructions to Item 402(b) as Instructions to Item 402(b)(1)(i) and (b)(1)(ii);
- d. Adding a heading to newly redesignated paragraph (b)(1)(i);
- e. Revising the introductory text to newly redesignated paragraph (b)(1)(ii);
- f. Revising newly redesignated Instructions to Item 402(b)(1)(i) and (b)(1)(ii);
- g. Adding new paragraph (b)(2);
- h. Adding Instructions 1, 2, and 3 to Item 402(b);
- i. Revising Instruction 2 to Item 402(c)(2)(iii) and (iv), paragraphs (c)(2)(v) and (c)(2)(vi), the Instructions to Item (c)(2)(v) and (vi), and paragraph (c)(2)(ix)(G);
- j. Revising the Grants of Plan-Based Awards Table in paragraph (d)(1);
- k. Removing the period at the end of paragraphs (d)(2)(iii) and (d)(2)(iv) and adding a semicolon in its place;
- l. Adding “and” at the end of paragraph (d)(2)(vi), removing “and” at the end of paragraph (d)(2)(vii) and adding a period in its place;
- m. Removing paragraph (d)(2)(viii) and Instruction 7 to Item 402(d);
- n. Revising paragraphs (k)(2)(iii) and (k)(2)(iv) and the Instruction to Item (k)(2)(iii) and (iv);
- o. Revising paragraph (k)(2)(vii)(I) and Instruction to Item 402(k);

p. Revising Instruction 2 to Item 402(n)(2)(iii) and (iv);

q. Revising paragraphs (n)(2)(v), (n)(2)(vi) and the Instruction to Item 402(n)(2)(v) and (vi);

r. Revising paragraph (n)(2)(ix)(G);

s. Revising paragraphs (r)(2)(iii), (r)(2)(iv) and (r)(2)(vii)(I) before the Instruction, and Instruction to Item 402(r).

The revisions and additions read as follows:

§ 229.402 (Item 402) Compensation.

(b) *Compensation discussion and analysis.* (1)(i) *Compensation discussion and analysis for the named executive officers.* * * *

(ii) While the material information to be disclosed under Compensation Discussion and Analysis for the Named Executive Officers will vary depending upon the facts and circumstances, examples of such information may include, in a given case, among other things, the following:

Instruction 1 to Item 402(b)(1)(i) and (b)(1)(ii). The purpose of the Compensation Discussion and Analysis for the Named Executive Officers is to provide to investors material information that is necessary to an understanding of the registrant’s compensation policies and decisions regarding the named executive officers.

Instruction 2 to Item 402(b)(1)(i) and (b)(1)(ii). The Compensation Discussion and Analysis for the Named Executive Officers should be of the information contained in the tables and otherwise disclosed pursuant to this Item. It should also cover actions regarding executive compensation that were taken after the registrant’s last fiscal year’s end. Actions that should be addressed might include, as examples only, the adoption or implementation of new or modified programs and policies or specific decisions that were made or steps that were taken that could affect a fair understanding of the named executive officer’s compensation for the last fiscal year. Moreover, in some situations it may be necessary to discuss prior years in order to give context to the disclosure provided.

(2) *Compensation discussion and analysis of the registrant’s overall compensation program as it relates to the registrant’s risk management.* To the extent that risks arising from the registrant’s compensation policies and overall actual compensation practices for employees generally may have a material effect on the registrant, discuss

the registrant's policies or practices of compensating its employees, including non-executive officers, as they relate to risk management practices and/or risk-taking incentives. While the situations requiring disclosure will vary depending on the particular registrant and compensation policies, situations that may trigger disclosure include, among others, compensation policies: At a business unit of the company that carries a significant portion of the registrant's risk profile; at a business unit with compensation structured significantly differently than other units within the registrant; at business units that are significantly more profitable than others within the registrant; at business units where compensation expense is a significant percentage of the unit's revenues; and that vary significantly from the overall risk and reward structure of the registrant, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the registrant from the task extend over a significantly longer period of time. The purpose of this paragraph (b)(2) is to provide investors material information concerning how the registrant compensates and incentivizes its employees that may create risk. While the information to be disclosed pursuant to this paragraph (b)(2) will vary depending upon the nature of the registrant's business and the compensation approach, the following are examples of the issues that the registrant may need to address for the business units or employees discussed:

(i) The general design philosophy of the registrant's compensation policies for employees whose behavior would be most impacted by the incentives established by the policies, as such policies relate to or affect risk taking by employees on behalf of the registrant, and the manner of its implementation;

(ii) The registrant's risk assessment or incentive considerations, if any, in structuring compensation policies or in awarding and paying compensation;

(iii) How the registrant's compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw backs or imposing holding periods;

(iv) The registrant's policies regarding adjustments to its compensation policies to address changes in its risk profile;

(v) Material adjustments the company has made to its compensation policies or practices as a result of changes in risk profile; and

(vi) The extent to which the registrant monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.

