

Client Alert

Financial Markets Developments

New (and Old) Questions to Consider when Drafting Next Year's CD&A

With executive compensation back in the spotlight as a result of the ongoing financial crisis and the recently enacted American Recovery and Reinvestment Act of 2009 (the "ARRA"), the Securities and Exchange Commission (the "SEC") has announced that it again intends to focus on companies' executive compensation disclosure as part of its upcoming proxy season review. Although executive compensation restrictions under the Troubled Asset Relief Program (the "TARP") (as recently amended by the ARRA) apply only to participating institutions, these restrictions and the policy goals underlying them are likely to impact the compensation policies and related disclosure of non-participating entities.

In this alert, we pose several questions for public companies to consider when crafting clear, compelling and concise disclosure for their Compensation Discussion and Analyses ("CD&A"). These questions reflect new issues arising out of the financial crisis, as well as old issues that continue to present challenges in connection with the implementation of the SEC's executive compensation disclosure rules.

1. Did the economic downturn influence your compensation decisions? What executive pay related actions were taken in response to the increased market volatility?

In a speech in October 2008, John White, the former director of the SEC's Division of Corporation Finance, stated that "current market events are already affecting many companies' compensation decisions and thus should be affecting the drafting of their upcoming CD&A's" and that the SEC's 2009 review program will be "responsive to current conditions." Mr. White warned against merely marking up last year's disclosure and suggested that all companies, regardless of their participation in the TARP, "should be carefully considering if and how recent economic and financial events affect [their] compensation program[s]."¹ As a result, this year, a comprehensive CD&A should disclose what the company did differently from prior years in response to the economic downturn. In that respect, Mr. White specifically encouraged companies to consider a number of questions as they prepare their executive compensation disclosures for the upcoming proxy season, including whether, as a result of the current economic downturn, the company has:

- modified outstanding awards or plans, or implemented new ones
- reconsidered the structure of its compensation program, or the relative weighting of various compensation elements
- waived any performance conditions, or set new ones using different standards
- changed its processes and procedures for determining executive and director pay, thus triggering corporate governance related disclosure

¹ Executive Compensation Disclosure: Observations on Year Two and a Look Forward to the Changing Landscape for 2009, John White, Director, Division of Corporation Finance Securities and Exchange Commission, New Orleans, Louisiana, October 21, 2008, available at <http://www.sec.gov/news/speech/2008/spch102108jww.htm>.



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Specifically, if the current economic downturn resulted in one or more of the following cost-cutting and other initiatives and such events are material, they will warrant discussion in a company's CD&A:

- **Base salary freezes or cutbacks.** A company may have decided to defer salary increases or implement salary cutbacks for its executive officers in light of the ongoing economic downturn. Furthermore, senior executive officers may have decided to forego voluntarily their scheduled annual salary increases and bonuses. The CD&A should contain a specific description of any actions that were taken and a clear explanation of the reasons for these actions, discussing how and why the current economic downturn resulted in these specific cost-cutting initiatives. As companies continue to revise dramatically their compensation programs in response to changing market conditions, actions that were taken after the end of the fiscal year may be material to a fair understanding of the company's compensation arrangements for last fiscal year.² In addition, disclosure of such post-fiscal year end actions would enable a company to demonstrate to investors that its compensation-setting process is evolving and dynamic, and that its board of directors took action to address the downturn by modifying its compensation programs.
- **Limitations on severance benefits.** In the current climate of increased transparency, there is enhanced focus on payments to executive officers triggered by terminations. Severance packages have been subject to shareholder scrutiny in light of recent high-profile executive leadership failures and subsequent lucrative walk-away payouts. In response, many companies are reassessing the appropriateness of their existing post-employment benefit programs to ensure that they do not reward failure through excessive "golden parachutes."³ In reevaluating and scaling back their executive severance programs, companies should review their definitions of "good reason termination," "termination for cause" and "change of control" to ensure that they correctly capture circumstances when a payout is warranted. In addition, companies should

reevaluate the appropriateness of high base salary and bonus severance multiples, excessive post-employment perquisites, accumulation of wealth for a particular executive, single-trigger payouts (e.g., a change of control payout in case of voluntary termination) and single-trigger vesting of equity awards (e.g., a change of control triggered vesting despite continued employment with the acquiror-company). Appropriate disclosure regarding these reviews should be included in the CD&A.

