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17 CFR Parts 229, 239, 240, et al.

Proxy Disclosure Enhancements; Final Rule

SECURITIES AND EXCHANGE COMMISSION

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

[Release Nos. 33–9089; 34–61175; IC–29092; File No. S7–13–09]

RIN 3235–AK28

Proxy Disclosure Enhancements

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules that will enhance information provided in connection with proxy solicitations and in other reports filed with the Commission. The amendments will require registrants to make new or revised disclosures about: compensation policies and practices that present material risks to the company; stock and option awards of executives and directors; director and nominee qualifications and legal proceedings; board leadership structure; the board's role in risk oversight; and potential conflicts of interest of compensation consultants that advise companies and their boards of directors. The amendments to our disclosure rules will be applicable to proxy and information statements, annual reports and registration statements under the Securities Exchange Act of 1934, and registration statements under the Securities Act of 1933 as well as the Investment Company Act of 1940. We are also transferring from Forms 10–Q and 10–K to Form 8–K the requirement to disclose shareholder voting results.

DATES: *Effective Date:* February 28, 2010.

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SUPPLEMENTARY INFORMATION: We are adopting amendments to Items 401,[1] 402,[2] and 407 [3] of Regulation S–K; [4] Schedule 14A [5] and Forms 8–K,[6] 10–Q,[7] and 10–K [8] under the Securities Exchange Act of 1934 (''Exchange Act''); [9] and Forms N–1A,[10] N–2,[11] and N–3,[12] registration forms used by management investment companies to register under the Investment Company Act of 1940 (''Investment Company Act'') [13] and to offer their securities under the Securities Act of 1933 (''Securities Act'').[14]

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I. Background and Overview of the Amendments

On July 10, 2009, we proposed a number of revisions to our rules that were designed to improve the disclosure shareholders of public companies receive regarding compensation and corporate governance.[15] As discussed in detail below, we have taken into consideration the comments received on the proposed amendments and are adopting several amendments to our rules. Among other improvements, the new disclosure requirements adopted today enhance the information provided in annual reports, and proxy and information statements to better enable shareholders to evaluate the leadership of public companies.

As discussed more fully in 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 disclosure enhancements we are adopting respond to this focus, and will significantly improve the information companies provide to shareholders with regard to the following:

- *Risk:* By requiring disclosure about the board's role in risk oversight 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 voting results; and
- *Compensation:* By revising the reporting of stock and option awards in the Summary Compensation Table [16] and Director Compensation Table,[17] and requiring disclosure of potential conflicts of interest of compensation consultants in certain circumstances. We believe that providing a more transparent view of these key risk, governance and compensation matters

[1] 17 CFR 229.401.
[2] 17 CFR 229.402.
[3] 17 CFR 229.407.
[4] 17 CFR 229.10 *et al.*
[5] 17 CFR 240.14a–101.
[6] 17 CFR 249.308.
[7] 17 CFR 249.308a.
[8] 17 CFR 249.310.
[9] 15 U.S.C. 78a *et seq.*
[10] 17 CFR 239.15A and 274.11A.
[11] 17 CFR 239.14 and 274.11a–1.
[12] 17 CFR 239.17a and 274.11b.
[13] 15 U.S.C. 80a–1 *et seq.*
[14] 15 U.S.C. 77a *et seq.*
[15] *See* Release No. 33–9052 (July 10, 2009) [74 FR 35076] (''Proposing Release'').
[16] Item 402(c) and 402(n) of Regulation S–K [17 CFR 229.402(c) and 229.402(n)].
[17] Item 402(k) and 402(r) of Regulation S–K [17 CFR 229.402(k) and 229.402(r)].

will help shareholders make more informed voting and investment decisions.

We received over 130 comment letters in response to the proposed amendments.[18] These letters came from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested parties. In general, the commenters supported the objectives of the proposed new requirements. Most investors supported the manner in which we proposed to achieve these objectives and, in some cases, urged us to require additional disclosure from companies. Other commenters, however, opposed some of the proposed revisions and suggested modifications to the proposals.

We have reviewed and considered all of the comments that we received on the proposed amendments. The adopted rules reflect changes made in response to many of these comments. We discuss our revisions with respect to each proposed rule amendment in more detail throughout this release. The amendments that we are adopting will require:

- 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 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 Financial Accounting Standards Board Accounting Standards Codification Topic 718, Compensation—Stock Compensation (''FASB ASC Topic 718''),[19] rather than the dollar amount recognized for financial statement purposes for the fiscal year, 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 in the proxy materials prepared with respect to nominees for director 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;
- 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;
- 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 about the fees paid to compensation consultants and their affiliates under certain circumstances; and
- Disclosure of the vote results from a meeting of shareholders on Form 8–K generally within four business days of the meeting.

With respect to management investment companies that are registered under the Investment Company Act (''funds''),[20] the amendments we are adopting will require expanded disclosure regarding director and nominee qualifications; past directorships held by directors and nominees; and legal proceedings involving directors, nominees, and executive officers to funds; and new disclosure about leadership structure and the board's role in the oversight of risk.

The Proposing Release also included several proposed amendments to our rules governing the proxy solicitation process. We have decided to defer consideration of those proposed amendments at this time, pending our consideration of our proposal intended to facilitate shareholder director nominations in companies' proxy materials.[21]

II. Discussion of the Amendments

A. Enhanced Compensation Disclosure

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

We proposed amendments to our Compensation Discussion and Analysis (''CD&A'') requirements to broaden their scope to include a new section regarding how the company's overall compensation policies for employees create incentives that can affect the company's risk and management of that risk. We are adopting the disclosure requirements generally as proposed, but we are revising the placement of the new required disclosures and the disclosure threshold, as suggested by commenters.

a. Proposed Amendments

Under the amendments we proposed, companies would be required to discuss and analyze their broader compensation policies and overall actual compensation practices for employees generally, including non-executive officers, if risks arising from those compensation policies or practices may have a material effect on the company. As we stated in the Proposing Release, we believe that disclosure of a company's compensation policies and practices in certain circumstances can help investors identify whether the company has established a system of incentives that can lead to excessive or inappropriate risk taking by employees.

The proposed amendments enumerated a non-exclusive list of situations where compensation programs may raise material risks to companies, and several examples of the types of issues that would be appropriate for a company to discuss and analyze. The illustrative examples, consistent with the principles-based approach of the CD&A, were intended to help identify the types of situations in which the disclosure may be required.

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. Individual investors, trade unions, institutional investors and pension funds supported the proposals.[22] Some of these commenters

[18] The public comments we received are available on our Web site at *http://www.sec.gov/comments/s7-13-09/s71309.shtml*. Comments are also available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.

[19] Both our rule proposal and the former disclosure requirement used the nomenclature Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004) *Share-Based Payment* (FAS 123R). We are updating our references in this release and the final rules to reflect that the FASB Accounting Standards Codification has superseded all references to previous FASB standards for interim or annual periods ending on or after September 15, 2009.

[20] Management investment companies typically issue shares representing an interest in a changing pool of securities, and include open-end and closed-end companies. An open-end company is a management company that is offering for sale or has outstanding any redeemable securities of which it is the issuer. A closed-end company is any management company other than an open-end company. *See* Section 5 of the Investment Company Act [15 U.S.C. 80a–5].

[21] *See* Release No. 33–9046 (June 10, 2009) [74 FR 29024].

[22] *See, e.g.,* letters from American Federation of Labor and Congress of Industrial Organizations

Continued

believed the new CD&A disclosure would improve the ability of investors to make informed investment decisions.[23] Other commenters believed the amendments would significantly improve shareholders' understanding of both the process by which pay is set and the substantive policies that guide companies' risk assessment or incentive considerations in structuring compensation policies or awarding compensation.[24]

Most companies, law firms and bar groups opposed the proposal.[25] Concerns that were expressed included, for example, that the proposed amendments would not lead to meaningful disclosures,[26] and that the CD&A was already long and the proposed amendments would add length without a corresponding benefit to shareholders.[27] Another concern expressed by commenters was that the linkage between risk-taking and executive compensation is not well understood, and that the disclosures provided under the proposed amendments would likely be boilerplate that could give investors a false sense of comfort regarding risk and risk-taking.[28]

Other commenters argued that it was not appropriate to expand the CD&A beyond the named executive officers to include disclosure of the company's broader compensation policies and overall compensation practices for employees generally.[29] Some of these commenters argued that expanding the CD&A would represent a fundamental shift in the approach to the CD&A.[30] Concerns were also expressed that risk management, risk-taking incentives and related business strategy are complex subjects that could not be adequately analyzed in CD&A without adding voluminous text to an already lengthy proxy statement.[31]

Comments also were mixed on the illustrative examples included with the proposed amendments. Some commenters supported the list, noting that the additional disclosures would provide investors with a better understanding of a company's compensation policies and how such policies can create incentives that could affect the company's risk profile and ability to manage that risk.[32] Other commenters asserted that the proposed revisions would lead to boilerplate disclosures and information that would not be meaningful to investors.[33]

Several commenters recommended that we revise the disclosure threshold in the proposed amendments, which we proposed as ''may have a material effect'' on the company.[34] Suggested alternatives included changing the standard to ''likely to have a material effect,'' ''reasonably likely to have a material effect,'' or ''will likely have a material effect.'' [35] Some commenters believed the ''may have a material effect'' standard was too speculative and that basing the disclosure standard on whether the risks are ''reasonably likely to have a material effect'' would give companies more certainty and provide investors with more meaningful disclosure.[36] Commenters also noted that, to avoid voluminous and extraneous disclosure, the requirement should focus on compensation arrangements that are likely to promote risk-taking behavior that could have a significant and damaging impact on the company's operations.[37]

c. Final Rule

After considering the comments, we are adopting the disclosure requirement substantially as proposed with some modifications. We continue to believe that it is important for investors to be informed of the compensation policies and practices that are likely to expose the company to material risk, but we recognize that, consistent with the comments received, we should revise our proposals. We have tailored the final amendments to address many of the concerns expressed by commenters, consistent with the purposes to be advanced by the disclosure.

The final rule requires a company to address its compensation policies and practices for all employees, including non-executive officers, if the compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company.[38] As noted above, the proposed rules 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 agree with the suggestions of several commenters that the new requirements should have a ''reasonably likely'' disclosure threshold. Companies are familiar with the ''reasonably likely'' disclosure threshold used in our Management Discussion and Analysis (''MD&A'') rules,[39] and this approach would parallel the MD&A requirement, which requires risk-oriented disclosure of known trends and uncertainties that are material to the business. We believe that the ''reasonably likely'' threshold also addresses concerns of some commenters that the proposed requirements might have caused companies attempting compliance to burden shareholders and investors with voluminous disclosure of potentially insignificant and unnecessarily speculative information about their compensation policies. By focusing on risks that are ''reasonably likely to have a material adverse effect'' on the company, the amendments are intended to elicit disclosure about incentives in the company's compensation policies and practices that would be most relevant to investors.[40] This change from the proposal also addresses concerns some commenters raised that the proposal did not allow companies to consider compensating or offsetting steps or controls designed to limit risks of certain compensation arrangements.[41] If a company has compensation policies and practices for different groups that

(''AFL–CIO''), American Association of Retired Persons (''AARP''), Grahall Partners LLC, Institute of Internal Auditors (''IIA''), Pfizer Inc., Risk and Insurance Management Society, Inc. (''RIMS''), State of Connecticut Treasurer's Office (''CTO''), State of Wisconsin Investment Board (''SWIB''), Ralph S. Saul, Teachers Insurance and Annuity Association of America—College Retirement and Equities Fund (''TIAA–CREF''), and Mark Whitton.

[23] *See, e.g.,* letters from California State Teachers' Retirement System (''CalSTRS''), and RIMS.

[24] *See, e.g.,* letters from Service Employees International Union (''SEIU''), and Walden Asset Management.

[25] *See, e.g.,* letters from the American Bar Association (''ABA''), Robert Ahrenholz, American Electric Power, Business Roundtable, StanCorp Financial Group, and Wisconsin Electric Corporation.

[26] *See, e.g.,* letters from Association Corporate Counsel (''ACC''), BorgWarner Inc., NACCO Industries, Inc. (''NACCO''), and Sullivan & Cromwell (''S&C'').

[27] *See, e.g.,* letters from National Association of Corporate Directors (''NACD'') and S&C.

[28] *See, e.g.,* letters from ABA and DolmatConnell Partners, Inc. (''DolmatConnell'').

[29] *See, e.g.,* letters from BorgWarner, NACCO and the Society of Corporate Secretaries and Corporate Governance Professionals (''SCSGP'').

[30] *See, e.g.,* letters from BorgWarner and NACCO.

[31] *See e.g.,* letter of NACD.

[32] *See, e.g.,* letters from CalSTRS, Council of Institutional Investors (''CII''), Glass Lewis & Co (''Glass Lewis''), and RIMS.

