

New Hedging Disclosure Rule Compliance Date Draws Near

New Item 407(i) of Regulation S-K, the hedging disclosure rule adopted by the Securities and Exchange Commission in December 2018, will soon begin to apply to certain public companies. Generally, public companies will need to disclose whether they maintain practices or policies regarding their employees' (including officers) and directors' ability to hedge the economic risk of owning company equity securities in their proxy and information statements which include a proposal for the election of directors during fiscal years beginning on or after July 1, 2019. Smaller reporting companies and emerging growth companies do not have to comply with the new disclosure requirement until their first proxy and information statement containing a proposal for the election of directors during fiscal years beginning on or after July 1, 2020.

Thus, in the case of a public company (other than a smaller reporting company or an emerging growth company) with a June 30th or September 30th fiscal year-end, such disclosure will need to be provided in its first proxy or information statement filed after fiscal year-end, even if filed in late 2019. In contrast, a company with a calendar year fiscal year-end will need to provide the required disclosure for the first time in its proxy or information statement filed during the 2020 proxy season.

As discussed in more detail in our Thoughtful Disclosure Alert, [SEC Issues Final Hedging Disclosure Rule](#) (January 18, 2019), Item 407(i) requires public companies to disclose in their proxy and information statements relating to the election of directors any practices or policies they have adopted with respect to the ability of their employees (including officers) and directors, or any of their designees, to purchase financial instruments, or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of the company equity securities either (i) granted to the employee or director by the company as part of their compensation or (ii) held, directly or indirectly, by the employee or director.

Other key aspects of the new disclosure requirement are as follows:

- *Companies Subject to Disclosure* – New Item 407(i) applies to all companies with securities registered under Section 12 of the Exchange Act, including smaller reporting companies and

emerging growth companies. It does not apply to foreign private issuers or listed closed-end investment companies.

- *Compliance Dates* – As noted above, for public companies that are neither smaller reporting companies nor emerging growth companies, the new Item 407(i) disclosure is required in proxy and information statements which include a proposal for the election of directors during fiscal years beginning on or after July 1, 2019. In the case of smaller reporting companies and emerging growth companies, the new disclosure requirement is applicable for fiscal years beginning on or after July 1, 2020.
- *Scope of Disclosure* – Companies are required either to (i) provide a fair and accurate summary of any practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted or disallowed or (ii) disclose their practices or policies in full. If a company does not have any practices or policies regarding hedging, it must disclose that fact or state that hedging transactions are generally permitted.
- *Covered Transactions* – The SEC does not define the term “hedge,” but instead indicates that the term should be applied as a broad principle. Consequently, companies will have to evaluate their practices and policies in the context of the activities, if any, that are intended to be covered by such practices and policies to determine whether – and how – disclosure is required.
- *Coordination with CD&A Hedging Disclosure Requirement* – Companies that are subject to both new Item 407(i) and Item 402(b) of Regulation S-K (which requires the inclusion of a Compensation Discussion and Analysis in the proxy or information statement) can avoid potentially duplicative disclosure by incorporating the Item 407(i) disclosure into the CD&A, either by directly setting out the information or by providing the Item 407(i) disclosure outside the CD&A and adding a cross-reference within the CD&A. Alternatively, a company may choose to keep the two disclosures separate.

Observations. Public companies that already include disclosure about their hedging policy or practices in their proxy or information statements may want to compare this disclosure against the specific requirements of new Item 407(i) to determine whether any new or different information will be needed once they are required to comply with the new rule. In our experience, many of the current disclosures about hedging policies are largely very general and don't necessarily address the subjects contemplated

New Hedging Disclosure Rule Compliance Date Draws Near (continued)

by the new disclosure requirement (such as who is specifically covered by the policy and what categories of hedging transactions, if any, are specifically permitted or prohibited). Companies should determine whether any revisions to their policy are necessary or appropriate and/or ensure that their disclosure reflects the details of their policy, as well as see that their current disclosure provides a “fair and accurate” summary of the policy. In addition, companies that do not have a hedging policy may wish to consider putting one in place, or face the prospect of having to disclose this fact in their proxy or information statement.

Need Assistance?

Compensia has extensive experience in helping companies prepare the executive compensation disclosure in the proxy materials for their Annual Meeting of Shareholders, as well as analyze the potential impact of the various SEC disclosure requirements on their executive compensation programs. If you would like assistance in preparing your disclosure, or if you have any questions on the subjects addressed in this Thoughtful Disclosure Alert, please contact Mark A. Borges.

About Compensia:

Compensia, Inc. is a management consulting firm that provides executive compensation advisory services to Compensation Committees and senior management. ■

New Hedging Disclosure Rule Compliance Date Draws Near (continued)

About Compensia

Compensia, Inc. is a management consulting firm that provides executive compensation advisory services to Compensation Committees and senior management.

Silicon Valley

125 S. Market Street
Suite 1000
San Jose, California 95113
408.876.4025

Thomas G. Brown, Chairman &
Managing Principal
tbrown@compensia.com
408.876.4023

Susan Gellen
sgellen@compensia.com
408.907.4302

Tom LaWer, Managing Principal
tlawer@compensia.com
408.907.4309

Timothy Sparks
tsparks@compensia.com
408.876.4024

Greg Loehmann
gloehmann@compensia.com
408.907.4319

Aaron Johansen
ajohansen@compensia.com
408.907.4310

San Francisco

One Embarcadero Center
Suite 2830
San Francisco, California 94111
415.462.2990

Mark A. Borges
mborges@compensia.com
415.462.2995

Erik Beucler
ebeucler@compensia.com
408.907.4314

Amanda Feyerabend
afeyerabend@compensia.com
415.462.2988

Southern California

Ralph Barry
rbarry@compensia.com
858.603.2288

Pacific Northwest

Jason Borrevik
jborrevik@compensia.com
408.876.4035