

**PREPARATION FOR 2010 ANNUAL REPORTING SEASON:
SUMMARY OF SIGNIFICANT CHANGES**

To assist clients prepare their annual reports and proxy materials for the 2010 annual reporting season, we are highlighting some of the most significant developments during the last year:

- Proxy disclosure enhancements for public companies.
- Additional requirements for TARP recipients.
- Non-binding say-on-pay proposals.
- Further extension of attestation report exemption for non-accelerated filers.
- Elimination of broker discretionary voting authority.
- Changes to NASDAQ corporate governance rules.
- Form 10-K considerations.
- Heightened regulatory oversight and enforcement.

1. **Proxy disclosure enhancements for public companies.**

The Securities and Exchange Commission (the “SEC”) has adopted amendments to its rules on compensation and corporate governance disclosure.¹ The enhanced disclosure rules apply to Annual Reports on Form 10-K and proxy statements filed on or after February 28, 2010, for companies with fiscal years ending on or after December 20, 2009. The changes include:

a. **New disclosure regarding compensation policies and practices as they relate to the company’s risk management.**

Item 402 of Regulation S-K now requires that a company (other than a smaller reporting company) discuss its policies and practices for compensating all employees, including non-executive officers, if the compensation policies and practices create risks that are “reasonably likely to have a materially adverse effect on the company.” One must wonder why a company would have such plans in effect and be subject to this amendment to Rule 402.

This new disclosure will not be in the Compensation Discussion and Analysis (“CD&A”) section. Whereas the CD&A (which is not applicable to smaller reporting companies) is designed to provide a discussion and analysis of the compensation of the named executive officers (“NEOs”) and the information contained in the Summary Compensation Table and other required tables, the new disclosure covers **all employees**. However, an analysis of how risk management policies or practices affect compensation for NEOs would still be part of the CD&A if such policies or practices were a material factor in the determination of the forms or terms of compensation awarded to NEOs.

¹ SEC Release No. 34-61175 (December 16, 2009).

When assessing whether disclosure is required, a company may consider policies and practices that mitigate or balance incentives, such as clawback policies or stock ownership-holding requirements.

Note that smaller reporting companies are not required to provide this new disclosure.

b. Revised treatment of equity awards in the Summary Compensation Table and the Director Compensation Table.

The Summary Compensation Table and the Director Compensation Table have been revised to require disclosure of the aggregate grant date fair value of stock and option awards **made during the fiscal year**, computed in accordance with Financial Accounting Standards Board (“FASB”) Accountings Standards Codification Topic 718, *Compensation/Stock Compensation* (“ASC Topic 718”).

This revision replaces prior rules that required companies to report the value of **all outstanding** equity awards in the Summary Compensation Table and Director Compensation Table, based on the dollar amount recognized for financial statement reporting purposes during the year (FASB 123(r)). This change may affect which executive officers (other than the CEO and CFO) will be NEOs, and may cause more variability from year to year in these designations to the extent executives receive larger than normal equity grants or do not receive any equity grants, in a particular year.

This change is intended to improve disclosure by focusing on the value of the award in the year granted rather than the current year accounting for awards made in prior years.

For transition to the new rules, companies with fiscal years ending on or after December 20, 2009, must present recalculated disclosures under the new rules and report in the Summary Compensation Table the value of equity awards granted to the current year’s NEOs in all prior fiscal years required to be included in the table and reported for that officer.

Additionally, the revised rule clarifies how companies should report the value of performance awards, and permits companies to add an intrinsic value column to the Outstanding Equity Awards at Fiscal Year-End Table. Specifically, the value of performance awards reported in the Summary Compensation Table, Grants of Plan-Based Awards Table and Director Compensation Table must be based on the probable outcome of the performance condition (typically the “target” award value) consistent with the grant date estimate of compensation costs to be recognized over the service period, excluding the effect of forfeitures. In addition, a footnote to the Summary Compensation Table and Director Compensation Table must disclose the maximum value of the award at the grant date, assuming achievement of the highest level of performance conditions is probable.

c. Enhanced director, nominee and executive officer disclosure.

Item 401(f) of Regulation S-K now requires disclosure regarding (i) the qualifications of directors and nominees, (ii) previous directorships held by directors and nominees, and (iii) legal proceedings involving directors, nominees and executive officers. Companies will be required 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. Also, Item 407(c) now requires disclosure of whether, and if so how, a nominating committee considers diversity when identifying nominees. If the company has a policy relating to diversity, disclosure is required on how the board assesses the effectiveness of the policy. Diversity is not defined in the rule.

