



Preparing Your Executive Compensation Disclosure in 2009

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Agenda

- ▶ The Challenges of the 2009 Proxy Season
- ▶ Five Tips for Preparing Your Compensation Discussion and Analysis
- ▶ Addressing the Current Economic Crisis
- ▶ Addressing the New Executive Compensation Standards
- ▶ The Looming Impact of “Say on Pay”
- ▶ Questions

The Challenges of the 2009 Proxy Season

- ▶ Transition to new executive compensation disclosure rules now complete
 - Compensation Discussion and Analysis
 - Two years of experience drafting
 - Summary Compensation Table
 - Three years of information
- ▶ Distressed economic environment
 - Impact on 2008 compensation decisions
 - Changes to 2009 compensation programs
- ▶ New executive compensation “best practices”
 - TARP I (and II) (and even more?)
- ▶ A skeptical public

Preparing Your Compensation Discussion and Analysis

- ▶ SEC Staff has shifted executive compensation comments to triennial Exchange Act review
- ▶ Staff's reaction to 2008 primarily focused on three areas:
 - The need for more analysis
 - Disclosure of performance metrics and target levels
 - Disclosure of competitive positioning
- ▶ Don't forget the "plain English" principles

Preparing Your Compensation Discussion and Analysis

- ▶ No. 1: You must explain both how and why you have implemented specific compensation policies and made the pay decisions reflected in the compensation table (the “analysis” in the CD&A)
 - Key themes:
 - Program objectives
 - Desired behaviors
 - Program elements
 - How and why each compensation element was chosen
 - How the amount of each compensation element was determined
 - How the various compensation elements fit into your overall business and compensation objectives

Preparing Your Compensation Discussion and Analysis

- ▶ No. 2: You must address your incentive compensation arrangements with specificity
 - Start by determining if disclosure of performance metrics and targets levels is material
 - If material, must determine if disclosure of target levels would result in “competitive harm”
 - Corporate vs. individual objectives
 - Financial vs. operational objectives
 - Completed vs. current periods
 - Even if withheld, must explain “degree of difficulty” in achieving undisclosed targets
 - Even if withheld, must explain existence and use of discretion

Preparing Your Compensation Discussion and Analysis

- ▶ No. 3: If you “benchmark” pay, you must identify and justify comparator companies
 - Staff position: “benchmarking” entails “using compensation data about other companies as a reference point on which . . . to base, justify or provide a framework for a compensation decision.”
 - Must analyze whether you “benchmark” or use peer group as reference point or “market check”
 - Emerging “best practice” is to provide criteria upon which selection was based

Preparing Your Compensation Discussion and Analysis

- ▶ No. 4: You should clearly explain roles of executive officers and compensation consultants in determining or recommending executive compensation
 - Key is making clear who makes decisions and who has the ability to influence or affect the process

Preparing Your Compensation Discussion and Analysis

- ▶ No. 5: Your post-employment disclosure should focus on two specific topics:
 - How severance and change-in-control arrangements were structured and specific payout amounts or formula were determined
 - Relationship between these arrangements and overall compensation objectives
 - How decisions about this element affect decisions made with regard to other compensation elements

Addressing the Current Economic Crisis

- ▶ Annual incentive awards
 - Missing performance objectives
 - Waiving objectives
 - Paying discretionary bonuses
 - Selecting current year metrics and target levels

- ▶ Long-term equity award
 - Accelerating annual grants
 - Special retention awards
 - Dilution and burn “rate” concerns
 - Repricings and exchanges

- ▶ Depreciated equity awards values
 - Reporting in the Summary Compensation Table
 - Stock holding requirements

Addressing the New Executive Compensation Standards

- ▶ The Emergency Economic Stabilization Act
 - The impact of TARP I
 - Prohibition of incentive compensation that encourages excessive risk
 - Compensation recovery policies
 - “Golden parachute” restrictions
 - \$500,000 deduction limit
 - The shadow of TARP I.5
 - Prohibition on bonuses and incentive compensation to 25 most highly-compensated employees;
 - Prohibition on compensation plans that encourage manipulation of earnings to enhance pay
 - Divestiture of private aircraft or leases

Addressing the New Executive Compensation Standards

- ▶ The Administration's new executive compensation standards
 - The \$500,000 cap and use of restricted stock
- ▶ The executive compensation standards of the Stimulus bill
- ▶ Further reform on the way?

The Looming Impact of Say on Pay

- ▶ Likely to be a requirement in 2010
- ▶ Does your executive compensation program reflect “good stewardship”?
 - Is there an appropriate pay-for-performance alignment?
 - Link between pay and performance
 - Fixed versus variable pay mix
 - Use of appropriate performance metrics
 - Cost of equity-based compensation
 - Do arrangements reward “pay for failure”?
 - Indefinite employment agreements
 - Excessive severance packages
 - Guaranteed compensation

The Looming Impact of Say on Pay

- ▶ Does your executive compensation program reflect “good stewardship”?
 - Is there an independent and effective compensation committee?
 - Does committee include directors with the appropriate skills, knowledge, and experience, and that uses a sound decision-making process
 - Is director pay appropriate, or does it risk compromising their independence and ability to make sound judgments in evaluating executive pay and performance?
 - Is executive compensation disclosure clear and comprehensive?

Questions

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For more information

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