

how decisions with respect to awards granted for the year relate to other compensation decisions in the context of total compensation for the year. For awards subject to performance conditions, tabular disclosure will be based upon the probable outcome of the performance conditions as of the grant date. A special instruction for awards subject to performance conditions that requires footnote disclosure of the grant date fair value, assuming that the highest level of performance conditions will be achieved, will provide investors with further information as to the maximum potential payout of a particular grant. 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.

Under the 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 former rules. To the extent that this change better aligns the identification of named executive officers with compensation decisions for the year, it should make it easier for companies to track executive compensation for reporting purposes.

Although the amendments are not intended to steer behavior, changes in the way that executive compensation is represented in the Summary Compensation Table and other new, compensation-related disclosures may indirectly lead boards to reconsider pay structure, potentially changing the amount of pay in some cases.

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

3. Benefits Related to Enhanced Director and Nominee Disclosure

The amendments to Item 401 of Regulation S-K, Schedule 14A and Forms N-1A, N-2 and N-3 will 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. Disclosure of board's or other proponents' rationale for their nominees' membership on the board may benefit investors by enabling them to better assess whether and why a particular nominee is an appropriate choice for a particular company. Investors would be able to make more informed voting decisions in electing directors. Investors would also 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.

Required disclosure of whether, and if so, how, a nominating committee (or the board) considers diversity in connection with identifying and evaluating persons for consideration as nominees for a position on the board of directors may also benefit investors. Board diversity policy is an important factor in the voting decisions of some investors.¹⁹³ Such investors will directly benefit from diversity policy disclosure to the extent the policy and the manner in which it is implemented is not otherwise clear from observing past and current board selections. Although the amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer

existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision-making process by encouraging consideration of a broader range of views.

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.

The expanded list of legal proceedings involving directors, nominees and executive officers that must be disclosed, as well as the expanded disclosure of these legal proceedings 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.

4. Benefits Related to New Disclosure About Board Leadership Structure and the Board's Role in Risk Oversight

Investors may benefit from new disclosure about board 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 a registered management investment 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. Although the amendments are not intended to drive behavior, there may be possible benefits if a company re-evaluates its leadership structure or the

¹⁹³ See, e.g., letters from Calvert, Trillium, Boston Common Asset Management, CII, Florida State Board of Administration, and Sisters of Charity BVM. See also letter from Lissa Lamkin Broome and Thomas Lee Hazen.

board's role in risk oversight and decides to make changes as a result.

Disclosures of the board's role in risk oversight may also benefit investors. Expanded disclosure of the board's role in risk oversight may enable investors to better evaluate whether the board is exercising appropriate oversight of risk. 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.

5. 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 the value of non-executive compensation services is over \$120,000 for the last fiscal year will allow 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 significant additional revenue streams, they may face incentives to cater, to some degree, to management preferences in recommending executive compensation packages.¹⁹⁴ The House Committee on Oversight and Government Reform's Study on Executive Pay documented that 113 of 250 of the largest publicly traded companies hired compensation consultants that earned fees from other services, and that this practice was positively correlated with higher CEO pay.¹⁹⁵ However, Cadman, Carter and Hillgeist (2009) studied a larger set of companies, but did not find statistically significant relations between certain factors thought to indicate conflicts of

interest and the level of CEO pay.¹⁹⁶ To the degree that these potential conflicts may be more transparent under the amendments, investors benefit through their ability to better monitor the process of setting executive pay. This potential conflict is substantially reduced when the compensation committee hires a compensation consultant that does not provide other services to the company. Benefits of the amendment may be limited to the degree that compensation consultants have other potential conflicts of interest not specifically enumerated in the amendments.

Disclosures about compensation consultants may have effects on competition in the compensation consulting industry, introducing potential relative costs and benefits to both multi-service consulting firms and consulting firms exclusively specializing in executive compensation. Specific potential effects on competition are discussed in Section V below. Broadly, the disclosures may affect the level of competition in the compensation consulting industry. Any increase in competition could reduce prices of consulting services, benefiting client companies. Changes in competition may also affect the content of advice provided to companies. As discussed more fully in Section C below, it is possible that, if the level of competition in the industry decreases, compensation consultants may be less inclined to make recommendations favorable to management. This could potentially benefit shareholders.

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

The amendments to Form 8-K will 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.

C. Costs

The amendments will impose new disclosure requirements on companies. Some of the disclosures are designed to build upon existing requirements to elicit a more detailed discussion of director and nominee qualifications, legal proceedings, and the interests of compensation consultants. To the degree that the amendments require

collecting information currently available, costs related to information collection will be limited.

