VENABLE LLP

SEC update

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SEC Adopts Executive Compensation and Corporate Governance Disclosure Enhancements

On December 17, 2009, the SEC adopted new executive compensation and corporate governance disclosure requirements that will become effective February 28, 2010. These final rules reflect final action taken on certain of the SEC's July proposals we wrote about last summer. Importantly, however, the SEC has deferred action on the proxy access proposal and proposed amendments to the proxy solicitation procedures.

Compensation Policies and Practices as Related to Risk Management

The new rule requires a discussion of compensation policies and practices for all employees, including non-executive officers, if these policies and practices create risks that are reasonably likely to have a material adverse effect on the company as a whole. This discussion is separate from the CDA. The SEC refers to the "reasonably likely" disclosure threshold under MD&A as a parallel disclosure threshold. Mitigating factors and controls can be considered in making the determination. The rule contains a non-exclusive list of policies and practices that may raise potential risks, as well as examples, if the company concludes disclosure is required, of matters the company may need to address regarding its compensation policies and practices. There is no requirement, however, to state affirmatively that the company has determined that the risks arising from its compensation policies and practices are not reasonably expected to have a material adverse effect where the company concludes that disclosure is not required under the new requirements.

Smaller reporting companies will not be required to provide this new disclosure.

Change to Valuation of Stock and Option Awards

The SEC adopted amendments to the Summary Compensation Table and Director Compensation Table to require disclosure of the aggregate grant date fair value of stock and option awards computed in accordance with FASB ASC Topics 718, rather than the dollar amount recognized for that year for financial statement purposes. The aggregate grant date fair value would be considered for the purpose of determining who is a named executive officer. For awards that are contingent on performance, a new Instruction has been added to make clear that the computation should be based upon the probable outcome of performance conditions to the vesting of the award, not the assumption of attaining the maximum. A footnote to the table to disclose the maximum value is required. The disclosure relates to awards granted during the year and so would not include awards granted after year end for services during the year, although the SEC noted such post-fiscal year-end grants may be the subject of discussion in the CDA.

The SEC retained the requirement to report the full grant date fair value of each equity award in the Grants of Plan-Based Award Table and Director Compensation Table.

The Summary Compensation Table must be recomputed for required prior years so that stock and option award columns present applicable full grant date fair value, and the total compensation column is correspondingly recomputed.

Expanded Disclosure of Director and Nominee Experience and Qualifications

The SEC has expanded certain disclosures required by Item 401 of Regulation S-K with respect to directors and nominees. Specifically, the Board of Directors must explain what particular experience, qualifications, attributes or skills led the Board to conclude that a director or nominee should serve as a director of the Company. The disclosure is required annually whether or not a director is up for election. However, no such discussion is required with respect to committee memberships.

In addition, Item 401 now requires disclosure of the public company directorships held by a director or nominee for the past five years as opposed to the current provisions that only require disclosure of the current public company directorships. The amendments to Item 401 also lengthen the time during which disclosure of legal proceedings involving directors, nominees and executive officers is required from five to ten years. The types of proceedings required to be disclosed has also been expanded. Finally, the SEC has adopted an amendment to Item 401(c) to require disclosure of whether, and if so, how, a nominating committee considers diversity in identifying nominees for director. If such diversity policy is in place, disclosure is required of how it

is implemented and its effectiveness evaluated. The amendment does not define diversity, noting some companies may consider race, gender or national origin while others may consider other factors such as skills, education, experience and other factors.

Board Leadership Structure and Board's Role in Risk Oversight

Under new amendments to Item 407, a company is required to disclose whether and why it has chosen to combine or separate the principal chief executive officer and board chairman positions and the reasons why the company believes that this board leadership structure is the most appropriate structure. Where a company combines the role of chairman and principal executive officer and a lead director chairs meetings of independent directors, a company must discuss whether and why the company has a lead director and what role he or she plays in the leadership of the company.

The final rules also require a company to describe the Board's role in the oversight of risks. Types of disclosure suggested include a discussion of how the Board administers its risk oversight functions, whether through reports to the entire Board or a committee, and how information is reported.

Compensation Consultants

The new amendment to Item 401 requires disclosure of the aggregate fees paid for services to a compensation consultant (and affiliates) if the Board has engaged a consultant for determining or recommending the amount or form of executive and director compensation and where the aggregate fees paid for any non-executive compensation consulting services provided by the consultant is in excess of $120,000.

Disclosure of whether management engaged or recommended engagement of the consultant and whether the Board (or compensation committee) approved the other non-executive compensation services is required. If the Board has not engaged a compensation consultant but a consultant provided executive compensation consulting services to the Company and also provided over $120,000 in other services, the aggregate fees for the executive compensation consulting services and the other services must be disclosed. (Exceptions apply where compensation consulting services are limited to non-discriminatory broad-based plans or involve only general information that has not been customized for the company, such as surveys).

Reporting of Voting Results on Form 8-K

A new Item 5.07 to Form 8-K requires companies to disclose the results of a shareholder vote within four (4) business days after the end of the meeting at which the vote was held. Accordingly, this reporting requirement is eliminated from Form 10-Q and Form 10-K. Where final voting results are not known by the filing deadlines, preliminary results should be reported and updated when results are final.

Staff Transition Guidance

The Staff of the SEC has provided the following guidance with regard to the implementation of the new rules:

- **Form 10-K and Proxy Statement:** If an issuer's fiscal year ends on or after December 20, 2009, its Form 10-K and proxy statement must be in compliance with the new proxy disclosure requirements if filed on or after February 28, 2010. If such an issuer is required to file a preliminary proxy statement and expects to file its definitive proxy statement on or after February 28, 2010, then the preliminary proxy statement must be in compliance with the new proxy disclosure requirements, even if filed before February 28, 2010. If such an issuer files its 2009 Form 10-K before February 28, 2010 and its proxy statement on or after February 28, 2010, the proxy statement must be in compliance with the new proxy disclosure requirements.
- **Voluntary Compliance:** An issuer may voluntarily comply with the new disclosure requirements; provided, however, that an issuer may voluntarily comply with the Summary Compensation Table and Director Compensation Table amendments only if it also complies with all other Regulation S-K amendments that apply to the form filed.
- **Registration Statements:** Any Securities Act or Exchange Act registration statements for a registrant with a 2009 fiscal year that ends before December 20, 2009, filed before the 2010 Form 10-K is required to be filed, would not be subject to the Regulation S-K amendments. For new registrants that first file a registration statement on or after December 20, 2009, compliance with the Regulation S-K amendments would be required for such registration statement in order for it to be declared effective on or after February 28, 2010.
- **Form 8-K:** Any shareholder meeting that takes place on or after February 28, 2010 is subject to the new Form 8-K Item 5.07 reporting requirement. If the meeting takes place before February 28, 2010, an Item 5.07 Form 8-K is not required.

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