[33] *See e.g.,* letters of Business Roundtable and Cleary Gottlieb Steen & Hamilton LLP (''Cleary Gottlieb'').

[34] *See* letters from ACC, BorgWarner, Davis Polk & Wardwell LLP (''Davis Polk''), Honeywell International Inc. (''Honeywell''), NACCO, and SCSGP.

[35] *See* letters from ABA, ACC, BorgWarner, Davis Polk, Honeywell, NACCO, and SCSGP.

[36] *See* letters from ABA and Davis Polk.

[37] *See* letters from ABA and Pearl Meyer & Partners (''Pearl Meyer'').

[38] *See* new Item 402(s) of Regulation S–K. As we noted in the Proposing Release, to the extent that risk considerations are a material aspect of the company's compensation policies or decisions for named executive officers, the company is required to discuss them as part of its CD&A under the current rules.

[39] *See* Item 303 of Regulation S–K [17 CFR 229.303].

[40] *See* note 36 above and accompanying text.

[41] *See* letters from ABA and Center on Executive Compensation.

mitigate or balance incentives, these could be considered in deciding whether risks arising from the company's compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company as a whole.

In addition, we have modified the proposal to provide that disclosure is only required if the compensation policies and practices are reasonably likely to have a material ''adverse'' effect on the company, as opposed to any ''material effect'' as proposed. As noted in the Proposing Release, well-designed compensation policies can enhance a company's business interests by encouraging innovation and appropriate levels of risk-taking. By focusing the disclosure on material *adverse* effects, the final rule should help avoid voluminous and unnecessary discussion of compensation arrangements that may mitigate inappropriate risk-taking incentives.

We are also moving the new requirements into a separate paragraph in Item 402 of Regulation S–K.[42] As adopted, the new disclosure requirements will not be a part of the CD&A.[43] We were persuaded by commenters who asserted that it would be potentially confusing to expand the CD&A beyond the named executive officers to include disclosure of the company's broader compensation policies and practices for employees. CD&A provides discussion and analysis of the compensation of the named executive officers and the information contained in the Summary Compensation Table and other required tables, and the new disclosure requirements would be inconsistent with that approach because they would cover all employees, not just the named executive officers.[44]

The final rule will contain, as proposed, the non-exclusive list of situations where compensation programs may have the potential to raise material risks to companies, and the examples of the types of issues that would be appropriate for a company to address. Under the amendments, the situations that would require disclosure will vary depending on the particular company and its compensation program. We believe situations that potentially could trigger discussion include, among others, compensation policies and practices:

- At a business unit of the company that carries a significant portion of the company's risk profile;
- At a business unit with compensation structured significantly differently than other units within the company;
- At a business unit that is significantly more profitable than others within the company;
- At a business unit where the compensation expense is a significant percentage of the unit's revenues; and
- That vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.

This is a non-exclusive list of situations where compensation programs may have the potential to raise material risks to the company. There may be other features of a company's compensation policies and practices that have the potential to incentivize its employees to create risks that are reasonably likely to have a material adverse effect on the company. However, disclosure under the amendments is only required if the compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. We note that in the situations listed above, a company may under appropriate circumstances conclude that its compensation policies and practices are not reasonably likely to have a material adverse effect on the company.

We are adopting, as proposed, the illustrative examples of the issues that would potentially be appropriate for a company to address. As we stated in the Proposing Release, the examples are non-exclusive and that the application of an example should be tailored to the facts and circumstances of the company. We believe that a principles-based approach, similar to our CD&A requirements, utilizing illustrative examples strikes an appropriate balance that will effectively elicit meaningful disclosure. If a company determines that disclosure is required, we believe examples of the issues that companies may need to address regarding their compensation policies or practices include the following:

- The general design philosophy of the company'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 those employees on behalf of the company, and the manner of their implementation;
- The company's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;
- How the company'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;
- The company's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;
- Material adjustments the company has made to its compensation policies and practices as a result of changes in its risk profile; and
- The extent to which the company monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees.

We believe using illustrative examples helps to identify the types of disclosure that may be applicable. However, companies must assess the information that is identified by the example in light of the company's particular situation. Thus, for example, we would not expect to see generic or boilerplate disclosure that the incentives are designed to have a positive effect, or that compensation levels may not be sufficient to attract or retain employees with appropriate skills in order to enable the company to maintain or expand operations.

Consistent with the approach taken in the proposals, smaller reporting companies will not be required to provide the new disclosure, even though the new rule will not be part of CD&A.[45] At this time, we believe that such companies are less likely to have the types of compensation policies and practices that are intended to be addressed in this rulemaking.[46]

[42] *See* new Item 402(s) of Regulation S–K.

[43] In making this change, we also revised the final rule from what was proposed by eliminating the term ''generally.'' Previously, we believed this term was helpful to distinguish the proposed amendments from the CD&A for the named executive officers by emphasizing that it also applied to non-executive officers. Because we are moving the new requirements into a separate paragraph, we do not believe the term is needed. Moreover, one commenter noted that the term could be confusing in light of the examples listed in the rule. *See* letter from ABA.

[44] *See* letters from BorgWarner, NACCO and SCSGP.

[45] Because smaller reporting companies are not required to provide CD&A disclosure, we did not propose to require that they provide the new disclosure.

[46] *See, e.g.,* letter of Committee on Securities Law of the Business Law Section of the Maryland State Bar Association (''In our view smaller reporting

Continued

In the Proposing Release, we requested comment on whether we should require a company to affirmatively state that it has determined that the risks arising from its compensation policies are not reasonably expected to have a material effect on the company if it has concluded that disclosure was not required. Commenters were mixed in their response to this request. Several commenters believed that companies should be required to affirmatively state that they have determined that the risks arising from their broader compensation policies are not reasonably expected to have a material effect.[47] Others believed that the proposed amendments should not require an affirmative statement because it would not provide investors with useful information and would create potential liability for companies.[48] Another commenter noted that our disclosure rules have not traditionally required companies to address affirmatively matters that the company has determined are not applicable to it.[49] We believe an approach consistent with our prior practice is appropriate and the final rule does not require a company to make an affirmative statement that it has determined that the risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company.

2. Revisions to the Summary Compensation Table

We proposed to amend Item 402 of Regulation S–K to revise Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value of awards computed in accordance with FASB ASC Topic 718. The revised disclosure[50] would replace previously mandated disclosure of the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with FASB ASC Topic 718, and would affect the calculation of total compensation, including for purposes of determining who is a named executive officer.[51] We are adopting the revisions substantially as proposed with some changes in response to comments.

a. Proposed Amendments

As we stated in the Proposing Release, we proposed these amendments because of comments we previously received from a variety of sources that the information that investors would find most useful and informative in the Summary Compensation Table and Director Compensation Table is the full grant date fair value of equity awards made during the covered fiscal year. Investors may consider compensation decisions made during the fiscal year, which usually are reflected in the full grant date fair value measure but not in the financial statement recognition measure, to be material to voting and investment decisions.

We also proposed to rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table[52] and the corresponding footnote disclosure to the Director Compensation Table[53] because these disclosures may be considered duplicative of the aggregate grant date fair value to be provided in the amended Summary Compensation Table. In addition, we proposed to amend Instruction 2 to the salary and bonus columns of the Summary Compensation Table so that companies would not be required to report in those columns the amount of salary or bonus forgone at a named executive officer's election, and the non-cash awards received instead of salary or bonus would be reported in the column applicable to the form of award elected. As proposed, the Summary Compensation Table disclosure would reflect the form of compensation ultimately received by the named executive officer.

b. Comments on the Proposed Amendments

A broad spectrum of commenters supported the proposal to revise the Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value of awards.[54] Most commenters agreed that because aggregate grant date fair value disclosure better reflects compensation committee decisions with respect to stock and option awards,[55] it is more informative to voting and investment decisions[56] and a better measure for purposes of identifying named executive officers.[57] However, some commenters objected that use of grant date fair value to identify named executive officers may result in relatively frequent changes in the named executive officer group based on grants of ''one time'' multi-year awards to newly hired executives or special awards to enhance retention.[58]

As discussed in detail below, many commenters expressed concern that the amount to be reported in the table for performance awards would be calculated without regard to the likelihood of achieving the relevant performance objectives, which could discourage companies from granting these awards.[59] Others, however, suggested that the design of equity awards is driven by numerous considerations, and companies would continue to make equity awards subject to performance conditions.[60]

companies and their compensation structures generally are not geared towards the kind of disclosure that would be required by the proposal''). The amendments will not alter the reporting requirements for smaller reporting companies under Item 402. Specifically, smaller reporting companies are permitted to provide the scaled disclosures specified in Items 402(l) through (r) of Regulation S–K, rather than the disclosure specified in Items 402(a) through (k) of Regulation S–K.

[47] *See, e.g.,* letters from Calvert Group, Ltd. (''Calvert''), Grahall Partners and Integrated Governance Solutions.

[48] *See, e.g.,* letters from the Business Roundtable, Honeywell, Pfizer and S&C.

[49] *See* letter from ABA.

[50] Items 402(c)(2)(v) and (vi), 402(k)(2)(iii) and (iv), 402(n)(2)(v) and (vi), and 402(r)(2)(iii) and (iv) of Regulation S–K.

[51] Items 402(a)(3)(iii) and (iv) and 402(m)(2)(ii) and (iii) of Regulation S–K.

[52] Item 402(d)(2)(viii) of Regulation S–K and Instruction 7 to Item 402(d).

[53] Instruction to Item 402(k)(2)(iii) and (iv) of Regulation S–K.

[54] *See, e.g.,* letters from AARP, Business Roundtable, State of Wisconsin Investment Board (''SWIB''), Pfizer, SCSGP, S&C, United Brotherhood of Carpenters and Joiners of America (''United Brotherhood of Carpenters''), United States Proxy Exchange (''USPX'').

[55] *See, e.g.,* letters from Business Roundtable (''Generally, we support the Proposed Rules, as they likely will produce disclosure that, in most situations, is more in line with how compensation committees view annual equity compensation—that is, disclosure of the equity compensation that a company grants in a particular year.''); and SCSGP (''We support this change. The aggregate grant date fair value is generally used by compensation committees in determining the amount of stock and options to award, whereas the current disclosure requirement confusingly focuses on accounting considerations that may have no bearing on compensation decisions.'').

[56] *See, e.g.,* letter of United Brotherhood of Carpenters (''The proposed SCT reporting of equity awards will help inform investment decisions, as well as important investor voting decisions regarding executive compensation and director performance.'').

[57] *See, e.g.,* letter of Mercer (''Because the value included in the SCT determines the identification of at least three of the named executive officers (other than the principal executive officer and the principal financial officer), disclosure of the full grant-date fair value would also better align the identification of these officers with company compensation decisions.'').

[58] *See, e.g.,* letter of Protective Life Corporation.

[59] *See, e.g.,* letters from ABA, Business Roundtable, Center on Executive Compensation, Cleary Gottlieb, Compensia, Honeywell, Frederic W. Cook & Co., Inc., Pearl Meyer, Protective Life Corporation, Securities Industry and Financial Markets Association (SIFMA), SCSGP, and Towers Perrin.

[60] *See, e.g.,* letter from Hewitt Associates LLC (''Hewitt'').

With respect to the proposal to rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table, the comments were mixed. While some commenters supported this proposal,[61] others stated that retaining disclosure of the grant date fair value of individual awards would continue to provide investors valuable information. Because different companies may vary in the assumptions they apply to compute grant date fair value, some commenters noted that retaining this disclosure makes it easier for investors to assess how companies determined fair value for individual grants.[62] Further, different types of equity awards can have different incentive effects, making it important that shareholders understand the value associated with each type of award granted and the mix of values among various award types.[63] Commenters pointed out that reporting the separate value of multiple individual awards provides investors more information regarding the specific decisions of the compensation committee, so that investors can better evaluate those decisions and understand pay for performance.[64]

We also received a wide range of comments on our proposal to amend Instruction 2 to the salary and bonus columns of the Summary Compensation Table. Some commenters favored this amendment because, as stated in the Proposing Release, it would report compensation in the form actually received.[65] Other commenters, however, said it is important to report the form of compensation that the compensation committee originally awarded, so that investors can understand the overall compensation strategy and the intended distribution of risk among different types of compensation.[66]

c. Final Rule

After considering the comments received, we are adopting the proposed amendments to revise Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards to require disclosure of the aggregate grant date fair value of awards computed in accordance with FASB ASC Topic 718, with a special instruction for awards subject to performance conditions as described below. We agree with commenters that aggregate grant date fair value disclosure better reflects the compensation committee's decision with regard to stock and option awards. We remain of the view that it is more meaningful to shareholders if company compensation decisions—including decisions to grant large ''one time'' multi-year awards—cause the named executive officers to change. In circumstances where such a large ''new hire'' or ''retention'' grant results in the omission from the Summary Compensation Table of another executive officer whose compensation otherwise would have been subject to reporting, the company can consider including compensation disclosure for that executive officer to supplement the required disclosures.