1. Costs Related to the New Narrative Disclosure of the Company's Compensation Policies and Practices as They Relate to the Company's Risk Management

We believe that there may be information gathering costs associated with the new disclosure of the company's compensation policies and practices as they relate to the company's risk management, even though the information required may be readily available, because this information may need to be reported up from business units and analyzed. Some commenters noted that the amendments would require companies to incur additional costs, such as costs related to conducting a risk analysis of compensation policies for all employees.¹⁹⁷ This could also include the cost of hiring additional advisors to assist in the analysis, as well as additional costs in drafting the new disclosure. Using our PRA burden estimates, we estimate the aggregate annual cost of the amendments to be approximately \$12,215,326.¹⁹⁸ As previously discussed, the proposed amendments would have required discussion and analysis of compensation policies if risks arising from those compensation policies "may have a material effect on the company." We have revised the amendment to require a company to discuss its compensation policies and practices for employees if such policies and practices are "reasonably likely to have a material adverse effect" on the company. By focusing on risks that are "reasonably likely to have a material adverse effect" on the company, we believe the amendments will result in a smaller number of companies making this risk disclosure. This change from the "may have a material effect" disclosure should mitigate some of the costs and burdens associated with the amendments.

Companies may also face costs related to the disclosure of the company's compensation policies to the extent that

¹⁹⁴ See letter from Mary Ellen Carter.

¹⁹⁵ 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 "Waxman Report"). The Waxman 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).

¹⁹⁶ Cadman, Carter and Hillgeist, 2009, The Incentives of Compensation Consultants and CEO Pay, Journal of Accounting and Economics (forthcoming) and provided with the letter submitted by Mary Ellen Carter.

¹⁹⁷ See, e.g., letters from Business Roundtable and Robert Ahrenholz.

¹⁹⁸ This estimate is based on the estimated total burden hours of the amendments associated with the schedules and forms that would include the new disclosure, 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.

it provides management with incentives to adopt risk-averse strategies that result in the abandonment of risky projects whose returns otherwise would compensate for the amount of additional risk. This could discourage beneficial risk-taking behavior.

2. Costs Related to Revisions to Summary Compensation Table Disclosure

Investors may face some costs related to revisions in executive compensation reporting. Under the 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 previously required measure of stock awards and option awards to aggregate grant date fair value reporting. We expect that any such additional costs will be limited by the fact that grant date fair value information required under the amendments is also collected to comply with financial reporting purposes. Because companies other than smaller reporting companies previously were required to report the grant date fair value of individual equity awards in the Grants of Plan-Based Awards Table, we expect that they will incur only negligible costs in switching to the amended Summary Compensation Table and Director Compensation Table disclosure requirements.

Moreover, grant date fair value guidelines under FASB ASC Topic 718 call for management to exercise judgment in valuing stock options. For financial statement recognition purposes, the 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. To the extent that an investor believes that Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards should be measured based on financial statement recognition principles to take into account potential adjustments, the amendments may entail a cost. The special instruction for awards subject to

performance conditions mitigates this potential cost to some extent by providing that such awards are reported in the Summary Compensation Table and Director Compensation Table based upon the probable outcome of the performance condition(s) as of the grant date. This instruction also requires footnote disclosure of the maximum value assuming the highest level of performance conditions is probable. We believe that any incremental cost associated with providing this footnote disclosure would be minimal.

3. Costs Related to Enhanced Director and Nominee Disclosure

Companies may face some information gathering and reporting costs related to enhanced director and nominee disclosure. One commenter noted that companies may face costs related to the amendments to the extent that companies will need to update their director and officer questionnaires to obtain more detailed information, and will need to spend additional time analyzing the information as well as preparing the disclosures.¹⁹⁹ 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 through other sources, however, we expect the potential costs of the additional disclosure will be limited. Using our PRA burden estimates, we estimate the aggregate annual cost to operating companies to be approximately \$20,790,000.²⁰⁰ With respect to our PRA burden estimates for registered management investment companies, we estimate the aggregate annual cost to be approximately \$6,979,700.²⁰¹

In addition, although the amendments are not intended to steer behavior, a company may adopt a diversity policy in connection with preparing its

disclosure regarding whether and, if so, how diversity is considered in connection with identifying and evaluating persons for consideration as nominees for a position on the board of directors. If this policy turns out to be difficult to implement, companies could incur economic costs as a result in the form of recruiting costs or otherwise.