This expanded disclosure applies to all directors and nominees, including incumbent directors, director nominees who are selected by a company's nominating committee and any nominees put forward by shareholders.

d. New disclosure about board leadership structure and the board's role in risk oversight.

The revised proxy rules require a company to disclose its board leadership structure and explain why it believes its structure is appropriate given the company's specific characteristics or circumstances. In particular, a company must disclose:

- (i) whether and why the company has chosen to combine or separate the board chairman and CEO positions;
- (ii) if the board chairman and CEO positions are combined, whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the company's leadership; and
- (iii) why the company believes its structure is the most appropriate for the company.

Additional disclosure is required about the extent of the board's role in the risk oversight of the company, such as how the board administers its oversight function and the effect that this has on the board's leadership structure.

e. New disclosure regarding compensation consultants.

Proxy statements must now disclose fees paid to compensation consultants and their affiliates who provided advice **to the board or the compensation committee** on executive and director compensation, if the consultants or their affiliates also provided additional services to the company, provided that the fees for such additional services exceeded \$120,000 during the company's fiscal year. Disclosure is also required as to whether the decision to engage the compensation consultant or its affiliates to provide additional services was made or recommended by management, and whether the board approved these services.

If the board has not engaged its own consultant, fee disclosures are required if a consultant or its affiliates provided executive compensation consulting services and additional services **to the company**, provided the fees for the additional services exceeded \$120,000 during the company's fiscal year.

If both the board or the compensation committee and management have engaged different compensation consultants to provide advice on executive or director compensation, fee disclosure is not required, even if management's consultant provides additional services to the company.

No disclosure is required if the compensation consultant's only involvement in recommending the amount or form of executive or director compensation is in connection with broad-based plans, such as 401(k) plans or health insurance plans, that do not discriminate in favor of executive officers or directors of the company or services that are limited to providing information not customized for the company.

These new disclosures are intended to encourage compensation committees and boards of directors to engage compensation consultants that are independent from management.

f. **Accelerated reporting of shareholder voting results on Form 8-K.**

The SEC has added a new Item 5.07 to Form 8-K. It requires companies to disclose the results of a shareholder vote within four business days after the end of the meeting at which the vote was held. This Form 8-K disclosure replaces a similar disclosure previously required on Form 10-Q or Form 10-K.

2. **Additional certification and disclosure requirements for TARP recipients.**

As discussed in previous guidance, the Interim Final Rule issued by the United States Treasury ("Treasury") under The Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009 (the "EESA"), imposed additional executive compensation and corporate governance requirements on recipients of funds under the Troubled Asset Relief Program ("TARP").² These include the requirement that the compensation committee and the principal executive and financial officers each provide annual certifications per the model certifications in Appendices A and B attached hereto.

a. **PEO/PFO certifications.**

A TARP recipient with securities registered pursuant to the federal securities laws (a "reporting company") must provide the certifications in Appendix A, attached hereto, as an exhibit (pursuant to Item 601(b)(99)(i) of Regulation S-K) to its Annual Report on Form 10-

² Interim Final Rule, published in the Federal Register on June 15, 2009.

K and to the Treasury.³ Other TARP recipients must provide these certifications to their primary regulatory agency⁴ and to the Treasury within 90 days of the end of the fiscal year.⁵

b. **TARP recipient compensation committee certifications and narrative disclosures.**

- (i) *Certifications* - The compensation committee must provide the certifications in Appendix B attached hereto.
- (ii) *Disclosures* - The compensation committee must provide a narrative description identifying each senior executive officer (“SEO”) compensation plan and explaining how the SEO compensation plan does not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the company. The compensation committee must also identify each employee compensation plan, explain how any unnecessary risks posed by such plan have been limited, and further explain how the plan does not encourage the manipulation of reported earnings to enhance the compensation of any employee.

TARP recipients must annually disclose the amount, nature, and justification for offering any perquisites whose total value for the company’s fiscal year exceeds \$25,000 for any employee who is subject to the bonus payment limitations (*i.e.*, the most highly compensated employee of any TARP recipient receiving less than \$25 million in financial assistance, or at least the five most highly compensated employees of any TARP recipient receiving \$25 million but less than \$250 million in financial assistance).