Based on comments received, we are clarifying how performance awards[67] are disclosed. Most commenters stated that reporting the aggregate grant date fair value of performance awards based on maximum performance could discourage companies from granting these awards.[68] Noting that compensation committees take performance-contingent conditions into account when granting such awards, commenters said that the grant date fair value reported for awards with a performance condition should instead be based on the probable outcome of the performance conditions, consistent with the recognition criteria in the accounting literature.[69] As commenters stated, because performance awards generally are designed to incentivize attainment of target performance and set a higher maximum performance level as a ''cap'' on attainable compensation, requiring disclosure of an award's value to always be based on maximum performance would overstate the intended level of compensation and result in investor misinterpretation of compensation decisions. This could also discourage the grant of awards with difficult—or any—performance conditions, and lead to inflated benchmarking values used to set equity award or total compensation levels at other companies.

We are persuaded that the value of performance awards reported in the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table should be computed based upon the probable outcome of the performance condition(s) as of the grant date because that value better reflects how compensation committees take performance-contingent vesting conditions into account in granting such awards. We are adopting new Instructions to these tables to clarify that this amount will be consistent with the grant date estimate of compensation cost to be recognized over the service period, excluding the effect of forfeitures.[70] To provide investors additional information about an award's potential maximum value subject to changes in performance outcome, we will also require in the Summary Compensation Table and Director Compensation Table footnote disclosure of the maximum value assuming the highest level of performance conditions is probable.[71] Such footnote disclosure will permit investors to understand an award's maximum value without raising the concerns associated with requiring its tabular disclosure.[72]

We are requiring disclosure of awards granted during the year, as proposed. A number of commenters responded to our request for comment by indicating that they would prefer disclosure of the aggregate grant date fair value of equity awards granted *for* services in the relevant fiscal year, even if granted after fiscal year end, rather than awards granted *during* the relevant fiscal year, as proposed.[73] Other commenters expressed concern that revising the proposal in this way would result in a lack of uniformity that would confuse investors, would be inconsistent with the FASB ASC Topic 718 grant date, and could invite manipulated

[61] *See* letters from Buck Consultants, Chadbourne Park, Mercer, Pfizer, Protective Life Corporation, and S&C.

[62] *See* letters from AFL–CIO, Compensia and Graef Crystal.

[63] *See* letters from Compensia, Frederic W. Cook & Co., Inc., and Risk Metrics.

[64] *See* letters from Center on Executive Compensation, Hewitt, Pearl Meyer, Towers Perrin, and Universities Superannuation Scheme, *et al.*

[65] *See, e.g.,* letters from Pfizer and RiskMetrics.

[66] *See* letters from Center on Executive Compensation, and Pearl Meyer.

[67] Performance awards include only those awards that are subject to performance conditions as defined in the Glossary to FASB ASC Topic 718.

[68] *See, e.g.,* letters from ABA, Business Roundtable, Center on Executive Compensation, Cleary Gottlieb, Compensia, Honeywell, Frederic W. Cook & Co., Inc., Pearl Meyer, Protective Life Corporation, SIFMA, SCSGP, and Towers Perrin.

[69] FASB ASC Topic 718.

[70] *See* Instruction 3 to Item 402(c)(2)(v) and (vi), Instruction 8 to Item 402(d), and Instruction 3 to Item 402(n)(2)(v) and (vi).

[71] *See* Instruction 3 to Item 402(c)(2)(v) and (vi), and Instruction 3 to Item 402(n)(2)(v) and (vi).

[72] *See, e.g.,* letter from ABA.

[73] *See, e.g.,* letters from ACC, Ameriprise Financial, Inc., BorgWarner, Business Roundtable, Cleary Gottlieb, Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, Frederic W. Cook & Co., Inc., Graef Crystal, Davis Polk, General Mills, Inc., Glass Lewis, Grahall Partners, LLC., Honeywell, JP Morgan Chase & Co., RiskMetrics, SCSGP, SIFMA, and S&C. These commenters suggested this approach would better align the amounts reported in the Summary Compensation Table with the compensation decisions discussed in CD&A, and clarify the relationship between pay and performance.

reporting.[74] We recognize that a ''performance year'' standard for reporting equity awards in securities in the relevant fiscal year may sometimes better align compensation disclosure with compensation decision making, and may be more consistent with Summary Compensation Table salary and bonus disclosure.[75] However, because it appears that multiple subjective factors, which could vary significantly from company to company, influence equity awards granted after fiscal year end, we are concerned that changing the approach to reporting could result in inconsistencies that would erode comparability. One commenter noted that many companies make equity awards after the end of the fiscal year based on executive performance during the last completed fiscal year, but determining whether an equity award was granted primarily for services performed during the last completed fiscal year can be a highly subjective determination and the factors that influence the decision of when to report an equity award may vary significantly from company to company.[76] Companies should continue to analyze in CD&A their decisions to grant post-fiscal year end equity awards where those decisions could affect a fair understanding of named executive officers' compensation for the last fiscal year,[77] and consider including supplemental tabular disclosure where it facilitates understanding the CD&A.

Although we proposed to revise Instruction 2 to the salary and bonus column of the Summary Compensation Table so that companies would not be required to report in those columns the amount of salary or bonus forgone at a named executive officer's election and the non-cash awards received instead of salary or bonus would be reported in the column applicable to the form of award elected, we have decided not to adopt this amendment. We agree with commenters that disclosing the amounts of salary and bonus that the compensation committee awarded better enables investors to understand the relative weights the company applied to annual incentives and salary.[78] This information provides investors more insight into the extent to which a company's compensation strategy pays for performance, may be heavily weighted in salary, or may be heavily weighted in annual incentives. Consistent with our decision to amend our rules to require disclosure enabling investors to better understand the risks involved in compensation programs, we are retaining the current version of this instruction, so that investors can understand overall compensation strategy and the intended distribution of risk among different types of compensation. Companies will continue to report the forgone amounts in the salary or bonus column, with footnote disclosure of the receipt of non-cash compensation that refers to the Grants of Plan-Based Awards Table where the stock, option or non-equity incentive plan awarded the named executive officer elected is reported.[79]

Finally, based on the comments received, we have decided not to rescind, as was proposed, the requirement to report the full grant date fair value of each equity award in the Grants of Plan-Based Awards Table and the Director Compensation Table. We agree with commenters that, because this disclosure reveals the value associated with each type of equity award granted and the mix of values among various awards with different incentive effects, retaining it will help investors better evaluate the decisions of the compensation committee.[80]

d. Transition

To facilitate year-to-year comparisons, consistent with our proposal, we will implement the Summary Compensation Table amendments by requiring companies providing Item 402 disclosure for a fiscal year ending on or after December 20, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the table, so that the stock awards and option awards columns present the applicable full grant date fair values, and the total compensation column is correspondingly recomputed.[81] The stock awards and option awards columns amounts should be computed based on the individual award grant date fair values reported in the applicable year's Grants of Plan-Based Awards Table, except that awards with performance conditions should be recomputed to report grant date fair value based on the probable outcome as of the grant date, consistent with FASB ASC Topic 718. In addition, if a person who would be a named executive officer for the most recent fiscal year (2009) also was disclosed as a named executive officer for 2007, but not for 2008, the named executive officer's compensation for each of those three fiscal years must be reported pursuant to the amendments.[82] However, companies are not required to include different named executive officers for any preceding fiscal year based on recomputing total compensation for those years pursuant to the amendments, or to amend prior years' Item 402 disclosure in previously filed Forms 10–K or other filings.

e. Comment Responses Regarding Rulemaking Petition and Other Requests for Comment

We requested comment regarding a rulemaking petition recommending Summary Compensation Table disclosure of stock and option awards based on the annual change in value of awards.[83] We also requested comment on whether any potential amendments to the Grants of Plan-Based Awards Table or the Outstanding Equity Awards at Fiscal Year-End Table should be considered to better illustrate the relationship between pay and company performance. Most commenters did not support the petition's recommendation because they believed it would not report the board's compensation decisions, on which investors focus in making voting and investment decisions, and could result in disclosure of negative numbers.[84] However, several commenters recommended other tabular revisions to highlight how compensation may be related to the company's performance.[85] Most of these suggestions were in anticipation that legislation establishing an annual ''say-on-pay'' shareholder advisory vote may be enacted.[86] Commenters most

[74] *See* letters from Buck Consultants, Compensia, Pearl Meyer, Protective Life Corporation, and United Brotherhood of Carpenters.

[75] Instruction 1 to Item 402(c)(2)(iii) and (iv) provides that if the amount of salary or bonus earned for the fiscal year cannot be calculated as of the most recent practicable date, footnote disclosure of this fact and the date the amount is expected to be determined is required. When determined, the omitted amount and a recalculated total compensation figure must be reported in a filing under Item 5.02(f) of Form 8–K [17 CFR 249.308].

[76] *See* letter from Compensia.

[77] Instruction 2 to Item 402(b).

[78] *See, e.g.,* letters from Center on Executive Compensation and Pearl Meyer.

[79] Instruction 2 to Item 402(c)(2)(iii) and (iv).

[80] *See* letters from Center on Executive Compensation and Pearl Meyer.

[81] Commenters generally favored this approach as a means of ensuring year-to-year comparability, and said it would not be difficult to comply. *See, e.g.,* letters from Glass Lewis, Mercer, and Pfizer.

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

[83] *See* May 26, 2009, rulemaking petition submitted by Ira T. Kay and Steven Seelig, Watson Wyatt Worldwide, File No. 4–585, *at http://www.sec.gov/rules/petitions/2009/petn4–585.pdf.*

[84] *See, e.g.,* letters from Protective Life Corporation, RiskMetrics.

[85] *See, e.g.,* letters from Center on Executive Compensation, Graef Crystal, Paul Hodgson, Don Meiers and Dan Gode.

[86] The United States House of Representatives has passed H.R. 3269, the Corporate and Financial

frequently recommended adding a column to the Outstanding Equity Awards at Fiscal Year-End Table to report the fiscal year end intrinsic value of outstanding options and stock appreciation rights (''SARs'').[87]

In addition, we solicited comment on whether there are other initiatives we should consider proposing to improve executive compensation disclosure, such as including disclosure of each executive officer's compensation, not just the named executive officers; eliminating the instruction providing that performance targets can be excluded based on the potential adverse competitive effect on the company of their disclosure; making the CD&A part of the Compensation Committee Report, and requiring the report to be ''filed;'' additional disclosure regarding ''hold to retirement'' and/or claw back provisions; and internal pay ratios.[88] Commenters who addressed these topics expressed mixed views.[89]

Our goal at this stage is to adopt discrete amendments to improve compensation disclosure in proxy statements, such as the changes to option reporting in the Summary Compensation Table and Director Compensation Table, that can be implemented for the 2010 proxy season. Therefore, we are not adopting any other changes to executive compensation disclosure at this time. However, we will consider the comments received in connection with future rulemaking initiatives on compensation disclosure.

B. Enhanced Director and Nominee Disclosure

We proposed to amend Item 401 of Regulation S–K to expand the disclosure requirements regarding the qualifications of directors and nominees, past directorships held by directors and nominees, and the time period for disclosure of legal proceedings involving directors, nominees and executive officers. We are adopting the changes generally as proposed, but have made revisions in response to comments.

1. Proposed Amendments

Under the proposed amendments, a company would be required to disclose for each director and any nominee for director the particular experience, qualifications, attributes or skills that qualified that person to serve as a director of the company, and as a member of any committee that the person serves on or is chosen to serve on, in light of the company's business. In addition to the expanded narrative disclosure regarding director and nominee qualifications, the proposed amendments would require disclosure of any directorships held by each director and nominee at any time during the past five years at public companies and registered investment companies, and would lengthen the time during which disclosure of legal proceedings involving directors, director nominees and executive officers is required from five to ten years. As proposed, this expanded disclosure would apply to incumbent directors, to nominees for director who are selected by a company's nominating committee, and to any nominees put forward by another proponent in its proxy materials.

We proposed that the disclosures under the Item 401 amendments would appear in proxy and information statements on Schedules 14A and 14C, annual reports on Form 10–K and registration statements on Form 10 under the Exchange Act, as well as in registration statements under the Securities Act.

We also proposed to apply the expanded disclosure requirements regarding director and nominee qualifications, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings involving directors, nominees, and executive officers to funds. Specifically, we proposed to amend Schedules 14A and 14C to apply these expanded requirements to fund proxy and information statements, where action is to be taken with respect to the election of directors, and to amend Forms N–1A, N–2, and N–3 to require that funds include the expanded disclosures regarding director qualifications and past directorships in their statements of additional information.[90]

2. Comments on the Proposed Amendments

Comments on the proposal were mixed. Individual investors, trade unions, institutional investors and pension funds supported the proposals. Several of these commenters noted that the amendments would be a helpful step forward in providing investors and shareholders with additional information they need to make more informed investment and voting decisions relating to corporate governance and the election of directors.[91] Most companies, law firms and bar groups opposed the proposal. Many of the commenters opposed to the proposed amendments expressed concern about requiring companies to disclose the qualifications, attributes and skills of directors and nominees on a person-by-person basis.[92] Some of

Institution Compensation Fairness Act of 2009, which would provide shareholders an advisory vote to approve the compensation of executives in any proxy, consent, or authorization for an annual meeting.