- **Impact of declining stock prices on equity award policies.** A lower share price generally means that more options or other stock-based awards must be granted to long-term incentive plan participants to maintain the economic value of equity awards. The need to grant more shares may mean that companies will need to seek shareholder approval to increase the number of shares available under their equity plans earlier than anticipated. Increased grants, and the related dilution, are often a source of displeasure from shareholders. Proxy advisors may recommend voting against stock plans if a company's burn rate exceeds their published guidelines, which companies may be unable to meet in the current economic climate. In response, many companies have been compelled to review the number of shares required to meet their long-term incentive target values and assess whether the increased number is within a reasonable range consistent with the company's overall compensation philosophy and objectives and compliant with the relevant federal tax deduction restrictions under the plan on the amount of equity awards that may be granted to an individual employee in any given period. A company should describe such review and analyze its conclusions in the CD&A.
- **Changes to annual incentive award performance targets.** With respect to 2008 annual incentive plan awards, recognizing the unprecedented nature of the economic downturn, some company boards have exercised discretion and paid out incentive awards despite non-achievement of the stated targets. The CD&A should analyze the company's decision to waive, maintain or relax 2008 annual incentive plan performance targets, discussing the rationale for any particular decision in light of the

² Regulation S-K Item 402(b) Instruction 2.

³ See e.g., Pfizer Inc. Current Report Form 8-K (Feb. 20, 2009), announcing the adoption of a severance plan significantly limiting executive severance benefits.

company's compensation philosophy and objectives. In setting their 2009 annual incentive plan targets, some companies have lowered performance targets under their plans to be more reflective of the current economic reality, while others have kept targets unchanged. Companies may choose to address these post-fiscal year end actions in their CD&As to signal to investors how they are responding to the ongoing economic downturn and to put their overall compensation-setting process in context.

- **Changes to long-term incentive award performance targets.** Facing the current economic reality, some companies have addressed the perceived "unachievable" performance criteria of outstanding long-term awards by granting new awards with more "achievable" targets based on the belief that the prior grants will likely never pay out and the new grants are necessary to create sufficient incentive going forward. While views relating to the appropriate ways to structure future incentive plans may differ, most investors seem to agree that a significant proportion of remuneration should remain linked to long-term performance. Appropriate disclosure regarding these grants should be included in the CD&A.
- **Limitations on perquisites.** To promote transparency and positive investor perception, companies have increasingly chosen to limit, or completely eliminate, executive perquisites. A company that decided to limit or completely eliminate executive perquisites should disclose this in the CD&A and describe its rationale for such action.

2. Do any of your executive compensation programs promote inappropriate risk-taking behavior by senior executives that could threaten the value of the institution?

The SEC suggested several months ago that it expects to see risk assessment analyses even in the CD&As of non-TARP participating companies.⁴ In discussing the federally mandated restrictions on bonuses or incentives that could lead senior executive officers to take unnecessary and excessive risks that could threaten the value of the financial institution, John White acknowledged that the

limitation "applies on its face only to participants in the TARP;" but, focusing on broader implications, he stated with respect to non-participating companies that it would "be prudent for compensation committees, when establishing targets and creating incentives, not only to discuss how hard or how easy it is to meet the incentives, but also to consider the particular risks [to the enterprise as a whole] an executive might be incentivized to take to meet the target."⁵ Mr. White further stated that, "to the extent that such considerations are or become a material part of a company's compensation policies or decisions, a company would be required to discuss them as part of its CD&A."⁶ As the ongoing economic crisis deepens and companies become more likely to reevaluate whether their incentive compensation programs reward senior executives for sustained performance rather than reacting to short-term fluctuations, an explanation regarding the risks that a company's senior executive officers may be incentivized to take as a result of the features of the company's incentive compensation program will inevitably become material to an understanding of the health of many companies' compensation policies, warranting a risk assessment disclosure in the CD&A.

While the extent of the risk assessment discussion will vary among companies, at a minimum, a company should state whether its compensation committee considered risk issues in evaluating its existing incentive compensation programs and revising them for the upcoming year, and whether such programs may incentivize excessive risk-taking behavior. So far, two approaches to disclosure appear to be emerging.⁷ Many filers are opting for an "acknowledgement" approach, including in their disclosures a statement indicating whether they have conducted a risk assessment of their incentive compensation programs and describing the conclusion of such assessment.⁸ Some companies are opting for a "mini-analysis" approach, going beyond an affirmative statement as to whether or not they believe that their incentive compensation programs encourage inappropriate risk-taking.⁹ These companies provide a more detailed analysis that seeks to demonstrate that the compensation committee

⁴ Supra note 1.

⁵ Id.

⁶ Id.

⁷ See Borges & Lynn's Proxy Disclosure Updates on CompensationDisclosure.com, Executive Pay Risks: Analysis, Practice Pointers and Model Disclosure (Winter 2009).