4. Costs Related to New Disclosure About Board Leadership Structure and the Board's Role in Risk Oversight

Companies may face some costs related to new disclosure about board leadership structure. Disclosure of the board's role in risk oversight 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 \$11,970,000.²⁰² With respect to our PRA burden estimates for registered management investment companies, we estimate the aggregate annual cost to be approximately \$6,367,200.²⁰³ 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 risk oversight and decides to make changes as a result.

5. Costs Related to New Disclosure Regarding Compensation Consultants

Companies may face some costs related to new disclosure about fees for compensation consulting and for other services provided by compensation consultants. Using our PRA burden estimates, we estimate the aggregate annual cost to be approximately \$5,985,000.²⁰⁴ In addition, the costs to a company in contracting with compensation consultants could be increased under these amendments, and compensation consultants also may alter

¹⁹⁹ See letter from Business Roundtable.

²⁰⁰ This estimate is based on the estimated total burden hours of the amendments associated with the schedules and forms that would include the new disclosures, 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.

²⁰¹ This estimate is based on the estimated total burden hours of 22,742, 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.

²⁰² This estimate is based on the estimated total burden hours of the amendments associated with the schedules and forms that would include the new disclosures, an assumed 75%/25% split of the burden hours, and an hourly rate of \$200 for internal staff time and \$400 for external professionals.

²⁰³ 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.

²⁰⁴ This estimate is based on the estimated total burden hours related to the amendments in connection to Schedules 14A and 14C, 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 mix of services. For instance, costs may increase if companies decide to contract with multiple compensation consultants for services that had previously been provided by only one compensation consultant. Several commenters asserted that the amendments could discourage companies from using a single compensation consulting firm to provide executive compensation services and services other than executive compensation consulting.²⁰⁵ Possible increased costs might include the costs associated with the time each new compensation consultant will need to learn about the company and the decline in any economies of scale the compensation consultant may have factored into fees charged to the company. To the extent that compensation consulting firms exit compensation consulting to eliminate potential conflicts and mandatory fee disclosure, fewer experienced consultants may be available for hire. To the extent that the remaining consultants cannot scale operations sufficiently quickly to meet demand, then this could result in less qualified opinions from remaining consultants, with potential costs to shareholders. In the long run, however, industry capacity may increase, which would mitigate this effect.

Disclosures on compensation consultants may have effects on competition in the compensation consulting industry, introducing potential relative costs and benefits to multi-service consulting firms and consulting firms specializing in executive compensation. Specific potential effects on competition are discussed in the Section V below. As discussed in more detail in Section V, competition could conceivably decrease if some multi-service firms exit the executive compensation consulting industry. Any decrease in competition could increase prices of consulting services, potentially creating higher costs for client companies, while benefiting the compensation consulting industry as a whole. However, competition could increase, for example, to the extent that the amendments make smaller boutique firms more attractive to companies. If the amendments increase competitiveness of the industry, compensation consultants may charge lower fees. They may also, however, feel pressure to generate recommendations favorable to management in order to increase the likelihood of being retained

²⁰⁵ See, e.g., letters from Mercer, Towers Perrin and Watson Wyatt.

in the future. Any decline in the objectivity of advice from compensation consultants would potentially be costly to shareholders.

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

Shareholders who are used to receiving this information in a Form 10-Q filing may incur costs of adapting their research practices to find this information in Form 8-K filings, which may involve searching through a number of filings. This adjustment may involve costs, 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 that report preliminary voting results may face some additional information gathering and reporting costs because they would need to file a Form 8-K to disclose preliminary voting results and to file an amended Form 8-K to disclose final vote results. Using our PRA burden estimates, we estimate the aggregate annual cost to be approximately \$2,207,750.²⁰⁶

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 requires us,²⁰⁷ 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,²⁰⁸ Section 3(f) of the Exchange Act,²⁰⁹ and Section 2(c) of the Investment Company Act require us,²¹⁰ when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public

²⁰⁶ This estimate is based on the estimated 8,831 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.

²⁰⁷ 15 U.S.C. 78w(a)(2).

²⁰⁸ 15 U.S.C. 77b(b).

²⁰⁹ 15 U.S.C. 78c(f).