[87] *See, e.g.,* letters from Cleary Gottlieb, Compensia, Grant Thornton, Hewitt, Pearl Meyer, and Towers Perrin. We would not object if companies voluntarily add a column captioned ''Value of unexercised in-the-money options/SARs at fiscal year end ($)'' to the Outstanding Awards at Fiscal Year-End Table to report these fiscal year end intrinsic values.

[88] *See* Proposing Release at Section II.H.

[89] Commenters who addressed these topics generally opposed expanding executive compensation disclosure beyond the named executive officers, stating that it would not add meaningful information. *See, e.g.,* letters from BorgWarner, Business Roundtable, Hewitt, Pearl Meyer, SCSGP and SIFMA. Some commenters opposed eliminating the ability to omit disclosure of performance targets based on competitive harm to the company, stating that disclosure would discourage use of performance targets or that adverse consequences to the company would outweigh the targets' informative value to investors. *See, e.g.,* letters from BorgWarner, Business Roundtable, SCSGP, and Pearl Meyer (supporting disclosure of the percentage of target awards actually earned). Other commenters supported requiring retrospective disclosure of performance targets for awards in completed periods. *See* letters from RiskMetrics, SEIU, State Board of Administration of Florida, and Towers Perrin (supporting the competitive harm exclusion for performance cycles in effect when the proxy statement is distributed). Some commenters supported making CD&A part of the Compensation Committee Report as a means to improve CD&A disclosure quality, often recommending that the combined document be ''filed.'' *See* letters from AFL–CIO, Jesse M. Brill, United Brotherhood of Carpenters, Hodak Value Advisors, RiskMetrics, and SEIU. Others supported retaining the current disclosure roles and status of the CD&A and Compensation Committee Report, finding no compelling reasons to change them. *See, e.g.,* letters from Ameriprise Financial, Pearl Meyer, and SIFMA. Some commenters favored requiring enhanced disclosure of hold-to-retirement and clawback policies to demonstrate whether compensation practices foster a long-term value approach. *See* letters from Jesse M. Brill, SEIU, and State Board of Administration of Florida. Others opposed adding specific requirements, often noting that if such policies are material to compensation decisions, principles-based CD&A currently subjects them to disclosure. *See, e.g.,* letters from Buck Consultants, Business Roundtable, Pearl Meyer, and Towers Perrin. Commenters similarly divided about requiring disclosure of internal pay ratios. *See* letters from Jesse M. Brill, Pearl Meyer, SCSGP and SIFMA. One commenter opposed all of the potential initiatives on which we solicited comment, stating that they ''would generate extensive disclosures of questionable relevance.'' *See* letter from Pfizer.

[90] Form N–1A is used by open-end management investment companies. Form N–2 is used by closed-end management investment companies. Form N–3 is used by separate accounts, organized as management investment companies, which offer variable annuity contracts.

[91] *See, e.g.,* letters from Board of Directors Network, Forum of Executive Women, Integrated Governance Solutions, Norges Bank Investment Management (''Norges Bank''), and Ralph Saul.

[92] *See, e.g.,* letters from ABA, Ameriprise, Business Roundtable, BorgWarner, Davis Polk, Honeywell, JPMorgan, Southern Company (''Southern''), and Wisconsin Energy.

these commenters believed that requiring disclosure of the qualifications, attributes and skills of directors and nominees on a person-by-person basis would not elicit meaningful disclosure. They asserted that well-assembled boards usually consist of a diverse collection of individuals who bring a variety of complementary skills that nominating committees and boards generally consider in the broader context of the board's overall composition, with a view toward constituting a board that, as a body, possesses the appropriate skills and experience to oversee the company's business. Another concern expressed by commenters opposed to the proposed amendments was that the disclosure of specialized knowledge or background of particular directors could lead to heightened liability.[93]

Commenters also objected to the use of term ''qualify'' in the proposed amendment. They noted that the term ''qualify'' would only be relevant to the extent that a company's governing instruments create minimum qualifications for directors, such as a requirement to own a certain amount of shares in the company.[94] Other commenters believed that ''risk assessment skills'' should not be singled out for specific discussion, but rather should be considered as part of the discussion of the board's aggregate skills and attributes.[95] These commenters stated that a better alternative may be to address risk as separate disclosure topic to elicit more detailed disclosure about risk.

Several commenters believed that it would be inappropriate to require disclosure of the specific experience, qualifications or skills that qualify a person to serve as a member of a particular board committee.[96] According to these commenters, other than having at least one member of the board with ''financial expertise'' satisfying the requirements for the audit committee, companies generally do not select individuals to serve on the board based on what committee they will serve on. These commenters noted that in many instances, companies will rotate directors among several committee positions during their tenure on the board.[97]

On the question of how frequently the disclosure should be required, many commenters supported having the disclosure provided on an annual basis for all continuing directors and new nominees.[98] These commenters noted that the overall composition of the board changes when new nominees are introduced and annual disclosure would facilitate shareholders' assessments of the quality of the board as a whole, which must be analyzed in relation to any changes in the company's strategy, relevant risks, operations and organization. However, several other commenters stated that if the requirements are adopted, they should only be required when a director is first nominated.[99]

A broad spectrum of commenters supported the proposed amendments to require disclosure of any directorships at public companies held by each director and nominee at any time during the past five years instead of only currently held directorships, and to lengthen the time during which disclosure of legal proceedings is required from five to ten years.[100] However, other commenters asserted that additional disclosure of past directorships would become voluminous and tend to obfuscate a nominee's most relevant credentials.[101]

We requested comment on whether we should retain Item 407(c)(2)(v) of Regulation S–K in light of the proposed amendments to Item 401 of Regulation S–K. This item, among other things, requires disclosure of any minimum qualifications that a nominating committee believes must be met by someone nominated by a committee for a position on the board. Several commenters believed we should retain the disclosure currently required by Item 407(c)(2)(v) because this information allows shareholders to gain an understanding of the overall quality of the board and the board's priorities, and would improve the ability of shareholders to compare a nominee's background to the standards set by the board itself and to further evaluate board and committee composition.[102]

We also requested comment on whether there were additional legal proceeding disclosures that reflect on a director's, executive officer's, or nominee's character and fitness to serve as a public company official that should be required to be disclosed, and we listed several possible additions to the current list. Several commenters agreed that the disclosure about the additional legal proceedings noted was important information that reflected on an individual's competence and integrity and as such, should be disclosed.[103] Other commenters believed the current disclosure requirements were adequate.[104]

3. Final Rule

After considering the comments, we are adopting the amendments to Item 401, but with several revisions. We believe the amendments will provide investors with more meaningful disclosure that will help them in their voting decisions by better enabling them to determine whether and why a director or nominee is an appropriate choice for a particular company.

The final rules require companies to disclose for each director and any nominee for director the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director for the company as of the time that a filing containing this disclosure is made with the Commission.[105] The same disclosure, with respect to any nominee for director put forward by another proponent, would be required in the proxy soliciting materials of that proponent. This new disclosure will be required for all nominees and for all directors, including those not up for reelection in a particular year. The final rule requires this disclosure to be made annually because the composition of the entire board is important information for voting decisions. Although we are adopting the amendments to Item 401, we are not eliminating the disclosure requirements in Item 407(c)(2)(v) of Regulation S–K regarding the specific minimum qualifications and specific qualities or skills used by the nominating committee. We agree with commenters that this requirement should be retained because it will allow investors to compare and evaluate the skills and qualifications of each director

[93] *See, e.g.,* letters from ABA, Ameriprise and Business Roundtable.

[94] *See* letter from ABA.

[95] *See, e.g.,* letters from Honeywell and Protective Life Corporation.

[96] *See* letters from SCSGP, S&C and Southern.

[97] *See, e.g.,* letters from SCSGP and S&C.

[98] *See, e.g.,* letters from IIA, Norges Bank, Pax World Management Corporation, and RiskMetrics.

[99] *See* letters from BorgWarner, Business Roundtable, Cleary Gottlieb, SCSGP and S&C.

[100] *See, e.g.,* letters from AARP, AFL–CIO, CII, Evolution Petroleum, Pfizer, RILA, SCSGP, TIAA–CREF, United Brotherhood of Carpenters, and Universities Superannuation Scheme, *et al. Cf.* letters from AFSCME and Florida State Board of Administration (supporting the proposed amendment and also suggesting that the disclosure of legal proceedings involving fraud should not be subject to a time limit).

[101] *See, e.g.,* letter from S&C.

[102] *See, e.g.,* letters from ABA and CII.

[103] *See, e.g.,* letters from AARP, Colorado Public Employees' Retirement Association (''COPERA''), and Interfaith Center on Corporate Responsibility.

[104] *See, e.g.,* letters from American Electric Power and S&C.

[105] Consistent with the comments, we are revising the requirement to delete the term ''qualify,'' and instead we are focusing on the reasons for the decision that the person should serve as a director.

and nominee against the standards established by the board.[106]

The final rules do not require disclosure of the specific experience, qualifications or skills that qualify a person to serve as a committee member. In making this change from the proposal, we were persuaded by commenters who noted that many companies rotate directors among different committee positions to allow directors to gain different perspectives of the company.[107] However, if an individual is chosen to be a director or a nominee to the board because of a particular qualification, attribute or experience related to service on a specific committee, such as the audit committee, then this should be disclosed under the new requirements as part of the individual's qualifications to serve on the board.

The final amendments do not specify the particular information that should be disclosed. We believe companies and other proponents should be afforded flexibility in determining the information about a director's or nominee's skills, qualifications or particular area of expertise that would benefit the company and should be disclosed to shareholders. Accordingly, we have deleted the reference to ''risk assessment skills'' that was included in the proposed amendments.[108] However, we note that if particular skills, such as risk assessment or financial reporting expertise, were part of the specific experience, qualifications, attributes or skills that led the board or proponent to conclude that the person should serve as a director, this should be disclosed.

We are adopting substantially as proposed the amendments to require disclosure of any directorships at public companies and registered investment companies held by each director and nominee at any time during the past five years. Item 401 presently requires disclosure of any current director positions held by each director and nominee in any company with a class of securities registered pursuant to Section 12 of the Exchange Act,[109] or subject to the requirements of Section 15(d) of that Act,[110] or any company registered as an investment company under the Investment Company Act. We believe that expanding this disclosure to include service on boards of those companies for the past five years (even if the director or nominee no longer serves on that board) will allow investors to better evaluate the relevance of a director's or nominee's past board experience, as well as professional or financial relationships that might pose potential conflicts of interest (such as past membership on boards of major suppliers, customers, or competitors).

In addition to these amendments, we are adopting amendments as proposed to lengthen the time during which disclosure of legal proceedings involving directors, director nominees and executive officers is required from five to ten years. We believe it is appropriate to extend the required reporting period from five to ten years as a means of providing investors with more extensive information regarding an individual's competence and character. We were persuaded by commenters who believed that disclosures of legal proceedings during the ten-year period would provide investors with additional important information.[111] We are also adopting amendments to expand the list of legal proceedings involving directors, executive officers, and nominees covered under Item 401(f) of Regulation S–K. Some commenters agreed that certain legal proceedings can reflect on an individual's competence and integrity to serve as a director, and that the additional disclosure noted in the proposing release would provide investors with valuable information for assessing the competence, character and overall suitability of a director, nominee or executive officer.[112]

In addition, consistent with our request for comment and comments received,[113] we are amending Item 401(f) to require disclosure of additional legal proceedings. These new legal proceedings include:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity;
- Any judicial or administrative proceedings based on violations of Federal or State securities, commodities, banking or insurance laws and regulations, or any settlement [114] to such actions; and
- Any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

We believe this amendment will provide investors with information that is important to an evaluation of an individual's competence and character to serve as a public company official.[115]

In the Proposing Release, we also requested comment on whether we should amend our rules to require disclosure of additional factors considered by a nominating committee when selecting someone for a board position, such as board diversity. A significant number of commenters responded that disclosure about board diversity was important information to investors.[116] Many of these commenters believed that requiring this disclosure would provide investors with information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions.[117] Commenters also noted that there appears to be a meaningful relationship between diverse boards and improved corporate financial performance, and that diverse boards can help companies more effectively recruit talent and retain staff.[118] We agree that it is useful for investors to understand how the board considers and addresses diversity, as well as the board's assessment of the implementation of its diversity policy, if any. Consequently, we are adopting amendments to Item 407(c) of Regulation S–K to require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director.[119] In addition, if the nominating committee (or the board) has a policy with regard to the consideration of diversity in

[106] *See, e.g.,* letter from CII.

[107] *See, e.g.,* letters from Davis Polk and Pfizer.