Instruction 1 to Item 402(b). The Compensation Discussion and Analyses provided pursuant to paragraph (b) should focus on the material principles underlying the registrant's compensation policies and decisions and the most important factors relevant to analysis of those policies and decisions. The Compensation Discussion and Analyses shall reflect the individual circumstances of the registrant and shall avoid boilerplate language and repetition of the more detailed information set forth in the tables and narrative disclosures that follow.

Instruction 2 to Item 402(b). Registrants are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant. The standard to use when determining whether disclosure would cause competitive harm for the registrant is the same standard that would apply when a registrant requests confidential treatment of confidential trade secrets or confidential commercial or financial information pursuant to Securities Act Rule 406 (17 CFR 230.406) and Exchange Act Rule 24b-2 (17 CFR 240.24b-2), each of which incorporates the criteria for non-disclosure when relying upon Exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)) and Rule 80(b)(4) (17 CFR 200.80(b)(4)) thereunder. A registrant is not required to seek confidential treatment under the procedures in Securities Act Rule 406 and Exchange Act Rule 24b-2 if it determines that the disclosure would cause competitive harm in reliance on this instruction; however, in that case, the registrant must discuss how difficult it will be for the executive or how likely it will be for the registrant to achieve the undisclosed target levels or other factors.

Instruction 3 to Item 402(b). Disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G (17 CFR 244.100 through 244.102) and Item 10(e) (§ 229.10(e)); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements.

(c) * * *

(2) * * *

Instructions to Item 402(c)(2)(iii) and (iv).

* * * * *

2. Registrants need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a registrant's program under which stock, equity-based or other forms of non-cash compensation may be received by a named executive officer instead of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation instead of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Summary Compensation Table corresponding to that fiscal year (e.g., stock awards (column (e)); option awards (column (f)); all other compensation (column (i))), or, if made pursuant to a non-equity incentive plan and therefore not reportable in the Summary Compensation Table when granted, a footnote must be added to the salary or bonus column so disclosing and referring to the Grants of Plan-Based Awards Table (required by paragraph (d) of this Item) where the award is reported.

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FAS 123R (column (e));

(vi) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R (column (f));

Instruction 1 to Item 402(c)(2)(v) and (vi). For awards reported in columns (e) and (f), include a footnote disclosing all assumptions made in the valuation by reference to a discussion of those assumptions in the registrant's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

Instruction 2 to Item 402(c)(2)(v) and (vi). If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the registrant shall include, as awards required to be reported in column (f), the incremental

fair value, computed as of the repricing or modification date in accordance with FAS 123R, with respect to that repriced or modified award.

(ix) * * *
(G) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the

stock or option award in columns (e) or (f); and
* * * * *
(d) * * *
(1) * * *

GRANTS OF PLAN-BASED AWARDS

Name	Grant date	Estimated future payouts under non-equity incentive plan awards			Estimated future payouts under equity incentive plan awards			All other stock awards: number of shares of stock or units (#)	All other option awards: number of securities underlying options (#)	Exercise or base price of option awards (\$/Sh)
		Threshold (\$)	Target (\$)	Maximum (\$)	Threshold (#)	Target (#)	Maximum (#)			
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
PEO										
PFO										
A										
B										
C										

* * * * *

(k) * * *
(2) * * *

(iii) For awards of stock, the aggregate grant date fair value computed in accordance with FAS 123R (column (c));

(iv) For awards of stock options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R (column (d));

Instruction to Item 402(k)(2)(iii) and (iv). For each director, disclose by footnote to the appropriate column, the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end.

* * * * *

(vii) * * *

(I) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (c) or (d); and

* * * * *

Instruction to Item 402(k). In addition to the Instructions to paragraph (k)(2)(vii) of this Item, the following apply equally to paragraph (k) of this Item: Instructions 2 and 4 to paragraph (c) of this Item; Instructions to paragraphs (c)(2)(iii) and (iv) of this Item; Instructions to paragraphs (c)(2)(v) and (vi) of this Item; Instructions to paragraph (c)(2)(vii) of this Item; and Instructions to paragraph (c)(2)(viii) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (k)

of this Item that correspond to analogous disclosures provided for in paragraph (c) of this Item to which they refer.