²¹⁰ 15 U.S.C. 80a-2(c).

interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The amendments that we are adopting are designed to enhance the information companies provide to investors with regard to the following:

- *Risk:* By requiring disclosure about the board's role in oversight of risk and, to the extent that risks arising from a company's compensation policies and practices are reasonably likely to have a material adverse effect on the company, disclosure about such policies and practices as they relate to risk management;

- *Governance and Director Qualifications:* By requiring expanded disclosure of the background and qualifications of directors and director nominees and new disclosure about a company's board leadership structure, and accelerating the reporting of information regarding shareholder voting results; and

- *Compensation:* By revising the reporting of stock and option awards received by named executive officers, and requiring disclosure of potential conflicts of interest of compensation consultants in certain circumstances.

The amendments are designed to enable investors to make better informed voting and investment decisions. For example, several commenters noted that investors will be able to use the new risk disclosures to make more informed investment decisions.²¹¹ Improved investment decisions could lead to increased efficiency and competitiveness of the U.S. capital markets. Investors could allocate capital across companies, toward companies where the risk incentives are more aligned with an investor's risk preference. In this regard, the amendments may affect the relative ability of some companies to raise capital depending on how investors react to the disclosures they provide in response to the amendments. In addition, the amendments may improve the efficiency of information gathering by investors to the extent that disclosure provided in response to the amendments is easier to access through filings made with the Commission.

The amendments may affect competition, such as encouraging competition among companies to demonstrate superior risk oversight and improved incentive structures for management and the employees of the company. Several commenters indicated

²¹¹ See, e.g., letters from CalSTRS, CII, the General Board of Pension and Health Benefits of the United Methodist Church, and Hermes.

that the amendments requiring fee and other disclosures related to compensation consultants might have some effects on competition among firms in this industry. Some of these commenters believed the amendments could negatively impact competition among large multi-service compensation consulting firms.²¹² Companies will face new disclosure requirements with respect to their use of compensation consulting firms in certain circumstances, but not with respect to compensation consulting firms who provide only executive compensation consulting services. To the extent that companies receiving compensation for consulting services are reluctant to disclose the fees paid for advice on executive compensation, this may put some larger multi-service compensation consulting firms at a competitive disadvantage relative to smaller firms who focus on executive compensation consulting. In such cases, multi-service firms may be excluded from competing for compensation consulting services at companies where they already provide other non-executive compensation consulting services. However, this potential anti-competitive impact may be diminished to the extent that the potential opportunities lost to some multi-service firms would otherwise be available to other multi-service firms who do not provide non-executive compensation consulting services to the company. To the extent that this occurs, competition between multi-service firms could increase. In addition, the amendments provide a limited exception to the disclosure requirements for fees paid to other compensation consultants retained by the company if the board has retained its own consultant that reports to the board. This exception limits disclosure to circumstances that are more likely to present conflicts of interest, which should also address concerns about the competitive disadvantage faced by multi-service firms.

In some instances, the amendments may result in disclosure of pricing information that certain compensation consulting firms would prefer to remain private, which could affect some consulting firms' marginal cost of providing executive compensation and non-executive compensation services. Competition in the compensation consulting industry also may be affected if, for example, some compensation consulting firms choose not to provide executive compensation consulting services to avoid having to disclose fees

on other, more critical aspects of their businesses. If multi-service compensation consulting firms currently use cross-selling synergies to subsidize their compensation consulting services for the purpose of soliciting other business, then their departure may result in an increase in fees, which may better approximate the stand-alone value of the services and promote competition from new market participants who could not otherwise subsidize compensation consulting services.

Conversely, the amendments may increase competition in the executive compensation consulting industry. If certain larger compensation consulting firms currently enjoy an advantage related to their ability to cross sell services, for example, where management is more likely to recommend to the board a compensation consultant with whom management has prior experience, the marginal cost of providing services may be lower, currently, than it is for smaller compensation consulting firms. In this circumstance, any additional marginal costs related to disclosure by multi-service firms may have the effect of making marginal costs faced by multi-service firms and boutique firms more equal, allowing boutique firms to compete more effectively. This may encourage entry into compensation consulting services by more firms, or at least make the threat of their entry more credible. If the number of multi-service compensation consulting firms is limited, relative to potential entrants, the level of effective competition in the industry may increase. The industry may also become more competitive for other reasons. For example, more public availability of aggregate fee disclosure, in general, may provide an informational advantage to companies as they negotiate with potential compensation consulting firms, effectively lowering the price of consulting services. Additionally, pricing disclosed, either publicly or in private negotiation, may more accurately reflect each particular service provided. If multi-service compensation consulting firms currently use cross-selling synergies to subsidize their compensation consulting services for the purpose of soliciting other business, then an increase in fees resulting from their departure may better approximate the stand-alone value of the services and promote competition from new market participants who could not otherwise subsidize compensation consulting services.