[108] *See, e.g.,* letters from Honeywell and Protective Life Corporation.

[109] 15 U.S.C. 78*l.*

[110] 15 U.S.C. 78*o*(d).

[111] *See, e.g.,* letters from ABA, AARP and COPERA.

[112] *See, e.g.,* letters from AARP, CII, COPERA, SEIU, and USPX.

[113] *See* note 103 above and accompanying text.

[114] This does not include disclosure of a settlement of a civil proceeding among private parties. We are including an instruction as part of the amendments to clarify this.

[115] Consistent with the current disclosure requirement regarding legal proceedings, the additional legal proceedings included in the new requirements will not need to be disclosed if they are not material to an evaluation of the ability or integrity of the director or director nominee. *See* 17 CFR 229.401(f).

[116] *See, e.g.,* letters from Board of Directors Network, Boston Common Asset Management, CalPERS, CalSTRS, Calvert, Council of Urban Professionals, Ernst & Young LLP (''E&Y''), Greenlining Institute, Hispanic Association on Corporate Responsibility, Interfaith Center on Corporate Responsibility, InterOrganization Network, Latino Business Chamber of Greater Los Angeles, Pax World Management Corporation, Prout Group, Inc., RiskMetrics, Sisters of Charity BVM, Sisters of St. Joseph Carondelet, and Trillium Asset Management Corporation.

[117] *See, e.g.,* letters from the Boston Club, Boston Common Asset Management, CalPERS, Pax World Management Corporation, Trillium Asset Management Corporation, and Social Investment Forum.

[118] *See, e.g.,* letters from Catalyst and the Social Investment Forum.

[119] *See* Item 407(c)(2)(vi) of Regulation S–K. Funds will be subject to the diversity disclosure requirement of Item 407(c)(2)(vi) of Regulation S–K under Item 22(b)(15)(ii)(A) of Schedule 14A. *See* 17 CFR 240.14a–101, Item 22(b)(15)(ii)(A).

identifying director nominees, disclosure would be required of how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy. We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.

C. New Disclosure About Board Leadership Structure and the Board's Role in Risk Oversight

We proposed a new disclosure requirement to Item 407 of Regulation S–K and a corresponding amendment to Item 7 of Schedule 14A to require disclosure of the company's leadership structure and why the company believes it is the most appropriate structure for it at the time of the filing. The proposal also required disclosure about the board's role in the company's risk management process. We are adopting the proposals with some changes.

1. Proposed Amendments

Under the proposed amendments, companies would be required to disclose their leadership structure and the reasons why they believe that it is an appropriate structure for the company. As part of this proposed disclosure, companies would be required to disclose whether and why they have chosen to combine or separate the principal executive officer and board chair positions. In addition, in some companies the role of principal executive officer and board chairman are combined, and a lead independent director is designated to chair meetings of the independent directors. For these companies, the proposed amendments would require disclosure of whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the leadership of the company. In proposing this requirement, we noted that different leadership structures may be suitable for different companies depending on factors such as the size of a company, the nature of a company's business, or internal control considerations, among other things. Irrespective of the type of leadership structure selected by a company, the proposed requirements were intended to provide investors with insights about why the company has chosen that particular leadership structure.

We also proposed to require additional disclosure in proxy and information statements about the board's role in the company's risk management process. Disclosure about the board's approach to risk oversight might address questions such as whether the persons who oversee risk management report directly to the board as whole, to a committee, such as the audit committee, or to one of the other standing committees of the board; and whether and how the board, or board committee, monitors risk.

We also proposed that funds provide the new Item 407 disclosure about leadership structure and the board's role in the risk management process in proxy and information statements and similar disclosure as part of registration statements on Forms N–1A, N–2 and N–3. The proposed amendments were tailored to require that a fund disclose whether the board chair is an ''interested person'' of the fund, as defined in Section 2(a)(19) of the Investment Company Act. We proposed that if the board chair is an interested person, a fund would be required to disclose whether it has a lead independent director and what specific role the lead independent director plays in the leadership of the fund.

2. Comments on the Proposed Amendments

Comments were mostly supportive of the proposals.[120] Commenters believed the disclosure regarding a company's leadership structure and the board's role in risk management process would provide useful information to investors and improve investor understanding of the role of the board in a company's risk management practices.[121] Some commenters opposed the disclosures. Many of these commenters believed that the proposed amendments were too vague and would likely elicit boilerplate descriptions of a company's management hierarchy and risk management that would not provide significant insight or meaning to investors.[122]

Many commenters suggested revisions to the proposed disclosure requirements. For instance, several commenters recommended that we use the phrase ''board leadership structure'' rather than ''company leadership structure'' and noted that the discussion of the board leadership structure and the board's role in risk management are two separate disclosure items.[123] These commenters believed that the use of the phrase ''company leadership structure'' could be misinterpreted to require a discussion of a company's management leadership structures. Other commenters suggested that we replace the phrase ''risk management'' with ''risk oversight'' because the board's role is to oversee management, which is responsible for the day-to-day issues of risk management.[124]

Several commenters believed disclosure of the board's role in risk management would be more effective as part of a comprehensive discussion of a company's risk management processes, rather than as stand-alone disclosure.[125] They suggested that companies be allowed to provide the required disclosure in the MD&A discussion included in the Form l0–K, and to incorporate by reference this information in the proxy statement rather than repeat the information.

With respect to funds, commenters addressing the issue generally supported the proposal that funds disclose whether the board chair is an ''interested person'' as defined under the Investment Company Act.[126] In addition, commenters noted the importance of fund board oversight of risk management,[127] but commenters were split regarding whether we should require disclosure about fund board oversight of risk management.[128]

3. Final Rule

After consideration of the comments, we are adopting the proposals substantially as proposed with a few technical revisions in response to comments. We believe that, in making voting and investment decisions,

[120] *See, e.g.,* letters from AFL–CIO, Chairmen's Forum, Calvert, CII, CalSTRS, the General Board of Pension and Health Benefits of the United Methodist Church, Hermes, Norges Bank, Pfizer, RiskMetrics, and SEIU.

[121] *See, e.g.,* letters from CII, the General Board of Pension and Health Benefits of the United Methodist Church, IGS, and RIMS.

[122] *See, e.g.,* letters from Cleary Gottlieb, S&C and Theragenics.

[123] *See, e.g.,* letters from Business Roundtable and Honeywell.

[124] *See, e.g.,* letters from GovernanceMetrics and PLC.

[125] *See, e.g.,* letters from ABA and JPMorgan.

[126] *See, e.g.,* letters from Independent Directors Council (''IDC'') and Mutual Fund Directors Forum (''MFDF'').

[127] *See, e.g.,* letters from IDC and MFDF.

[128] *See* letters from Calvert and MFDF (supporting disclosure). *But see* letters from the Investment Company Institute and IDC (opposing disclosure).

investors should be provided with meaningful information about the corporate governance practices of companies.[129] As we noted in the Proposing Release, one important aspect of a company's corporate governance practices is its board's leadership structure. Disclosure of a company's board leadership structure and the reasons the company believes that its board leadership structure is appropriate will increase the transparency for investors as to how the board functions.

As stated above, the amendments were designed to provide shareholders with disclosure of, and the reasons for, the leadership structure of a company's board concerning the principal executive officer, the board chairman position and, where applicable, the lead independent director position. We agree with commenters that the phrase ''board leadership structure'' instead of ''company leadership structure'' would avoid potential misunderstanding that the amendments require a discussion of the structure of a company's management leadership.[130] We also agree with commenters that the phrase ''risk oversight'' instead of ''risk management'' would be more appropriate in describing the board's responsibilities in this area.[131]

Under the amendments, a company is required to disclose whether and why it has chosen to combine or separate the principal executive officer and board chairman positions, and the reasons why the company believes that this board leadership structure is the most appropriate structure for the company at the time of the filing. In addition, in some companies the role of principal executive officer and board chairman are combined, and a lead independent director is designated to chair meetings of the independent directors. In these circumstances, the amendments will require disclosure of whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the leadership of the company. As we previously stated in the Proposing Release, these amendments are intended to provide investors with more transparency about the company's corporate governance, but are not intended to influence a company's decision regarding its board leadership structure.

The final rules also require companies to describe the board's role in the oversight of risk. We were persuaded by commenters who noted that risk oversight is a key competence of the board, and that additional disclosures would improve investor and shareholder understanding of the role of the board in the organization's risk management practices.[132] Companies face a variety of risks, including credit risk, liquidity risk, and operational risk. As we noted in the Proposing Release, similar to disclosure about the leadership structure of a board, disclosure about the board's involvement in the oversight of the risk management process should provide important information to investors about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company. This disclosure requirement gives companies the flexibility to describe how the board administers its risk oversight function, such as through the whole board, or through a separate risk committee or the audit committee, for example. Where relevant, companies may want to address whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from such individuals.

The final rules also require funds to provide disclosure about the board's role in risk oversight. Funds face a number of risks, including investment risk, compliance, and valuation; and we agree with commenters who favored disclosure of board risk oversight by funds.[133] As with corporate issuers, we believe that additional disclosures would improve investor understanding of the role of the board in the fund's risk management practices. Furthermore, the disclosure should provide important information to investors about how a fund perceives the role of its board and the relationship between the board and its advisor in managing material risks facing the fund.

D. New Disclosure Regarding Compensation Consultants

We proposed amendments to Item 407 of Regulation S–K to require, for the first time, disclosure about the fees paid to compensation consultants and their affiliates when they played a role in determining or recommending the amount or form of executive and director compensation, and they also provided additional services to the company. The proposed amendments also would have required a description of the additional services provided to the company by the compensation consultants and any affiliates of the consultants. We are adopting the amendments with changes in response to comments.

1. Proposed Amendments

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

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

The proposed disclosure requirements would have applied to all services provided by a compensation consultant and its affiliates if the compensation consultant played any role in determining or recommending the amount or form of executive and director compensation. The proposed amendments did not distinguish between consultants engaged by the board and consultants engaged by management. We provided an exception from the proposed disclosure requirements for those situations in which the compensation consultant's role in recommending the amount or form of executive and director compensation was limited to consulting on broad-based plans that did not discriminate in favor of executive officers or directors of the company, such as 401(k) plans or health insurance

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

[130] *See* letter from Honeywell.

[131] *See, e.g.,* letters from Ameriprise Financial and Protective Life Corporation.

[132] *See, e.g.,* letters from Norges Bank and RIMS.

[133] *See* letters from Calvert and MFDF.

plans. We believed that when a compensation consultant's services were limited to consulting on broad-based, non-discriminatory plans, these services did not give rise to the type of potential conflict of interest intended to be addressed by our proposed amendments.[134]

2. Comments on the Proposed Amendments

A significant number of commenters generally supported the proposed amendments to Item 407 of Regulation S–K to require disclosure of the fees paid to compensation consultants as well as a description of other services provided by compensation consultants.[135] Many of these commenters believed investors would benefit from disclosure regarding the potential conflicts of interests of compensation consultants when they advise on the amount or form of executive and director compensation and also provide additional services to the company.[136] These commenters believed that disclosure of the fees paid to compensation consultants would go a long way towards minimizing potential conflicts of interests and would allow shareholders to assess the potential conflicts of interest in regard to the compensation advice given to companies.

However, several commenters, primarily multi-service compensation consulting firms, opposed the proposed amendments.[137] These commenters believed the proposed amendments were too narrowly focused on fees paid to multi-service consulting firms and ignored important considerations relating to the consultant's qualifications, selection, and role.[138] They also asserted that the proposed disclosure could give investors a distorted view of how companies use and select compensation consultants. Because the role of consultants is not uniform and varies considerably from company to company, these commenters asserted that investors should be given an understanding not only of the role consultants serve for each company, but also of the board's or compensation committee's selection process. This would include how it assessed the consultant's qualifications and how any potential conflicts of interest that may have been identified are mitigated by formal processes, or by the internal controls and processes maintained by the consulting firm.[139]

Several commenters opposed to the proposed amendments asserted that the amendments would decrease the compensation consulting resources available to companies.[140] Other commenters asserted that the proposed amendments would cause competitive harm to multi-service consulting firms who provide services other than executive compensation consulting, as companies would be discouraged from using multi-service compensation consulting firms in more than one capacity.[141] These commenters also claimed that the proposed amendments would cause competitive harm because disclosure of the nature and extent of all additional services provided by the consultant would reveal confidential and competitively sensitive pricing information that could allow competitors to determine the fee structure for these additional services.[142]

These commenters also expressed concern that the proposed amendments did not address potential conflicts of interest that may occur when a compensation consultant that only provides executive-compensation related services to the board is overly reliant on the fees it receives from a particular client. They suggested an alternative rule that would require disclosure of fees paid to a compensation consultant when a significant portion of the annual revenues of the compensation consultant were generated from any one client.[143]

Several commenters expressed concern that the scope of the proposed amendments was too broad. These commenters believed that when a compensation committee engages its own compensation consultant, it mitigates any concerns about potential conflicts of interest involving consultants engaged by management.[144] According to these commenters, from that perspective, a compensation consulting firm that provides executive compensation consulting services to the company, and also provides other services to the company, would not present a conflict of interest issue when the compensation committee retains a different consultant.[145] Noting that management should have broad access to compensation experts and other third parties when developing executive pay proposals for board consideration, and that it is the board's responsibility to evaluate management's compensation proposals when determining whether or not to approve them, some commenters expressed concerns about the potential effect of the proposed disclosure on the board's discharge of its oversight responsibility.[146]

In the Proposing Release, we requested comment on whether there were other consulting services that do not give rise to potential conflicts of interest that should be excluded from the proposed disclosure requirements similar to the proposed exemption for consulting services that are limited to broad-based, non-discriminatory plans. Several commenters responded by suggesting that we exclude consulting services where the compensation consultant only provides the board with peer surveys that provide general information regarding the forms and amounts of compensation typically paid to executive officers and directors within a particular industry.[147] Another commenter suggested that surveys that are either not customized for a particular company, or that are customized based on parameters that are not developed by the compensation consultant, should be excluded from the amendments.[148] These commenters believed that in situations where the compensation consultant's services provided to a company were limited to providing those types of surveys, such services did not raise the potential conflicts of interest that the proposed amendments were intended to address.[149]

We also requested comment on whether we should establish a disclosure threshold based on the

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[134] We also proposed to amend Item 407 along the same lines to clarify that the current disclosure requirements under the item were not triggered for a compensation consultant whose only services with regard to executive or director compensation were limited to these types of broad-based, non-discriminatory plans. Many commenters supported this amendment and we are adopting it as proposed.