* * * * *

(n) * * *
(2) * * *

Instructions to Item 402(n)(2)(iii) and (n)(2)(iv). 1. * * *

2. Smaller reporting companies need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a smaller reporting company's program under which stock, equity-based or other forms of non-cash compensation may be received by a named executive officer instead of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation instead of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Summary Compensation Table corresponding to that fiscal year (e.g., stock awards (column (e)); option awards (column (f)); all other compensation (column (i))), or, if made pursuant to a non-equity incentive plan and therefore not reportable in the Summary Compensation Table when granted, a footnote must be added to the salary or bonus column so disclosing and referring to the narrative disclosure to the Summary Compensation Table (required by paragraph (o) of this Item) where the material terms of the award are reported.

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FAS 123R (column (e));

(vi) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R (column (f));

Instruction 1 to Item 402(n)(2)(v) and (n)(2)(vi). For awards reported in columns (e) and (f), include a footnote disclosing all assumptions made in the valuation by reference to a discussion of those assumptions in the smaller reporting company's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

Instruction 2 to Item 402(n)(2)(v) and (n)(2)(vi). If at any time during the last completed fiscal year, the smaller reporting company has adjusted or amended the exercise price of options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the smaller reporting company shall include, as awards required to be reported in column (f), the incremental fair value, computed as of the repricing or modification date in accordance with FAS 123R, with respect to that repriced or modified award.

* * * * *

(ix) * * *

(G) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the

stock or option award in column (e) or (f); and

* * * * *
(r) * * *
(2) * * *

(iii) For awards of stock, the aggregate grant date fair value computed in accordance with FAS 123R (column (c));

(iv) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R (column (d));

* * * * *
(vii) * * *

(I) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (c) or (d); and

* * * * *

Instruction to Item 402(r). In addition to the Instruction to paragraph (r)(2)(vii) of this Item, the following apply equally to paragraph (r) of this Item: Instructions 2 and 4 to paragraph (n) of this Item; the Instructions to paragraphs (n)(2)(iii) and (iv) of this Item; the Instructions to paragraphs (n)(2)(v) and (vi) of this Item; the Instructions to paragraph (n)(2)(vii) of this Item; the Instruction to paragraph (n)(2)(viii) of this Item; the Instructions to paragraph (n)(2)(ix) of this Item; and paragraph (o)(7) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (r) of this Item that correspond to analogous disclosures provided for in paragraph (n) of this Item to which they refer.

* * * * *

4. Amend § 229.407 by revising paragraph (e)(3)(iii) and adding paragraph (h) before the Instructions to Item 407 to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(e) * * *
(3) * * *

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation (other than any role 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) during the registrant's last

completed fiscal year, identifying such consultants, stating whether such consultants were engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement. If any compensation consultants or their affiliates played a role in determining or recommending the amount or form of executive and director compensation and they also provided additional services to the registrant or its affiliates during the registrant's last completed fiscal year (including 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), then disclose the nature and the extent of all additional services provided, as well as the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services. Disclose whether the decision to engage the compensation consultant or their affiliates for these other services was made, subject to screening, or recommended, by management, and whether the compensation committee or the board approved such other services of the compensation consultants or their affiliates.

* * * * *

(h) Company leadership structure. Briefly describe the registrant's leadership structure, 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, and, in the case of a registrant that is an investment company, whether the chairman of the board is an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act. If one person serves as both principal executive officer and chairman of the board, or if the chairman of the board of a registrant that is an investment company is an "interested person" of the registrant, disclose whether the registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the registrant. This disclosure should indicate why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the registrant. In

addition, disclose the extent of the board's role in the registrant's risk management and the effect that this has on the company's leadership structure.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

5. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

7. Amend § 240.14a-2 by revising paragraph (b)(1) introductory text; and paragraph (b)(1)(ix) to read as follows:

§ 240.14a-2 Solicitations to which § 240.14a-3 to § 240.14a-15 apply.