The size of the market for compensation consulting services is

large; depending on the assumptions, we estimate that the total fee revenues of the compensation consulting market could be in the range of \$480 million to \$3.7 billion. The lower approximate bound is calculated using the \$200,000 average per firm fee for executive compensation advice paid by the 250 large companies studied in the Waxman Report, and an estimated 2,190 companies from the Russell 3000 index that report using an executive compensation consultant.²¹³ The lower estimate could be higher to the extent that non-Russell 3000 companies also hire compensation consultants, or lower to the extent that smaller companies pay less than \$200,000 for compensation consulting advice. The upper approximate bound is calculated from the periodic reports of the four largest multi-service compensation consulting firms: Towers Perrin, Mercer, Hewitt, and Watson Wyatt. These four firms reported 2008 fiscal year-end total revenues of \$9.9 billion, of which \$2.16 billion was disclosed as generated from compensation consulting activities, but which could include non-executive compensation consulting services.²¹⁴ Considering that these four firms represent approximately 58% of the compensation consulting market,²¹⁵ this indicates the total compensation consulting market could be \$3.7 billion.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act.²¹⁶ This FRFA relates to amendments to Regulation S-K, Schedule 14A and Forms 8-K, 10-Q, and 10-K under the Exchange Act, and Forms N-1A, N-2, and N-3, under the Investment Company Act. The amendments will require the following:

- To the extent that risks arising from a company's compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company, discussion of the company's compensation policies or practices as they relate to risk

²¹³ See letter from Mary Ellen Carter.

²¹⁴ Hewitt reported 33% of total revenues (\$990 million) from Talent and Organizational Consulting; Mercer reported \$550 million in consulting revenue from management and rewarding of employees, the design of remuneration programs, and improvement of human resource effectiveness; Watson Wyatt reported 10% of total revenues (\$167 million) from its Human Capital Group, which included providing advice on compensation plans and other long-term incentive programs; Towers Perrin reported 26.6% of total revenues (\$450 million) from Talent and Rewards Consulting.

²¹⁵ See letter from Mary Ellen Carter.

²¹⁶ 5 U.S.C. 601.

²¹² See, e.g., letters from Hewitt, Mercer and Towers Perrin.

management and risk-taking incentives that can affect the company's risk and management of that risk;

- Reporting of the aggregate grant date fair value of stock awards and option awards granted in the fiscal year in the Summary Compensation Table and Director Compensation Table to be computed in accordance with FASB ASC Topic 718, with a special instruction for awards subject to performance conditions;
- New disclosure of the qualifications of directors and nominees for director, and the reasons why that person should serve as a director of the company at the time at which the relevant filing is made with the Commission; the same information would be required with respect to directors nominated by others;
- Additional disclosure of any directorships held by each director and nominee at any time during the past five years at any public company or registered investment company;
- Additional disclosure of other legal actions involving a company's executive officers, directors, and nominees for director, and lengthening the time during which such disclosure is required from five to ten years;
- New disclosure about a company's board leadership structure and the board's role in the oversight of risk;
- New disclosure regarding the consideration of diversity in the process by which candidates for director are considered for nomination by a company's nominating committee;
- New disclosure about the fees paid to compensation consultants and their affiliates under certain circumstances; and
- Reporting of the vote results from a meeting of shareholders on Form 8-K generally within four business days of the meeting.

An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Need for the Amendments

As described both in this release and the Proposing Release, during the past few years, investors 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. The amendments are intended to improve the disclosure shareholders of public companies receive regarding compensation and corporate governance, and facilitate communications relating to voting

decisions. We believe the amendments will enhance the transparency of a company's compensation policies and practices, and the impact of such policies and practices on risk taking; director and nominee qualifications; board leadership structure; the potential conflicts of compensation consultants; and will provide investors with clearer and more meaningful executive compensation disclosure.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commenters addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, some commenters believed that compliance with the proposed amendments would impose a significant burden on smaller companies.²¹⁷ Other commenters believed that smaller companies should be exempted from all or parts of the amendments.²¹⁸ Although we believe that a complete exemption from the amendments would not be appropriate because this would interfere with achieving the goal of enhancing the information provided to all investors, we have made revisions to the amendments that we believe will significantly reduce the impact of the amendments on reporting companies, including smaller companies. In addition, we did not propose, and we are not at this time adopting, a requirement that smaller companies discuss their compensation policies and practices for employees if such policies and practices are reasonably likely to have a material adverse effect.