[135] *See, e.g.,* letters from AFL–CIO, AFSCME, Business Roundtable, CalSTRS, CII, COPERA, Evolution Petroleum, Glass Lewis, Grahall, Hermes Equity Ownership Services, NACD, Oppenheimer Funds, Pax World Management Corporation, State of Connecticut Treasurer's Office, TIAA–CREF, Trillium Asset Management Corporation, and Walden Asset Management.

[136] *See, e.g.,* letters from AFL–CIO, Frank Inman, Hermes Equity Ownership Services Ltd., TIAA–CREF, and Trillium Asset Management.

[137] *See* letters from ABA, Hewitt, Mercer, Pfizer, Protective Life Corporation, Radford, Towers Perrin, Value Alliance, and Watson Wyatt.

[138] *See, e.g.,* letters from Hewitt, Mercer and Towers Perrin.

[139] *See, e.g.,* letter from Hewitt.

[140] *See, e.g.,* letters from Hewitt and Mercer.

[141] *See, e.g.,* letters from Mercer, Towers Perrin and Watson Wyatt.

[142] *See, e.g.,* letter from Mercer.

[143] *See, e.g.,* letters from Hewitt, Mercer, Towers Perrin and Watson Wyatt.

[144] *See, e.g.,* letters from E&Y and Deloitte.

[145] *Id.*

[146] *See* letters from Hewitt and E&Y.

[147] *See, e.g.,* letters from BorgWarner, Davis Polk, Honeywell, JPMorgan and Wisconsin Energy.

[148] *See* letter from ABA.

[149] *See, e.g.,* letters from BorgWarner, Davis Polk and Honeywell.

amount of the fees for the non-executive compensation related services, such as above a certain dollar amount or a percentage of income or revenues. Several commenters recommended that the proposed amendments should include a disclosure threshold, including many who suggested that we should require disclosure only if the aggregate fees for all additional services provided by the consultant and its affiliates exceeded $120,000.[150]

3. Final Rule

After considering the comments received, we are adopting a modified version of the proposed amendments. We believe the new disclosure requirements will provide investors with information that will enable them to better assess the potential conflicts a compensation consultant may have in recommending executive compensation, and the compensation decisions made by the board. As we noted in the Proposing Release, many companies engage compensation consultants to make recommendations on appropriate executive and director compensation levels, to design and implement incentive plans, and to provide information on industry and peer group pay practices. The services offered by compensation consultants, however, are often not limited to recommending executive and director compensation plans or policies. Many compensation consultants, or their affiliates, are retained by management to provide a broad range of additional services, such as benefits administration, human resources consulting and actuarial services. The fees generated by these additional services may be more significant than the fees earned by the consultants for their executive and director compensation services. The extent of the fees and provision of additional services by a compensation consultant or its affiliate may create the risk of a conflict of interest that may call into question the objectivity of the consultant's advice and recommendations on executive compensation.

At the same time, we are persuaded that there are circumstances where this disclosure should not be required either because of the limited nature of the additional services or because of other factors that mitigate the concern that the board may be receiving advice potentially influenced by a conflict of interest.

a. Summary of the Final Rule

As more fully described below, under our final rule, in addition to the requirement under the current rule to describe the role of the compensation consultant in determining or recommending the amount or form of executive and director compensation, fee disclosure related to the retention of a compensation consultant will be required in certain circumstances. The final rules can be summarized generally as follows:

- If the board, compensation committee or other persons performing the equivalent functions (collectively, ''board'') has engaged its own consultant to provide advice or recommendations on the amount or form of executive and director compensation and the board's consultant or its affiliates provide other non-executive compensation consulting services to the company, fee and related disclosure is required, provided the fees for the non-executive compensation consulting services exceed $120,000 during the company's fiscal year. Disclosure is also required of whether the decision to engage the compensation consultant or its affiliates for non-executive compensation consulting services was made or recommended by management, and whether the board has approved these non-executive compensation consulting services provided by the compensation consultant or its affiliate;
- If the board has not engaged its own consultant, fee disclosures are required if there is a consultant (including its affiliates) providing executive compensation consulting services and non-executive compensation consulting services to the company, provided the fees for the non-executive compensation consulting services exceed $120,000 during the company's fiscal year;
- Fee and related disclosure for consultants that work with management (whether for only executive compensation consulting services, or for both executive compensation consulting and other non-executive compensation consulting services) is not required if the board has its own consultant; and
- Services involving only broad-based non-discriminatory plans or the provision of information, such as surveys, that are not customized for the company, or are customized based on parameters that are not developed by the consultant, are not treated as executive compensation consulting services for purposes of the compensation consultant disclosure rules.

b. Disclosure Required if the Board's Compensation Consultant Provides Additional Services to the Company

If the board has engaged a compensation consultant to advise the board as to executive and director compensation, and such consultant or its affiliates provides other non-executive compensation consulting services to the company, the disclosures specified by the new rules are required. We believe that in that situation, the receipt of fees for non-executive compensation consulting services by the board's consultant presents the potential conflict of interest intended to be highlighted for investors by our new rules. Subject to the disclosure threshold discussed below, the final rule requires disclosure of the aggregate fees paid for services provided to either the board or the company with regard to determining or recommending the amount or form of executive and director compensation, and the aggregate fees paid for any non-executive compensation consulting services provided by the compensation consultant or its affiliates.

In addition, the new rules require disclosure of whether the decision to engage the compensation consultant or its affiliates for the non-executive compensation consulting services was made, or recommended by, management, and whether the board approved such other services.[151]

c. Disclosure Required if the Board Does Not Have a Compensation Consultant, but the Company Receives Executive Compensation and Non-Executive Compensation Services From Its Consultant

The new rule also requires disclosure of fees in situations where the board has not engaged a compensation consultant, but management or the company received executive compensation consulting services and other non-executive compensation consulting services from a consultant or its affiliates, and the fees from the non-executive compensation consulting services provided by that consultant or its affiliates exceed $120,000 for the company's fiscal year.[152] We recognize that in that situation the board, which generally is primarily responsible for determining the compensation paid to

[150] *See, e.g.,* letters from ACC, Business Roundtable, Davis Polk, and SCSGP. Some commenters also suggested a disclosure threshold based on tests in effect under rules with a similar focus in self-regulatory organizations, such as the 2% (for New York Stock Exchange-listed companies) or 5% (for NASDAQ-listed companies) of gross revenues test for disclosure of business relationships between a company and a director-affiliated entity. *See, e.g.,* letter from Cleary Gottlieb. *See also,* letter from ABA (suggesting a percentage threshold set at a level where the effect of such fees diminishes the possible appearance of a conflict of interest).

[151] Item 407(e)(3)(iii)(A) of Regulation S–K.

[152] Item 407(e)(3)(iii)(B).

senior executives, may not be relying on the consultant used by management, and, therefore, conflicts of interest may be less of a concern. However, we believe that when management has a compensation consultant and the board does not have its own compensation consultant to help filter any advice provided by management's compensation consultant, the concerns about board reliance on consultants that may have a conflict are sufficiently present to require this approach. Consequently, the final rule provides that in this fact pattern, fee disclosure is required if the fees from the non-executive compensation consulting services provided by the compensation consultant exceed the disclosure threshold described below.

d. Disclosure Not Required if the Board and Management Have Different Compensation Consultants, Even if Management's Consultant Provides Additional Services to the Company

In some instances, the board may engage a compensation consultant to advise it on executive or director compensation, and management may engage a separate consultant to provide executive compensation consulting services and one or more additional non-executive compensation consulting services. We believe there is less potential for a conflict of interest to arise when the board has retained its own compensation consultant, and the company or management has a different consultant to provide executive compensation consulting and other non-executive compensation consulting services.[153] When the board engages its own compensation consultant, it mitigates concerns about potential conflicts of interest involving compensation consultants engaged by management.[154] Accordingly, the final rules 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. In addition to limiting disclosure to circumstances that are more likely to present potential conflicts of interests, we believe this approach should address some concerns about competitive harm that were raised by commenters. The exception would be available without regard to whether management's consultant participates in board meetings. Where the board's compensation consultant provides additional non-executive compensation consulting services to the company, the rule would, as described above, require fee and other related disclosures, which should address concerns about conflicts of interest by that consultant. Fee disclosure for services provided by management's compensation consultant would be less relevant in this situation because the board is able to rely on its own compensation consultant's advice, rather than the advice provided by management's compensation consultant, when making its executive compensation decisions.

e. Disclosure Required Only if Fees for Additional Services Exceed $120,000 During the Company's Last Completed Fiscal Year

As noted previously, we agree with commenters that the final rule should have a disclosure threshold.[155] We believe that when aggregate fees paid for the non-executive compensation consulting services are limited, the potential conflict of interest is likely to be commensurately reduced. A disclosure threshold would also reduce the compliance burdens on companies when the potential conflict of interest is minimal. Under the rule as adopted, if the board has engaged a compensation consultant to provide executive and director compensation consulting services to the board or if the board has not retained a consultant but there is a firm providing executive compensation consulting services, fee disclosure is required if the consultant or its affiliates also provides other non-executive compensation consulting services to the company, and the fees paid for the other services exceed $120,000 for the company's fiscal year. We believe fees for other non-executive compensation consulting services below that threshold are less likely to raise potential conflicts of interest concerns, and note this disclosure threshold should reduce the recordkeeping burden on companies. This threshold is similar to the disclosure threshold for transactions with related persons in Item 404 of Regulation S–K, which also deals with potential conflicts of interest on the part of related persons who have financial transactions or arrangements with the company, and therefore provides some regulatory consistency.[156]

f. Disclosure of Nature and Extent of Additional Services Not Required

The rule, as adopted, does not require disclosure of the nature and extent of additional services provided by the compensation consultant and its affiliates to the company, as we proposed. We made this change from the proposal because we are persuaded by commenters who noted that requiring this disclosure could cause competitive harm by revealing confidential and sensitive pricing information, and we believe that the critical information about the potential conflict is adequately conveyed through the fee disclosure requirement. Although we are not adopting this requirement, companies may at their discretion include a description of any additional non-executive compensation consulting services provided by the compensation consultant and its affiliates where such information would facilitate investor understanding of the existence or nature of any potential conflict of interest.

g. Exceptions to the Disclosure Requirement for Consulting on Broad-Based Plans and Provision of Survey Information

We are adopting substantially as proposed the exception from the disclosure requirements for situations in which the compensation consultant's only role in recommending the amount or form of executive or director compensation is in connection with consulting on broad-based plans that do not discriminate in favor of executive officers or directors of the company. In addition, in response to comments received, we are expanding the exception to include situations where the compensation consultant's services are limited to providing information, such as surveys, that either is not customized for a particular company, or that is customized based on parameters that are not developed by the compensation consultant.[157] We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.[158] However, the exception would not be available if the compensation consultant provides advice or recommendations in connection with the information provided in the survey.

[153] *See, e.g.,* letters from Hewitt and E&Y.

[154] *See* letter from E&Y.

[155] *See, e.g.,* letters from ACC, Davis Polk and SCSGP. This threshold requirement should also help address some of the competitive concerns expressed by some commenters. *See, e.g.,* note 150 above and accompanying text.

[156] *See* 17 CFR 229.404.

[157] *See, e.g.,* letters from ABA, Mercer and Towers Perrin.