⁸ See e.g., Analog Devices, Inc. Proxy Statement (Schedule 14A) (February 4, 2009); Becton, Dickinson & Company, Proxy Statement (Schedule 14A) (Dec. 22, 2008).

⁹ See e.g., United Technologies Corporation Proxy Statement (Schedule 14A) (Feb. 20, 2009).

took diligent, thoughtful and fully-informed steps in evaluating each element of the company's executive compensation program (especially its incentive compensation arrangements). They further explain why the company believes that its programs do or do not incentivize inappropriate risk-taking, analyzing any remedial actions taken by the compensation committee or describing why such actions are not necessary given the particular features of the company's incentive compensation program. As part of this assessment, companies have the opportunity to demonstrate what their directors are doing to ensure that they are committed to compensation programs that promote long-term shareholder value and pay-for-performance principles. Many expect that this disclosure will become part of executive compensation disclosures for public companies, and, over time, will evolve into a more comprehensive analytical discussion. Recognizing this trend, some companies undertake in their 2008 CD&As that they will begin risk assessment reviews to confirm that their incentive compensation does not encourage unnecessary and excessive risks as a matter of best practice beginning this year.¹⁰

3. Does your CD&A contain a meaningful discussion of the rationales for your executive compensation policies and decisions or does it merely describe the executive compensation programs and processes in place?

The SEC continues to focus on the lack of meaningful and thorough analysis in executive compensation disclosures, expressing ongoing concern about the missing "how and the why" in explaining the connection between the numbers the company presents in its tabular disclosure and its compensation processes.¹¹ A CD&A should reflect the individual circumstances of the company and avoid boilerplate language.¹² Investors are looking for transparent and clear explanations of the rationales behind the company's past compensation decisions and the steps the company plans to take going forward in response to the ongoing crisis. A robust analysis of a company's compensation philosophy is especially important for companies that have implemented majority voting

policies and whose board members are therefore particularly susceptible to a "no" vote. Furthermore, the CD&A may be used as a means for a company to educate its shareholders on its executive compensation philosophy to enable shareholders to make informed decisions when it comes to "say on pay" votes. Such a vote is now required at TARP participants and has been implemented voluntarily by a number of public companies that are not participating in the TARP.¹³ Congress may take action in the future to mandate it for all public companies.

The first step in drafting an informative and concise discussion of material principles necessary to an understanding of the rationales behind a company's compensation decisions is to assess what issues constitute "material" information, and therefore warrant discussion in the CD&A. Based on the SEC's statements regarding last year's filings, it appears that in preparing their CD&As, many companies opted for over-disclosure and included non-material information in their discussions.¹⁴ John White suggested that addressing the threshold question of materiality first would allow a company to eliminate boilerplate discussion and unnecessary narrative disclosure, thus resulting in more clear disclosure, focusing on the issues material to the company's compensation philosophy and objectives.¹⁵ Mr. White also identified areas where improved disclosure strategies should be developed, including:

- **Material elements of compensation.** SEC comments requested that companies identify and discuss the rationales underlying each element of compensation, including the kind of behavior it is intended to drive and whether this objective is being achieved (e.g., salaries are usually offered in order to ensure a fixed level of ongoing cash compensation, while long-term incentive compensation tends to more closely align management's interests with those of the shareholders and promote retention). To enhance clarity of presentation, some companies choose to present this information in a table or a chart, listing each element of compensation and a description

¹⁰ See e.g., General Electric Company Proxy Statement (Schedule 14A) (Feb. 18, 2009).

¹¹ *Supra* note 1.

¹² Regulation S-K Item 402(b) Instruction 3.

¹³ American Recovery and Reinvestment Act 2009 Section 7001, SEC Compliance and Disclosure Interpretations Questions 4 and 5 (Feb. 26, 2009) available at <http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm>.

¹⁴ *Supra* note 1.

¹⁵ *Id.*

of the company's rationales for offering the specific element. The discussion should then evolve into a comprehensive analysis of how all elements of compensation fit together.