C. Small Entities Subject to the Final Amendments

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."²¹⁹ 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 157²²⁰ and Exchange Act Rule 0-10(a)²²¹ 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 amendments to Regulation S-K, Schedule 14A and Forms 8-K, 10-Q, and 10-K will affect any small entity that is subject to Exchange Act periodic and proxy reporting requirements. In addition, the amendments also will affect small entities that file a registration statement under the Securities Act.

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.²²² We believe that the amendments will affect small entities that are investment companies. We estimate that there are approximately 162 investment companies that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The 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 will require small entities that are operating companies to provide:

- Reporting stock awards and option awards in the Summary Compensation Table and Director Compensation Table based on aggregate grant date fair value;
- Disclosure of the qualifications of directors and nominees for director, and a brief discussion of the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the company at the time the disclosure is made, in light of the company's business and structure;
- Additional disclosure concerning certain legal proceedings involving a company's directors, nominees for director and executive officers;
- Disclosure regarding the consideration of diversity in the process

²¹⁷ See letters from Keith Bishop and Theragenics.

²¹⁸ See, e.g., letters from the Committee on Securities Law of the Business Law Section of the Maryland State Bar Association and Theragenics.

²¹⁹ 5 U.S.C. 601(6).

²²⁰ 17 CFR 230.157.

²²¹ 17 CFR 240.0-10(a).

²²² 17 CFR 270.0-10(a).

by which candidates for director are considered for nomination by a company's nominating committee;

- Additional disclosure, in certain instances, about compensation consultants retained by the board of directors; and

- Disclosure of the results of shareholder votes on Form 8-K generally within four business days after the end of the meeting.

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

- Disclosure of the qualifications of directors and nominees for director, and the reasons why that person should serve as a director of the company at the time at which the relevant filing is made with the Commission;
- Disclosure of any directorships held by each director and nominee at any time during the past five years at public companies or registered management investment companies; and
- Disclosure about a fund's board leadership structure and the board's role in the oversight of risk.

E. Agency Action To Minimize Effect on Small Entities

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 disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables 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.

In connection with the amendments, we considered alternatives, including establishing different compliance or reporting requirements that take into account the resources available to small entities, clarifying or simplifying compliance and reporting requirements under the amendments for small entities, using design rather than performance standards, and exempting small entities from all or part of the amendments.

Under our current rules, small entities are subject to some different compliance or reporting requirements under Regulation S-K, and the amendments do not alter 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. The amendments to the Summary Compensation Table and Director Compensation Table are unlikely to have a significant impact on small entities because their principal effect is to disclose stock and option awards based on grant date fair value, which small entities need to compute for financial reporting purposes. We did not propose, and we are not adopting, a requirement that smaller companies discuss their compensation policies and practices for employees if such policies and practices are reasonably likely to have a material adverse effect. In addition, the amendments to the Grants of Plan-Based Awards Table do not apply to small entities.

We considered, but did not establish additional different compliance requirements for small entities. We believe that investors in companies that are small entities may want and would benefit from the disclosures elicited by the amendments regarding director and nominee qualifications, as well as board leadership and risk oversight. For example, many commenters noted that our amendments to enhance director and nominee disclosure would provide investors with additional information that would allow them to make better informed investment and voting decisions.²²³ Different compliance requirements or an exemption for small entities would interfere with achieving the goal of enhancing the information provided to all investors. We believe that uniform and comparable disclosures across all companies will help investors and the markets.

We also considered, but did not establish, different disclosure thresholds for small entities under our amendments regarding compensation consultant disclosure. Although the disclosure exclusion provided in the amendment where the fees for non-executive compensation consulting services do not exceed \$120,000 for a company's fiscal year will reduce the

compliance burdens for all companies, we believe this change will likely be more meaningful to companies that are small entities because these companies likely expend a lesser amount of their revenues on compensation consulting services.

The amendments clarify, consolidate and simplify the reporting requirements for all public companies including small entities. The amendments 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 a mix of design and performance standards in connection with the amendments. Based on our past experience, we believe the amendments will be more useful to investors if there are specific disclosure requirements, however, some of the new requirements provide companies flexibility in determining what information to disclose. The disclosures are intended to result in more comprehensive and clearer disclosure.

VII. Statutory Authority and Text of the Amendments

The amendments contained in this release are being adopted 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

17 CFR Parts 229, 239, 240, 249 and 274 Reporting and recordkeeping requirements, Securities.

Text of the Amendments

■ For the reasons set out in the preamble, the Commission amends 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.

* * * * *

²²³ See, e.g., letters from Board of Directors Network, Forum of Executive Women, Integrated Governance Solutions, and Norges Bank.