[158] *See* letters from Davis Polk and Mercer.

h. Other Concerns

We did not propose, and do not at this time adopt, disclosure of consulting fees based on a percentage of revenues received from a company. We have considered the concern expressed by some commenters that compensation consultants, even if they are only retained by the board for executive compensation related services and do not provide any additional services to the company, may become overly reliant on a single client for revenues, which could affect the advice the consultant provides to the board.[159] However, we are not currently persuaded that such reliance would cause a consultant to provide advice to the board that inappropriately reflects *management's* influence as a result of fees for additional services, which is the primary concern addressed by the final rule.

We also considered the suggestion provided by these commenters that companies be required to disclose various matters about the consideration of potential conflicts of interest.[160] We are not persuaded that we need to address this issue at this time and believe our final rule addresses our concerns without adding significant length to the disclosure or burdens on companies.

Our amendments as adopted are intended to facilitate investors' consideration of whether, in providing advice, a compensation consultant may have been influenced by a desire to retain other engagements from the company. This does not reflect a conclusion that we believe that a conflict of interest is present when disclosure is required under our new rule, or that a compensation committee or a company could not reasonably conclude that it is appropriate to engage a consultant that provides other services to the company requiring disclosure under our new rule. It also does not mean that we have concluded that there are no other circumstances that might present a conflict of interest for a compensation consultant retained by a compensation committee or company. Rather, the amendments are designed to provide context to investors in considering the compensation disclosures required to be provided under our rules, and, as explained above, are based on our understanding of the situations that are more likely to raise potential conflicts of interest concerns.

E. Reporting of Voting Results on Form 8–K

We proposed to transfer the requirement to disclose shareholder vote results from Forms 10–Q and 10–K to Form 8–K, and to have that information filed within four business days after the end of the meeting at which the vote was held. We are adopting the proposal with some modifications in response to comments.

1. Proposed Amendments

Currently, Item 4 in Part II of Form 10–Q and Item 4 in Form 10–K require the disclosure of the results of any matter that was submitted to a vote of shareholders during the fiscal quarter covered by either the Form 10–Q or Form 10–K with respect to the fourth fiscal quarter. The proposed amendments would delete this requirement from Forms 10–Q and 10–K and move it to Form 8–K. As a result, voting results would be required to be filed on Form 8–K within four business days after the end of the meeting at which the vote was held. To accommodate timing difficulties in contested elections, we proposed a new instruction to the form that stated that if the matter voted upon at the shareholders' meeting related to a contested election of directors and the voting results were not definitively determined at the end of the meeting, companies would be required to file the preliminary voting results within four business days after the preliminary voting results were determined, and then file an amended report on Form 8–K within four business days after the final voting results were certified.

2. Comments on the Proposed Amendments

The majority of comments we received on the proposed amendments supported requiring the filing of voting results on Form 8–K. Many commenters believed that more timely disclosure of the voting result would benefit shareholders and investors.[161] Some noted that matters submitted for shareholder vote involve issues that directly impact shareholder interests—for example investment or divestments, changes in shareholder rights and capital changes—and that timely disclosure of voting results can be crucial.[162] One commenter believed that majority vote requirements for director elections have introduced greater accountability and uncertainty into uncontested director elections, making it increasingly important that these election outcomes be reported in a timely manner to shareholders.[163]

Several commenters recommended modifications to the proposed amendments. Specifically, some commenters expressed concern that preliminary voting results should not be required to be disclosed because disclosure of preliminary results could mislead investors if the definitive results reflect a different outcome than what was disclosed initially.[164] Concerns were also expressed that the reporting of preliminary voting results could inadvertently influence voting if the disclosure is made at a time when the opportunity remains open for additional votes to be cast.[165] Commenters also believed that the four business day reporting requirement should not be tied to the end of the shareholders' meeting, but rather to the issuance of a certified report of an inspector of election.[166] In addition, commenters suggested that the proposed instruction excepting the filing of voting results in contested elections of directors within four business days after the end of the shareholders' meeting should be expanded to cover any matter for which final voting results are not available or ''too close to call'' within four business days following the end of the shareholders' meeting.[167]

A few commenters opposed the proposed amendments.[168] Commenters opposed to amendments expressed concern that it would be very difficult to meet the four business day filing requirement. One of these commenters noted that problems that stem from share lending and other practices can

[159] *See* letters from Hewitt, Mercer, Pearl Meyer, and Towers Perrin.

[160] In their comment letters, several multi-service compensation consulting firms proposed an alternative disclosure requirement. Under their proposal, if the total fees paid to the consultant for all services provided to the company and its affiliates during the preceding fiscal year exceeded one-half of one percent of the total revenues of the consultant for that fiscal year, the company would be required to disclose, among other things, the protocols established by the compensation committee to ensure that the consultant is able to provide unbiased advice and is not inappropriately influenced by the company's management. *See* letters from Hewitt, Mercer, Watson Wyatt, and Towers Perrin.

[161] *See, e.g.,* letters from CalSTRS, CII, Hermes, IIA, Norges Bank, United Brotherhood of Carpenters and Walden.

[162] *See, e.g.,* letters from CalSTRS and Norges Bank.

[163] *See* letter from United Brotherhood of Carpenters.

[164] *See e.g.,* letter from Chadbourne.

[165] *See* letter from ABA.

[166] *See* letter from Allen Goolsby, *et al.*

[167] *See, e.g.,* letters from BorgWarner, Business Roundtable, SCSG, S&C and Southern.

[168] *See, e.g.,* letters from Keith Bishop, NACD, RILA and SCC.

significantly delay the time that votes can be tabulated.[169]

Several commenters believed that the disclosure of the results of shareholder votes should be added to the list of items on Form 8–K that are currently excluded from liability under Section 10(b) of the Exchange Act and Exchange Act Rule 10b–5, and that do not result in a loss of Form S–3 eligibility under General Instruction I.A.3(b).[170] One commenter, however, believed that an amendment to General Instruction I.A.3(b) of Form S–3 to add an exception to the Form S–3 eligibility requirements for the reporting of voting results would not be necessary if we allowed preliminary voting results for contested elections and on proposals that are ''too close to call'' to be reported within four business days of the meeting and final voting results within four business days after the voting results become final.[171]

3. Final Rule

After evaluating the comments received, we are adopting the proposed amendments to Form 8–K, and are eliminating the requirement to disclose shareholder voting results on Forms 10–Q and 10–K. Accordingly, new Item 5.07 to Form 8–K requires companies to disclose on the form the results of a shareholder vote and to have that information filed within four business days after the end of the meeting at which the vote was held. Tying the filing requirement to the end of the meeting will provide shareholders, investors and other users of this information with a readily identifiable and certain date upon which a company would be required to disclose information on the results of the vote. We believe more timely disclosure of the voting results from an annual or special meeting would benefit investors and the markets. Under our prior disclosure requirements, it could be a few months before voting results are disclosed in a Form 10–Q or 10–K. Often, matters submitted for a shareholder vote at an annual or special meeting involve issues that directly impact shareholder interests, such as the election of directors, changes in shareholder rights, investments or divestments, and capital changes. The delay between the end of an annual or special meeting of shareholders and when the voting results of the meeting are disclosed in a Form 10–Q or 10–K can make the information less useful to investors and the markets. We also understand that technological advances in shareholder communications and the growing use of third-party proxy services have increased the ability of companies to tabulate vote results and disseminate this information on a more expedited basis.

We agree with the suggestions of commenters that there may be situations other than contested elections where it may take a longer period of time to determine definitive voting results.[172] As a result, we are expanding the instruction to Form 8–K as adopted to state that companies are required to file the preliminary voting results within four business days after the end of the shareholders' meeting, and then file an amended report on Form 8–K within four business days after the final voting results are known.[173] However, if a company obtains the definitive voting results before the preliminary voting results must be reported and decides to report its definitive results on Form 8–K, it will not be required to file the preliminary voting results. For example, if a company obtains the definitive voting results two days after the end of the shareholders' meeting, it could report its definitive voting results on Form 8–K within four business days after the meeting and would not be required to file its preliminary voting results. To the extent that companies are concerned that the disclosure of preliminary voting results could be confusing to investors, they may include additional disclosure that helps to put the preliminary voting disclosure in a proper context.

In the Proposing Release, we requested comment on whether we should consider additional revisions to the requirement to report voting results, such as eliminating a portion of prior Instruction 4 to the disclosure item. One commenter responded by suggesting that we could consolidate and simplify some of the disclosure requirements and instructions to the item.[174] We agree with the suggestions that were submitted, and believe that certain requirements and instructions to the Item can be simplified, without changing the substance of what is required to be reported. Accordingly, we are adopting the following revisions to new Item 5.07:

- Adding to paragraph (a) of the item a statement that the information required by the item need be provided only when a meeting of shareholders is involved;[175]
- Combining paragraphs (b) and (c) to the item into a single paragraph that requires disclosure of the quantitative results of each matter voted on at the meeting, and a brief description of each matter; and
- Eliminating Instruction 3, Instruction 5 and Instruction 7 to the item, as well as deleting the first sentence of Instruction 4.

III. Paperwork Reduction Act

A. Background

Certain provisions of the final amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[176] We published a notice requesting comment on the collection of information requirements in the proposing release for the rule amendments, and we submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[177] The titles for the collection of information are:

(1) ''Regulation 14A and Schedule 14A'' (OMB Control No. 3235–0059);

(2) ''Regulation 14C and Schedule 14C'' (OMB Control No. 3235–0057);

(3) ''Form 10–K'' (OMB Control No. 3235–0063);

(4) ''Form 10–Q'' (OMB Control No. 3235–0070);

(5) ''Form 10'' (OMB Control No. 3235–0064);

(6) ''Form S–1'' (OMB Control No. 3235–0065);

(7) ''Form S–4'' (OMB Control No. 3235–0324);

(8) ''Form S–11'' (OMB Control No. 3235–0067);

(9) ''Form 8–K'' (OMB Control No. 3235–0060);

(10) ''Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations'' (OMB Control No. 3235–0158);

(11) ''Form N–1A'' (OMB Control No. 3235–0307);

(12) ''Form N–2'' (OMB Control No. 3235–0026);

[169] *See* letter from NACD.

[170] *See* letters from ABA, Business Roundtable, Honeywell and S&C.

[171] *See* letter from SCSGP.

[172] *See, e.g.,* letters from Business Roundtable, S&C and Southern.

[173] *See* Instruction 1 to Item 5.07 of Form 8–K. We note that our amendments to Form 8–K are not intended to preclude a company from announcing preliminary voting results during the meeting of shareholders at which the vote was taken and before filing the Form 8–K, without regard to whether the company webcast the meeting.

[174] *See* letter of ABA.

[175] *But see* current Instruction 1 to Item 4 of Form 10–Q with respect to matters that have been submitted to a vote otherwise than at a meeting of shareholders, which we are not amending and which will be retained as Instruction 2 to new Item 5.07 of Form 8–K.

[176] 44 U.S.C. 3501 *et seq.*

[177] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

(13) ''Form N–3'' (OMB Control No. 3235–0316); and

(14) ''Regulation S–K'' (OMB Control No. 3235–0071).

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

B. Summary of the Final Rules

As discussed in more detail above, the amendments that we are adopting will require:

- 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 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, computed in accordance with FASB ASC Topic 718, rather than the dollar amount recognized for financial statement purposes for the fiscal year, 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;
- 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 management 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 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 a company's board leadership structure and the board's role in the oversight of risk;
- New disclosure about the fees paid to compensation consultants and their affiliates under certain circumstances; and
- Disclosure of the vote results from a meeting of shareholders on Form 8–K generally within four business days of the meeting.

The disclosure enhancements we are adopting will significantly improve the information companies provide to investors with regard to risk, governance and director qualifications and compensation. We believe that providing a more transparent view of these matters will help investors make more informed voting and investment decisions.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on the PRA analysis. We received a response from one commenter that addressed our overall burden estimates for the proposed amendments. This commenter asserted that our PRA estimates underestimated the time and costs that companies would need to expend in complying with the proposed amendments.[178] This commenter asserted that companies would need to expend many additional hours to update their director and officer questionnaires to obtain more detailed information; director nominees would need to spend additional time responding to these questionnaires and providing companies with information about their backgrounds and qualifications; and companies would need to spend time analyzing the responses, deciding what information to disclose, and preparing the disclosures. This commenter, however, did not provide alternative cost estimates or cost estimates that could be applied generally to all companies. In response to comments and modifications to the amendments as proposed, we have revised our estimates as discussed more fully in Section D.