■ **How the company arrived at the varying levels of compensation.** SEC comments focused on the relationship between payout levels from different elements of compensation, seeking to understand whether each element is established individually or as part of the total compensation package, and the relationship between performance and actual payouts. A comprehensive CD&A should disclose the basis for granting different types and levels of compensation and describe the specific factors considered when approving particular components of each named executive officer's ("NEO") total compensation package, highlighting the relationship between decisions regarding one component and the payout levels derived from other components. The discussion should illustrate how individual performance results in specific award levels, indicating any exercise of compensation committee discretion. The frequently-overlooked provision in the rules regarding including an explanation of the amount of salary and bonus (i.e., fixed compensation) in proportion to total compensation (i.e., including variable "at-risk" incentive compensation), which can be presented in a table or a chart to enable the reader to quickly assess the company's compensation mix, may become especially relevant this year in the context of an increased focus on pay-for-performance.¹⁶

■ **Why the company believes that its compensation practices fit within its overall objectives and philosophy.** The CD&A should explain, with respect to each element of compensation, how and why specific executive compensation actions resulted in the quantitative disclosure presented in the executive compensation tables. SEC comments in this area focused on the lack of principles-based analysis tying together the company's philosophy with actual actions taken with respect to executive compensation.¹⁷ For example, a company whose stated

compensation philosophy is pay-for-performance is likely to offer executive compensation packages weighted more heavily towards incentive compensation and would explain in the CD&A how its actual ratio of fixed salary and bonus compensation to variable incentive compensation promotes this objective.

4. Does your CD&A contain a complete and meaningful disclosure of performance targets?

If quantitative and qualitative performance targets for incentive-based compensation are a material element of a company's compensation policies and decisions, they must be disclosed unless disclosure would result in competitive harm to the company. The threshold question of materiality requires company- and industry-specific facts and circumstances analysis. Since the new compensation disclosure rules have been in effect, a consensus has emerged that past period (i.e., completed year) performance targets are likely to be considered material, while future period (i.e., current year) performance targets will generally not be.¹⁸ In a healthy economic environment it is unlikely that an explanation of the target levels for the current fiscal year would be needed to assist investors in understanding the amounts paid or decisions made for the prior fiscal year. However, this information may gain relevance in the current market environment, as companies seek to explain in their CD&As what actions were or are about to be taken in response to the economic downturn (especially in case of multi-year compensation plans). Even if material, companies may be reluctant to disclose targets under multi-year long-term incentive plans due to competitive harm concerns because such disclosure would describe metrics that are still in use. After-the-fact disclosure of annual incentive plan targets may be a lot more difficult to withhold on the basis of competitive harm. Further, as a general matter, quantitative/objective performance targets (e.g., specific revenue or earnings targets) should be disclosed, while qualitative/subjective performance targets (e.g., effective leadership and communication) may be described without providing related quantitative measures (e.g., a subjective assessment of how effectively the CEO demonstrated leadership).

¹⁶ Regulation S-K Item 402(e)(1)(iv).

¹⁷ See e.g., Clearwire Corporation, SEC Comment Letter (Sep. 19, 2008), stating that the Staff believes that "it is appropriate to provide a more thorough analysis"; Central Garden & Pet Company, SEC Comment Letter (Aug. 25, 2008), requesting a discussion addressing "how decisions regarding particular elements of your compensation program fit into your overall compensation objectives and affect decisions regarding other elements".

¹⁸ See e.g., Mark A. Borges, SEC Executive Compensation Disclosure Rules, stating that while in its first year review, the SEC seemed to ask for disclosure of current fiscal year targets, it appears to have moved away from this comment in its second year review and current guidance, focusing on the targets for the completed fiscal year instead.

No confidential treatment request is required to be submitted in connection with the omission of performance target information and a CD&A is not required to indicate that the target information was omitted due to competitive harm.¹⁹ However, a company should use the same standard for evaluating whether target levels may be omitted as it would use when making a confidential treatment request under Securities Act Rule 406 or Exchange Act Rule 24b-2 (e.g., that disclosure would cause substantial competitive harm) and must be prepared to demonstrate to the SEC, if requested, that withholding target information meets this standard.²⁰ The SEC has cautioned against a general result-oriented conclusion at the time of filing, instead suggesting that companies engage in “contemporaneous written analysis” at the time they decide to omit the targets from their executive compensation disclosure in order to present a persuasive argument for omission when requested by the SEC.²¹

Companies that do not disclose performance targets must provide meaningful disclosure regarding the degree of difficulty associated with achievement of non-disclosed targets.²² While standard practice for satisfying this requirement has not yet emerged, it is common to address the requirement by describing whether the company achieved or failed to achieve similar targets in prior fiscal years, and analyzing the likelihood of achieving targets in the future in light of the history of achieving similar targets in the past. Making this prediction in light of the heightened market volatility may pose a particular challenge.

Finally, in discussing performance targets, companies must remember the two audiences for this disclosure. While investors are likely to focus on the appropriateness of the targets in light of the current economic downturn and company-specific factors (e.g., whether a specific target is sufficiently challenging), the SEC will focus on whether the company provided a logical explanation of its compensation-setting processes and fully complied with the relevant disclosure rules.