- 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, revising the phrase “during the past five years” to read “during the past ten years”;
 - d. Removing the word “or” following the semi-colon at the end of paragraph (f)(4);
 - e. Removing the period at the end of paragraphs (f)(5) and (f)(6) and adding in their place a semi-colon;
 - f. Adding paragraphs (f)(7) and (f)(8) before the Instructions to paragraph (f);
 - g. In the Instruction 1 to paragraph (f) revise the phrase “For purposes of computing the five year period” to read “For purposes of computing the ten-year period”; and
 - h. Adding Instruction 5 to the Instructions to paragraph (f).

The revisions and additions 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 led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant’s business and structure. If material, this disclosure should cover more than the past five years, including information about the person’s 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 or her professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

* * * * *

(f) * * *

(7) Such person was the subject of, or a party to, any Federal or State judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of:

- (i) Any Federal or State securities or commodities law or regulation; or
 - (ii) Any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or
 - (iii) Any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity; or
- (8) Such person was the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26))), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act (7 U.S.C. 1(a)(29))), or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member.

Instructions to Paragraph (f) of Item 401:

- * * * * *
5. This paragraph (f)(7) shall not apply to any settlement of a civil proceeding among private litigants.
- * * * * *
- 3. Amend § 229.402 by:
 - a. Revising paragraphs (c)(2)(v) and (c)(2)(vi);
 - b. Removing the Instruction to Item (c)(2)(v) and (vi), and adding in its place Instructions 1, 2, and 3 to Item (c)(2)(v) and (vi) before paragraph (c)(2)(vii);
 - c. Revising paragraph (c)(2)(ix)(G);
 - d. Removing the period at the end of paragraphs (d)(2)(iii) and (d)(2)(iv) and adding a semi-colon in their place;
 - e. Adding Instruction 8 to Item 402(d);
 - f. Revising paragraphs (k)(2)(iii) and (k)(2)(iv);
 - g. Revising paragraph (k)(2)(vii)(I) and Instruction to Item 402(k);

- h. In paragraph (l) revising the phrase “paragraphs (a) through (k)” to read “paragraphs (a) through (k) and (s)”;
- i. Revising paragraphs (n)(2)(v) and (n)(2)(vi);
- j. Removing the Instruction to Item 402(n)(2)(v) and (vi), and adding in its place Instructions 1, 2, and 3 to Item 402(n)(2)(v) and (vi) before paragraph (n)(2)(vii);
- k. Revising paragraph (n)(2)(ix)(G);
- l. Revising paragraphs (r)(2)(iii), (r)(2)(iv) and (r)(2)(vii)(I), and Instruction to Item 402(r); and
- m. Adding paragraph (s) before the Instruction to Item 402.

The revisions and additions read as follows:

§ 229.402 (Item 402) Executive compensation.

* * * * *

(c) * * *

(2) * * *

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (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 FASB ASC Topic 718 (column (f));

(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 FASB ASC Topic 718 (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 FASB ASC Topic 718, with respect to that repriced or modified award.

Instruction 3 to Item 402(c)(2)(v) and (vi). For any awards that are subject to performance conditions, report the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation

cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. In a footnote to the table, disclose the value of the award at the grant date assuming that the highest level of performance conditions will be achieved if an amount less than the maximum was included in the table.

* * * * *

(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

* * * * *

(d) * * *

Instructions to Item 402(d).

* * * * *

8. For any equity awards that are subject to performance conditions, report in column (l) the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures.

* * * * *

(k) * * *

(2) * * *

(iii) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (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 FASB ASC Topic 718 (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(k). In addition to the Instruction to paragraphs (k)(2)(iii) and (iv) and 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; Instructions to paragraph (c)(2)(viii) of this Item; and Instructions 1 and 5 to paragraph (c)(2)(ix) 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) * * *

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (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 FASB ASC Topic 718 (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 FASB ASC Topic 718, with respect to that repriced or modified award.

Instruction 3 to Item 402(n)(2)(v) and (vi). For any awards that are subject to performance conditions, report the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. In a

footnote to the table, disclose the value of the award at the grant date assuming that the highest level of performance conditions will be achieved if an amount less than the maximum was included in the table.

* * * * *

(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 FASB ASC Topic 718 (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 FASB ASC Topic 718 (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.