* * * * *

(b) * * *
(1) Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. Provided, however, that for purposes of this paragraph (b)(1), the term "form of revocation" does not include an unmarked duplicate of a form of proxy that the registrant provides to security holders if the person who furnishes such unmarked duplicate requests that it be returned directly to the registrant, and provided further that the exemption set forth in this paragraph shall not apply to:

* * * * *

(ix) Any person, whether or not a security holder of the registrant who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation other than a benefit:

(A) Realized as a security holder of the registrant that would be shared pro rata by all other holders of the same class of securities; or

(B) Arising from the person's employment with the registrant; and

* * * * *

8. Amend § 240.14a-4 by revising paragraphs (d)(4) and (e) to read as follows:

§ 240.14a-4 Requirements as to proxy.

* * * * *

(d) * * *

(4) To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters referred to in paragraph (c) of this section. A person shall not be deemed to be a bona fide nominee and the person shall not be named as such unless the person has consented to being named in the proxy statement and to serve if elected. Provided, however, that nothing in this § 240.14a-4 shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors, from seeking authority to vote for nominees named in the registrant's or one or more other persons' proxy statements, so long as the soliciting party:

(i) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(ii) Represents that it will vote for all the nominees named in such other proxy statements, other than those nominees specified by the soliciting party;

(iii) Provides the security holder an opportunity to withhold authority with respect to any other nominee named in such other proxy statements by writing the name of that nominee on the form of proxy;

(iv) States on the form of proxy and in the proxy statement that there is no assurance that the nominees named in such other proxy statements will serve if elected with any of the soliciting party's nominees; and

(v) If seeking authority to vote for nominees named in one or more other non-registrant persons' proxy statements, represents in the proxy statement that:

(A) It has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a "group" as determined under section 13(d)(3) of the Exchange Act (15 U.S.C. 78m(d)(3)) and in Regulation 13D-G (§§ 240.13d-1 through 240.13d-102) with any such other non-registrant person or persons; and

(B) It has not acted and otherwise will not act as a "participant," as defined in Schedule 14A (§ 240.14a-101), in any solicitation by any such other non-registrant person or persons.

(e) The proxy statement or form of proxy shall provide, subject to objectively determinable reasonable specified conditions, that the shares represented by the proxy will be voted and that where the person solicited specifies by means of a ballot provided pursuant to paragraph (b) of this section a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made.

* * * * *

9. Amend § 240.14a-12 by revising paragraph (a)(1)(i) to read as follows:

§ 240.14a-12 Solicitation before furnishing a proxy statement.

(a) * * *

(1) * * *

(i) The identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A (§ 240.14a-101)) and a description of their direct or indirect interests, by security holdings or otherwise, or, if that information previously has been filed either as part of a proxy statement or other soliciting materials under a cover page in the form set forth in Schedule 14A (§ 240.14a-101) in connection with the solicitation, a prominent legend in clear, plain language advising security holders where they can obtain that filed information; and

* * * * *

10. Amend § 240.14a-101 by:

- a. Revising paragraph (b) of Item 7;
- b. In Item 22:

i. Redesignating paragraph (b)(3) as paragraph (b)(3)(ii);

ii. Adding new paragraph (b)(3)(i); and

iii. Redesignating *Instruction to paragraph (b)(3)* as *Instruction to paragraph (b)(3)(ii)*;

iv. Redesignating paragraph (b)(4), introductory text, and paragraph (b)(4)(i) through paragraph (b)(4)(iv) as new paragraph (b)(4)(i), introductory text, and paragraph (b)(4)(i)(A) through paragraph (b)(4)(i)(D);

v. Adding new paragraph (b)(4)(ii); and

vi. Revising paragraph (b)(11).

The revisions and additions read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 7. Directors and Executive Officers.

* * * * *

(b) The information required by Items 401, 404(a) and (b), 405 and 407(d)(4), (d)(5) and (h) of Regulation S-K (§ 229.401, § 229.404(a) and (b), § 229.405 and § 229.407(d)(4), (d)(5) and (h) of this chapter).

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) *Election of Directors.* * * *

(3)(i) For each director or nominee for election as director, briefly discuss the specific experience, qualifications, attributes, or skills that qualify that person to serve as a director for the Fund at the time that the disclosure is made, and as a member of any committee that the person serves on or is chosen to serve on (if known), in light of the Fund's business and structure. If material, this disclosure should cover more than the past five years, and include information about the person's risk assessment skills, particular areas of expertise, or other relevant qualifications.

* * * * *

(4) * * *

(ii) Unless disclosed in the table required by paragraph (b)(1) of this Item or in response to paragraph (b)(4)(i) of this Item, indicate any directorships held during the past five years by each director or nominee for election as director in any company with a class of securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78j) or subject to the requirements of section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) 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, and name the companies in which the directorships were held.