5. Do you engage in benchmarking of executive compensation?

The SEC continues to emphasize benchmarking disclosure as one of the most important aspects of the CD&A, indicating that public companies are still struggling to provide meaningful explanations as to how they use data collected from their analyses of other companies’ compensation practices. Interestingly, the extent to which benchmarking will be relevant in compensation decisions for the upcoming year remains unclear as benchmarking studies and surveys completed in a different economic climate may have little or no value to justify compensation decisions going forward. The threshold question in approaching the benchmarking disclosure is whether the company actually engages in benchmarking as part of its compensation-setting process or simply reviews compensation data about other companies to understand general compensation practices. The SEC recently clarified that benchmarking “generally entails using compensation data about other companies as a reference point on which—either wholly or in part—to base, justify or provide a framework for a compensation decision.”²³ A company does not engage in benchmarking when it simply considers a broad-based third-party survey for a more general purpose (e.g., to obtain a general understanding of current compensation practices).²⁴

If a company determines that it engages in benchmarking as part of its compensation-setting process, then, in addition to identifying and describing each benchmark, it should:

- identify in its CD&A the companies that comprise the peer group used for benchmarking
- disclose the basis for selecting the peer group, listing specific characteristics that make the peer group companies comparable to the company and its compensation philosophy (e.g., industry, revenue or number of employees)
- describe the relationship between actual compensation and the data used in benchmarking or peer group studies

19 Regulation S-K SEC Compliance & Disclosure Interpretation No. 118.04, available at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

20 Id.

21 Supra note 1.

22 Regulation S-K Item 402(b) Instruction 4.

23 Regulation S-K SEC Compliance & Disclosure Interpretation No. 118.05, available at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

24 Id.

Finally, as part of a fulsome benchmarking discussion, companies should disclose what percentile of compensation of the peer group is targeted by the company (e.g., 25th, 50th or 75th), explain why that target is appropriate for the company, especially if, for example, the company targets pay above or below the median of the peer group, and state where the actual compensation for each NEO fell in comparison to the targeted percentile, specifically addressing differences among NEOs, if any (e.g., performance, experience, education, etc.).

If a company determines that it does not engage in benchmarking within the definition provided by the SEC, but merely reviews compensation practices of other companies to gain a general understanding of the market practice, then it is not required to identify the specific peer companies or describe the compensation components it reviewed.

6. Did you engage any compensation consultants? If so, did such consultants play a material role in your compensation-setting practices?

As executive compensation programs become increasingly sophisticated (and are subject to greater regulation) and many companies are reviewing and revising their compensation policies in light of the current economic downturn, the role of third parties, including compensation consultants and other advisors, in recommending and formulating pay decisions is likely to become more prominent and therefore subject to greater investor scrutiny. Pursuant to the corporate governance related disclosure requirements of Regulation S-K, if compensation consultants have a role in determining or recommending the amount or form of executive and director compensation, the company must identify such consultants, state whether such consultants are engaged

directly by the compensation committee or any other person and describe the nature and scope of their engagement, including the material elements of the instructions or directions given to the compensation consultants in connection with the assignment.²⁵ Since the new executive compensation disclosure rules have been in effect, companies had some discretion relating to where to include this disclosure, and generally included it either in the CD&A or in a separate subsection as part of the executive compensation disclosure section.²⁶ In recent guidance, the SEC clarified that, if a compensation consultant plays a material role in the company's compensation-setting practices and decisions, the company should discuss that role in the CD&A.²⁷

Conclusion

In light of the ongoing financial crisis, both investors and the SEC are seeking increased transparency and compliance with SEC rules governing executive compensation disclosure this proxy season. The current pay-for-performance climate put into focus the need to review and revise compensation policies to align senior management's interests with those of the shareholders and assess whether executive compensation policies incentivize senior executives to take unnecessary and excessive risks even for companies not participating in the TARP. In guidance issued throughout the year, the SEC highlighted several areas of improvement to ensure ongoing compliance with the 2006 rules. During this time of market volatility and uncertainty, it is especially important to present a thorough, company-specific analysis of the company's compensation policies, reflecting how the company responded to the current economic downturn and describing its philosophy for the future.

²⁵ Regulation S-K Item 407(e)(3)(iii).

²⁶ See e.g., Verizon Communications Inc. Proxy Statement (Schedule 14A) (Mar. 17, 2008); The Goldman Sachs Group Inc. Proxy Statement (Schedule 14A) (Mar. 7, 2008).

²⁷ Regulation S-K SEC Compliance & Disclosure Interpretation Nos. 118.06 and 133.08, available at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

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