* * * * *

(s) *Narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management.* To the extent that risks arising from the registrant's compensation policies and practices for its employees are

reasonably likely to have a material adverse effect on the registrant, discuss the registrant's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives. While the situations requiring disclosure will vary depending on the particular registrant and compensation policies and practices, situations that may trigger disclosure include, among others, compensation policies and practices: 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 a business unit that is significantly more profitable than others within the registrant; at a business unit 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(s) is to provide investors material information concerning how the registrant compensates and incentivizes its employees that may create risks that are reasonably likely to have a material adverse effect on the registrant. While the information to be disclosed pursuant to this paragraph(s) 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:

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

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

(3) How the registrant's compensation policies and practices 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;

(4) The registrant's policies regarding adjustments to its compensation

policies and practices to address changes in its risk profile;

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

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

* * * * *

■ 4. Amend § 229.407 by:

- a. Revising paragraph (c)(2)(vi);
- b. Revising paragraph (e)(3)(iii); and
- c. Adding paragraph (h) before the Instructions to Item 407.

The revisions and additions read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(c) * * *

(2) * * *

(vi) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy;

* * * * *

(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; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) 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:

(A) If such compensation consultant was engaged by the compensation committee (or persons performing the equivalent functions) to provide advice or recommendations on 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; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) and the compensation consultant or its affiliates also provided additional services to the registrant or its affiliates in an amount in excess of \$120,000 during the registrant's last completed fiscal year, then disclose 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 its affiliates for these other services was made, or recommended, by management, and whether the compensation committee or the board approved such other services of the compensation consultant or its affiliates.

(B) If the compensation committee (or persons performing the equivalent functions) has not engaged a compensation consultant, but management has engaged a compensation consultant to provide advice or recommendations on 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; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant

does not provide advice) and such compensation consultant or its affiliates has provided additional services to the registrant in an amount in excess of \$120,000 during the registrant's last completed fiscal year, then disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for any additional services provided by the compensation consultant or its affiliates.

* * * * *

(h) *Board leadership structure and role in risk oversight.* Briefly describe the leadership structure of the registrant's board, 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 (15 U.S.C. 80a-2(a)(19)). 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 board. 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 risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board'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 is revised to read 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 and 12 U.S.C. 5221(e)(3) unless otherwise noted.

* * * * *

- 7. 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);
 - vi. Revising paragraph (b)(11) before the Instruction; and
 - vii. Revising *Instruction to 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 led to the conclusion that the person should serve as a director for the Fund at the time that the disclosure is made in light of the Fund's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's 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. 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 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 paragraph (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

■ 8. 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.

* * * * *

■ 9. 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

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General Instructions

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Information To Be Included in the Report

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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, provide 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, as well as 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.

(c) 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. The registrant shall disclose on Form 8-K under this Item 5.07 the preliminary voting results. The registrant shall file an amended report on Form 8-K under this Item 5.07 to disclose the final voting results within four business days after the final voting results are known. *However*, no preliminary voting results need be disclosed under this Item 5.07 if the registrant has disclosed final voting results on Form 8-K under this Item.

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 provided. 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. 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 4 to Item 5.07. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (c), the paragraph may be answered by reference to the information contained in such material.

Instruction 5 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.

* * * * *

■ 10. 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.

■ 11. 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.

Note: The text of Forms 10-Q and 10-K do not, and these amendments will not, appear in the Code of Federal Regulations.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

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

■ 12. 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.

* * * * *

■ 13. 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

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Item 17. Management of the Fund

* * * * *

(b) *Leadership Structure and Board of Directors.*

(1) Briefly describe the leadership structure of the Fund's board, 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 risk oversight of the Fund, such as how the board administers its oversight function and the effect that this has on the board'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 led to the conclusion that the person should serve as a director for the Fund at the time that the disclosure is made, in light of the Fund's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications.

* * * * *

■ 14. 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 after the instructions.

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

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Item 18. Management

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5.(a) Briefly describe the leadership structure of the Registrant's board, 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 risk oversight of the Registrant, such as how the board administers its oversight function, and the effect that this has on the board'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 led to the conclusion that the person should serve as a director for the Registrant at the

time that the disclosure is made, in light of the Registrant's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications.

* * * * *

■ 15. 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);
- d. Adding new paragraph (e)(ii); and
- e. Adding paragraph (o) after the instructions.

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 leadership structure of the Registrant's board, 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 risk oversight of the Registrant, such as how the board administers its risk oversight function, and the effect that this has on the board'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 led to the conclusion that the person should serve as a director for the Registrant at the time that the disclosure is made, in light of the Registrant's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications.

* * * * *

Dated: December 16, 2009.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

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