* * * * *

(11) Provide in tabular form, to the extent practicable, the information required by Items 401(f) and (g), 404(a), 405, and 407(h) of Regulation S-K (§§ 229.401(f) and (g), 229.404(a), 229.405, and 229.407(h) of this chapter).

Instruction to Item 22(b)(11). Information provided under paragraph (b)(8) of this Item 22 is deemed to satisfy the requirements of Item 404(a) of Regulation S-K for information about directors, nominees for election as directors, and Immediate Family Members of directors and nominees, and need not be provided under this paragraph (b)(11).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. Amend Form 8–K (referenced in § 249.308) by adding Item 5.07 under the caption “Information to Be Included in the Report” after the General Instructions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

Information To Be Included in the Report

* * * * *

Item 5.07 Submission of Matters to a Vote of Security Holders

If any matter was submitted to a vote of security holders, through the solicitation of proxies or otherwise, furnish the following information:

- (a) The date of the meeting and whether it was an annual or special meeting.
- (b) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.
- (c) A brief description of each other matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office.
- (d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (17 CFR 240.14a–101)) terminating any solicitation subject to Rule 14a–12(c), including the cost or anticipated cost to the registrant.

Instruction 1 to Item 5.07. The four business day period for reporting the event under this Item 5.07 shall begin to run on the day on which the meeting ended. If the matter voted upon at the meeting relates to a contested election of directors and the information called for by this Item is not definitively determined at the end of the meeting, the registrant shall disclose on Form 8–

K under this Item 5.07 the preliminary voting results within four business days after the preliminary voting results are determined; provided that in such an event, the registrant shall file an amended report on Form 8–K under this Item 5.07 within four business days after the final voting results are certified.

Instruction 2 to Item 5.07. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders’ meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

Instruction 3 to Item 5.07. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

Instruction 4 to Item 5.07. Paragraph (b) need not be answered if (i) proxies for the meeting were solicited pursuant to Regulation 14A under the Act, (ii) there was no solicitation in opposition to the management’s nominees as listed in the proxy statement, and (iii) all of such nominees were elected. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

Instruction 5 to Item 5.07. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

Instruction 6 to Item 5.07. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

Instruction 7 to Item 5.07. If the registrant has published a report containing all the information called for by this item, the item may be answered by a reference to the information contained in such report.

* * * * *

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

13. Amend Form 10–Q (referenced in § 249.308a) by removing Item 4 in Part II—Other Information, and redesignating Items 5 and 6 as Items 4 and 5.

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

14. Amend Form 10–K (referenced in § 249.310) by removing Item 4 in Part I, and redesignating Items 5 through 15 as Items 4 through 14.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

15. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

16. Form N–1A (referenced in §§ 239.15A and 274.11A), Item 17 is amended by:

- a. Revising the heading to paragraph (b);
- b. Revising paragraph (b)(1);
- c. Redesignating paragraph (b)(3), introductory text, and paragraph (b)(3)(i) through paragraph (b)(3)(iv) as paragraph (b)(3)(i), introductory text, and paragraph (b)(3)(i)(A) through paragraph (b)(3)(i)(D);
- d. Adding new paragraph (b)(3)(ii); and
- e. Adding paragraph (b)(10).

The revisions and additions read as follows:

Note: The text of Form N–1A does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–1A

* * * * *

Item 17. Management of the fund.

* * * * *

(b) Leadership Structure and Board of Directors.

(1) Briefly describe the Fund’s leadership structure, including the responsibilities of the board of directors with respect to the Fund’s management and whether the chairman of the board is an interested person of the Fund. If the chairman of the board is an interested person of the Fund, disclose whether the Fund has a lead independent director and what specific role the lead independent director plays in the leadership of the Fund. This disclosure should indicate why the Fund has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the Fund. In addition, disclose the extent of the board’s role in the Fund’s

risk management and the effect that this has on the Fund's leadership structure.

* * * * *

(3) * * *

(ii) Unless disclosed in the table required by paragraph (a)(1) of this Item 17 or in response to paragraph (b)(3)(i) of this Item 17, indicate any directorships held during the past five years by each director in any company with a class of securities registered pursuant to section 12 of the Securities Exchange Act (15 U.S.C. 78l) or subject to the requirements of section 15(d) of the Securities Exchange Act (15 U.S.C. 78o(d)) or any company registered as an investment company under the Investment Company Act, and name the companies in which the directorships were held.