We have made several substantive modifications to the proposed amendments. First, new Item 402(s) of Regulation S–K requires 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. This change from the ''may have a material effect'' disclosure standard that was proposed should substantially mitigate some of the costs and burdens associated with the proposed amendments. By focusing on risks that are ''reasonably likely to have a material adverse effect'' on the company, the amendments are designed to elicit disclosure on the company's compensation policies and practices that would be most relevant to investors. Second, we have adopted amendments to expand the list of legal proceedings involving directors, executive officers, and nominees covered under Item 401(f) of Regulation S–K. Third, disclosure will be required of whether (and if so, how) the nominating committee considers diversity in identifying nominees for director. Fourth, we have adopted a disclosure threshold under the compensation consultant disclosure amendments that excludes fee and related disclosure where the fees for non-executive compensation consulting services do not exceed $120,000 for a company's fiscal year. In addition, disclosure of fees for consultants engaged by management would not be required if the compensation committee or board has its own compensation consultant.

D. Revisions to PRA Reporting and Cost Burden Estimates

For purposes of the PRA, in the Proposing Release we estimated that the total annual increase in the paperwork burden for all companies (other than registered management investment companies) to prepare the disclosure that would be required under the proposed amendments would be approximately 247,773 hours of company personnel time and a cost of approximately $47,413,161 for the services of outside professionals. We further estimated the total annual increase in paperwork burden for registered management investment companies under the proposed amendments to be approximately 14,041 hours of company personnel time and a cost of approximately $7,048,900 for the services of outside professionals. As discussed above, we are revising the PRA burden and cost estimates that we

[178] *See* letter from Business Roundtable.

originally submitted to the OMB in connection with the proposed amendments.

We derived our new burden hour and cost estimates by estimating the total amount of time it would take a company to prepare and review the disclosure requirements contained in the final rules. This estimate represents the average burden for all companies, both large and small. Our estimates have been adjusted to reflect the fact that some of the amendments would be required in some but not all of the documents listed above in Section A, and would not apply to all companies. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, and the nature of their operations. We believe that some companies will experience costs in excess of this average in the first year of compliance with the amendments and some companies may experience less than the average costs. We estimate the annual incremental paperwork burden for all companies (other than registered management investment companies) to be approximately 223,426 hours of company personnel time and a cost of approximately $49,964,730 for the services of outside professionals. For registered management investment companies, we estimate the annual paperwork burden to be approximately 19,334 hours of company personnel time and a cost of approximately $9,480,200 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing disclosure, filing documents and retaining records.

With respect to reporting companies (other than registered management investment companies), the new rules and amendments will increase the existing disclosure burdens associated with proxy and information statements, Forms 10, 10–K, 8–K, S–1, S–4 and S–11. However, the disclosure requirements under new Item 402(s) of Regulation S–K are not applicable to smaller reporting companies.[179] With respect to registered management investment companies, the revisions will be reflected in certain Regulation S–K items, Schedule 14A, and Forms N–1A, N–2 and N–3.

In the Proposing Release, we assumed that the burden hours of the amendments would be comparable to the burden hours related to similar disclosure requirements under existing reporting requirements, such as the disclosure of audit fees and non-audit services,[180] CD&A and executive compensation reporting,[181] and the disclosure of the activities of nominating committees.[182] We have made several adjustments to these estimates to reflect the revisions we made to the amendments and the responses of commenters. We increased the burden estimate for the enhanced director and nominee disclosure by four hours to reflect the additional disclosures that will be required, such as the new legal proceedings and diversity policy, and to address concerns that our initial estimate may have been understated. At the same time, we have decreased the burden estimate related to new Item 402(s) of Regulation S–K from sixteen to eight hours, as well as the burden estimate related to the new compensation consultant disclosure from four to three hours to reflect the revisions to the proposed amendments. However, we made no change in our assumption that substantially all of the burdens associated with the amendments to Items 401 and 402 of Regulation S–K would be associated with Schedules 14A and 14C, as these would be the primary disclosure documents where the new disclosures would be prepared and presented.[183]

We made no change in our estimate that there would be no annual incremental increase in the paperwork burden for companies to comply with the amendments to the Summary Compensation Table, Director Compensation Table, and Grants of Plan-Based Awards Table. We believe that the amendments to the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table will simplify executive compensation disclosure because companies no longer will need to report two separate measures of equity compensation in their compensation disclosure. For purposes of Item 402 disclosure, companies no longer will need to explain or analyze a second, separate measure of equity compensation that is based on financial statement recognition rather than compensation decisions. In addition, we believe it is likely that these amendments will make companies' identification of named executive officers more consistent from year-to-year, providing investors more meaningful disclosure and reducing executive compensation tracking burdens in determining which executive officers are the most highly compensated.

We have added a special instruction for equity awards subject to performance conditions calling for tabular disclosure of the value computed based upon the probable outcome of the performance conditions as of the grant date. Because this value is already required to be computed under the accounting literature,[184] it will not impose an incremental increase in paperwork burden. This instruction also requires footnote disclosure of the maximum value assuming the highest level of performance conditions is probable. We believe that any incremental burden associated with providing this footnote disclosure would be minimal.

For each reporting company (other than registered management investment companies), we estimate that the amendments would impose on average the following incremental burden hours:

- Eight hours related to the amendments to discuss compensation policies and practices as they relate to risk management;
- Eight hours for the enhanced director and nominee disclosure;
- Six hours for the disclosures about board leadership structure and the board's role in risk oversight;
- Three hours for the disclosures regarding compensation consultants; and
- One hour for the reporting of voting results on Form 8–K rather than on Forms 10–Q and 10–K.

With respect to registered management investment companies, the amendments to Forms N–1A, N–2, and N–3 will increase existing disclosure burdens for such forms by requiring:

- 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;

[179] Based on the number of proxy filings we received in the 2008 fiscal year, we estimate that approximately 3,922 domestic companies are smaller reporting companies that have a public float of less than $75 million.

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

[181] Release No. 33–8732A (Aug. 29, 2006) [71 FR 53518] (which we estimated to be 95 hours).

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

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

[184] FASB ASC Topic 718.

• Additional 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

• New disclosure about a fund's board leadership structure and the board's role in the oversight of risk.

We estimate that the amendments would impose on average the following incremental burden hours with respect to registered management investment companies:

• Eight hours for the enhanced director and nominee disclosure in proxy statements and six hours for such disclosure in registration statements; [185] and

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

1. Proxy and Information Statements

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

2. Exchange Act Periodic Reports

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

3. Securities Act Registration Statements and Exchange Act Registration Statements

For purposes of the PRA, in the case of reporting companies (other than registered management investment companies) we estimate the annual incremental paperwork burden for Securities Act registration statements under the amendments would be approximately sixteen hours per form.[186] For registered management investment companies, we estimate that the annual incremental paperwork burden under the amendments to Forms N–1A, N–2, and N–3 would be approximately twelve hours per form. These estimates include the time and the cost of preparing disclosure that has been appropriately reviewed by management, in-house counsel, outside counsel, and members of the board of directors.

The tables below illustrate the total annual compliance burden of the collection of information in hours and in cost under the amendments for annual reports; quarterly reports; current reports; proxy and information statements; Form 10; Forms S–1, S–4, S–11, N–1A, N–2, and N–3; and Regulation S–K.[187] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a company to prepare and review the disclosure requirements. For the Exchange Act reports on Forms 10–K, 10–Q, and 8–K, and the proxy and information statements we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. For the registration statements on Forms 10, S–1, S–4, S–11, N–1A, N–2, and N–3, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. There is no change to the estimated burden of the collections of information under Regulation S–K because the burdens that this regulation imposes are reflected in our revised estimates for the forms.

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

	Number of responses [188] (A)	Incremental burden hours/ form (B)	Total Incremental burden hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% professional (E)=(C)*0.25	Professional costs (F)=(E)*$400
10–K	13,545	1	13,545	10,159	3,386	$1,354,500
10–Q [189]	32,462	(1)	(7,300)	(5,475)	(1,825)	(730,000)
8–K [190]	117,255	1	117,255	87,941	29,314	11,725,500
Sch. 14A [191]	7,300					
Accel. Filers	3,378	25	84,450	63,338	21,113	8,445,000
SRC Filers	3,922	17	66,674	50,006	16,669	6,667,400
Sch. 14C	680					
Accel. Filers	315	25	7,867	5,900	1,967	786,658
SRC Filers	365	17	6,211	4,658	1,553	621,073
Rule 20a–1	1,225	14	17,150	12,863	4,288	1,715,000
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total			305,851			30,585,130

[185] We estimate that the disclosure burden for registration statements on Forms N–1A, N–2, and N–3 is less than for proxy statements because the disclosures relating to involvement in legal proceedings for the past ten years applies only to proxy statements and not to registration statements.

[186] We calculated the sixteen hours by adding eight hours for the requirements under Item 402(s) of Regulation S–K to eight hours for the enhanced director and nominee disclosure.

[187] Figures in both tables have been rounded to the nearest whole number.

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

	Number of responses [192] (A)	Incremental burden hours/ form (B)	Total incremental burden hours (C)=(A)*(B)	25% company (D)=(C)*0.25	75% professional (E)=(C)*0.75	Professional costs (F)=(E)*$400
Form 10	238	16	3,809	952	2,856	$1,142,500
Form S–1	768	16	12,288	3,072	9,216	11,579,500
Form S–4	619	16	9,904	2,476	7,428	3,686,400
Form S–11	100	16	1,600	400	1,200	2,971,200
Form N–1A	1,935	12	23,220	5,805	17,415	6,966,000
Form N–2	205	12	2,460	615	1,845	738,000
Form N–3	17	12	204	51	153	61,200
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total			53,485			27,144,800

IV. Cost-Benefit Analysis

A. Introduction

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

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

B. Benefits

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

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

Incentive arrangements and other compensation for employees may affect risk-taking behavior in the company's operations. To the extent that the risks arising from a company's compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company, investors will benefit through an enhanced ability to monitor it. They would also potentially benefit from the ability to use this additional information in allocating capital across companies, toward companies where employee incentives appear better aligned with operational success and investors' appetite for risk. The new disclosure may also encourage the board and senior management to examine and improve incentive structures for management and employees of the company. These benefits may also lead to increased value to investors.

2. Benefits Related to Revisions to Summary Compensation Table Disclosure

As a result of the Summary Compensation Table and Director Compensation Table amendments, companies will no longer need to prepare and report the allocation of equity awards' grant date fair value over time commensurate with financial statement recognition of compensation costs for executive and director compensation tabular reporting. Further, in preparing stock awards and option awards disclosure in the Summary Compensation Table and Director Compensation Table, companies no longer will need to incur additional costs to exclude the estimate for forfeitures related to service-based vesting used for financial statement reporting purposes. The elimination of costs of preparing and reporting this information is a benefit of the amendments.

The effects of the amendments in making information more readily available to investors may be useful to their voting and investment decisions. Reporting stock awards and option awards in the Summary Compensation Table based on aggregate grant date fair value is designed to make it easier for investors to assess compensation decisions and evaluate the decisions of the compensation committee. For example, under the amendments the Summary Compensation Table values will correspond to awards granted in the fiscal year, potentially allowing companies to better explain in CD&A

[188] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2008 fiscal year, except for Form 8–K. The number of responses for Form 8–K reflects the number of Form 8–Ks filed during the 2008 fiscal year plus an additional 8,831 filings. *See* footnote 190 below.

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

[190] We have included an additional 7,300 responses to Form 8–K to reflect the additional Form 8–Ks that would be filed to report final voting results. As explained in footnote 188 above, this number is based on the actual number of proxy statements filed in 2008. We adjusted this number upward by 20% to reflect our estimate of the additional Form 8–Ks that may be filed to report preliminary votes, and we have also included an additional 71 Form 8–Ks to reflect the number of Form 8–Ks that would be filed to report preliminary voting results because of a contested election, which we based on the actual number of proxy statements involving contested elections that were filed with the Commission during the 2008 fiscal year.

[191] The estimates for Schedule 14A and Schedule 14C are separated to reflect our estimate of the burden hours and costs related to new Item 402(s) of Regulation S–K which is applicable to companies that are either accelerated or large accelerated filers, but not applicable to companies that are non-accelerated filers, including smaller reporting companies. We estimate that 3,378 Schedule 14A responses were filed by accelerated or large accelerated filers, and 315 Schedule 14C responses were filed by accelerated or large accelerated filers.

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

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 Hilligeist (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 Hilligeist, 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 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 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

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

[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).

[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

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

[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.

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 IFRA. 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 157 [220] 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.

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

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, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 229.401 by:
■ a. Revising paragraph (e)(1);
■ b. In paragraph (e)(2) revising the phrase ''Indicate any other directorships'' to read ''Indicate any other directorships held, including any other directorships held during the past five years,'';
■ c. In paragraph (f), introductory text, 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));

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) * * *

(l) 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) * * *

(l) 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, 78*l,* 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll,* 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, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 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. 78*l*) 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

* * * * *

General Instructions

* * * * *

Information To Be Included in the Report

* * * * *

Item 5.07 Submission of Matters to a Vote of Security Holders

If any matter was submitted to a vote of security holders, through the solicitation of proxies or otherwise, 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.

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■ 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), 78*l,* 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

* * * * *

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. 78*l*) 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

* * * * *

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. 78*l*) 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. 78*l*) 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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