

Comments with consequences: SEC staff explains its approach to executive compensation disclosure for the 2010 proxy season

2009-12-02

In 2006, the SEC adopted comprehensive revisions to the rules governing public companies' disclosure about executive compensation. For the past three years, the SEC staff has been reviewing executive compensation disclosure and, when the staff had comments, generally permitting companies to revise their discussion of executive compensation in future submissions. In a speech on November 9, 2009, Shelley Parratt, the Deputy Director of the SEC's Division of Corporation Finance, warned that the staff will now require companies with materially deficient executive compensation disclosure to amend their current filings in response to staff comments.

Ms. Parratt said: "As we enter our fourth year of disclosure, our expectations for quality disclosure are heightened and we will reflect this in our comments. What does that mean for you? It means that after three years of futures comments, we expect companies and their advisors to understand our rules and apply them thoroughly. So, any company that waits until it receives staff comments to comply with the disclosure requirements should be prepared to amend its filings if it does not materially comply with the rules."

Ms. Parratt noted the intense interest in executive compensation generally and the heightened focus on the relationship between executive compensation and corporate accountability. She urged companies to improve their compensation disclosure in the following areas (none of which will come as a surprise to those who have followed the staff's previous statements on the topic):

- *Add more analysis to the Compensation Discussion and Analysis.* "A company's analysis of its compensation decisions should present shareholders with meaningful insight into its compensation policies and decisions, including the reasons behind them."
- *Disclose performance targets.* "Where a company determines that certain performance targets are material, then it must specifically — and if applicable, quantitatively — disclose the targets, unless such disclosure would cause it substantial competitive harm." Ms. Parratt's speech and our recent interactions with the staff suggest that the staff is skeptical

about claims that performance targets are not material. And although Ms. Parratt confirmed that companies could keep performance targets confidential if the disclosure of the targets would likely cause substantial harm to the company's competitive position, she indicated that the staff was skeptical about claims that a company's competitive position would be harmed by the disclosure of performance targets tied to company-wide financial results relating to past periods.

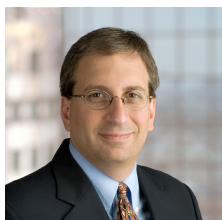
- Where performance targets need not be disclosed, disclose "degree of difficulty" instead. "[W]hen a company concludes that it may omit a performance target because disclosure would cause it competitive harm, it must disclose with meaningful specificity how difficult or likely it would be for the company or executive to achieve the undisclosed target."
- Explain the use of peer groups. "When a company refers to a peer group used for benchmarking purposes, we'll ask for the names of the peer group companies and how you selected them, and where actual awards fell relative to the benchmark."

Ms. Parratt concluded with a request that companies make their executive compensation disclosures "more meaningful and understandable."

Companies should begin work on their executive compensation disclosures substantially in advance of filing their proxy statements. While drafting the CD&A, companies should bear in mind the SEC staff's guidance on executive compensation disclosure, including Ms. Parratt's speech. Additional attention to this disclosure now may help reduce the risk that a company will be required to amend its proxy statement and Form 10-K.

The full text of Ms. Parratt's speech is available [here](#).

Authors



Stuart M. Falber

PARTNER

Co-Chair, Life Sciences Group

✉ stuart.falber@wilmerhale.com

☎ +1 617 526 6663



Knute J. Salhus

RETIRED PARTNER

✉ knute.salhus@wilmerhale.com

☎ +1 212 230 8800



Jonathan Wolfman

PARTNER

*Co-Chair, Corporate Governance
and Disclosure Group*

✉ jonathan.wolfman@wilmerhale.com

☎ +1 617 526 6833