* * * * *

(10) For each director, briefly discuss the specific experience, qualifications, attributes, or skills that qualify that person to serve as a director for the Fund at the time that the disclosure is made, and as a member of any committee that the person serves on, in light of the Fund's business and structure. If material, this disclosure should cover more than the past five years, and include information about the person's risk assessment skills, particular areas of expertise, or other relevant qualifications.

* * * * *

17. Form N-2 (referenced in §§ 239.14 and 274.11a-1), Item 18 is amended by:

- a. Redesignating paragraph 5, introductory text, and paragraph 5(a) through paragraph 5(d) as paragraph 5(b), introductory text, and paragraph 5(b)(1) through paragraph 5(b)(4);
- b. Adding new paragraph 5(a);
- c. Redesignating paragraph 6, introductory text, and paragraph 6(a) through paragraph 6(d) as paragraph 6(a), introductory text, and paragraph 6(a)(1) through paragraph 6(a)(4);
- d. Adding new paragraph 6(b); and
- e. Adding paragraph 17.

The additions read as follows:

Note: The text of Form N-2 does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N-2

* * * * *

Item 18. Management

* * * * *

5.(a) Briefly describe the Registrant's leadership structure, including whether the chairman of the board is an interested person of the Registrant, as defined in section 2(a)(19) of the 1940 Act (15 U.S.C. 80a-2(a)(19)). If the chairman of the board is an interested

person of the Registrant, disclose whether the Registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the Registrant. This disclosure should indicate why the Registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the Registrant. In addition, disclose the extent of the board's role in the Registrant's risk management and the effect that this has on the Registrant's leadership structure.

* * * * *

6. * * *

(b) Unless disclosed in the table required by paragraph 1 of this Item 18 or in response to paragraph 6(a) of this Item 18, indicate any directorships held during the past five years by each director in any company with a class of securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l) or subject to the requirements of section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or any company registered as an investment company under the 1940 Act, and name the companies in which the directorships were held.

* * * * *

17. For each director, briefly discuss the specific experience, qualifications, attributes, or skills that qualify that person to serve as a director for the Registrant at the time that the disclosure is made, and as a member of any committee that the person serves on, in light of the Registrant's business and structure. If material, this disclosure should cover more than the past five years, and include information about the person's risk assessment skills, particular areas of expertise, or other relevant qualifications.

* * * * *

18. Form N-3 (referenced in §§ 239.17a and 274.11b), Item 20 is amended by:

- a. Redesignating paragraph (d), introductory text, and paragraph (d)(i) through paragraph (d)(iv) as paragraph (d)(ii), introductory text, and paragraph (d)(ii)(A) through paragraph (d)(ii)(D);
- b. Adding new paragraph (d)(i);
- c. Redesignating paragraph (e), introductory text, and paragraph (e)(i) through paragraph (e)(iv) as paragraph (e)(i), introductory text, and paragraph (e)(i)(A) through paragraph (e)(i)(D);
- e. Adding new paragraph (e)(ii); and
- f. Adding paragraph (o).

The additions read as follows:

Note: The text of Form N-3 does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N-3

* * * * *

Item 20. Management

* * * * *

(d)(i) Briefly describe the Registrant's leadership structure, including whether the chairman of the board is an interested person of the Registrant, as defined in Section 2(a)(19) of the 1940 Act (15 U.S.C. 80a-2(a)(19)) and the rules thereunder. If the chairman of the board is an interested person of the Registrant, disclose whether the Registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the Registrant. This disclosure should indicate why the Registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the Registrant. In addition, disclose the extent of the board's role in the Registrant's risk management and the effect that this has on the Registrant's leadership structure.

(e) * * *

(ii) Unless disclosed in the table required by paragraph (a) of this Item 20 or in response to paragraph (e)(i) of this Item 20, indicate any directorships held during the past five years by each director in any company with a class of securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l) or subject to the requirements of section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or any company registered as an investment company under the 1940 Act, and name the companies in which the directorships were held.

* * * * *

(o) For each director, briefly discuss the specific experience, qualifications, attributes, or skills that qualify that person to serve as a director for the Registrant at the time that the disclosure is made, and as a member of any committee that the person serves on, in light of the Registrant's business and structure. If material, this disclosure should cover more than the past five years, and include information about the person's risk assessment skills, particular areas of expertise, or other relevant qualifications.

* * * * *

By the Commission.

Dated: July 10, 2009.

Elizabeth M. Murphy,
Secretary.

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