The compensation committee must annually provide a narrative description of whether the company, its board of directors, or the compensation committee has engaged a compensation consultant; and all types of services, including non-compensation related services, the compensation consultant or any of its affiliates has provided to the TARP recipient, the board, or the compensation committee during the past three

³ The information may be submitted to Treasury via email at TARP.Compliance@do.treas.gov. Alternatively, the information may be submitted to Treasury by regular mail addressed to: Director of Compliance; United States Department of the Treasury, Office of Financial Stability; 1500 Pennsylvania Avenue, NW; Washington, D.C. 20220. A TARP recipient that, prior to November 30, 2009, submitted information to Treasury via another method is not required to resubmit the information. However, the TARP recipient must provide Treasury with a description of the information provided, the date on which the information was provided, and the means by which the information was submitted. See Treasury’s Frequently Asked Questions (FAQs) Troubled Asset Relief Program (TARP) Standards for Compensation and Corporate Governance - <http://www.financialstability.gov/docs/IFrFAQsPartI.pdf>.

⁴ The Interim Final Rule definition of “primary federal regulator” states that for state-chartered banks that do not have securities registered with the SEC, the primary regulatory agency is the bank’s primary federal **banking** regulator. Accordingly, for state chartered, non-member banks the primary regulatory agency is the FDIC. The definition provides little guidance for registered bank holding companies; however informal guidance from the Treasury and the banking regulators indicates that for registered bank holding companies also, the primary regulatory agency is the company’s primary federal **banking** regulator, *i.e.*, the Board of Governors of the Federal Reserve System, and not the SEC.

⁵ See Q-15, Interim Final Rule.

years, including any “benchmarking” or comparisons employed to identify certain percentile levels of compensation (for example, entities used for benchmarking and a justification for using these entities at the lowest level proposed for compensation).

- (iii) *Location of Certifications and Disclosures* - All TARP recipients are required to provide these certifications and disclosures to Treasury within 120 days of the end of the fiscal year.

If the TARP recipient is a reporting company, the compensation committee must provide its certifications and narrative disclosures in the Compensation Committee Report contained in the company’s annual meeting proxy materials or its Annual Report on Form 10-K.⁶

If the TARP recipient is a smaller reporting company, or does not have a class of securities registered under the federal securities laws (a “non-reporting company”), the compensation committee certifications and narrative disclosures must be submitted within 120 days of the end of the company’s fiscal year to its primary regulatory agency. Neither the compensation committee certifications nor the associated narrative disclosures need to be included in the proxy statement of a smaller reporting company or non-reporting company, or the Annual Report on Form 10-K of the smaller reporting company. Note however, that smaller reporting companies are required to provide certain similar disclosures in their annual meeting proxy materials or in their Annual Report on Form 10-K (*See* “1. Proxy disclosure enhancements for public companies,” above), and because of this existing disclosure requirement, they may choose (but are not required) to include these TARP disclosures.

3. **Non-binding say-on-pay proposals.**

The EESA requires an annual non-binding shareholder advisory vote on the compensation paid to NEOs (“say-on-pay”). In reliance on the SEC’s published interpretive guidance and informal advice, reporting-companies and non-reporting companies included the say-on-pay proposal in their 2009 proxy statements. **However, recent interpretive guidance from Treasury and corrections to the Interim Final Rule indicate that the say-on-pay requirement does not apply to non-reporting companies.**⁷

On January 12, 2010, the SEC adopted Rule 14a-20 to establish its own say-on-pay requirements.^{8,9} Rule 14a-20 provides that TARP recipients (other than non-reporting companies) must allow their shareholders a non-binding vote on the compensation of the company’s NEOs, in

⁶ See Q-7(c), Interim Final Rule.

⁷ See Treasury’s Frequently Asked Questions (FAQs) Troubled Asset Relief Program (TARP) Standards for Compensation and Corporate Governance - <http://www.financialstability.gov/docs/IFrFAQsPartI.pdf>.

⁸ SEC Release No. 34-61335 (January 12, 2010).

⁹ Part 335 of the FDIC Rules and Regulations has the effect of extending the say-on-pay requirement to FDIC-reporting companies.

connection with an annual meeting of shareholders (or special meeting in lieu thereof) for which proxies are solicited for the election of directors. In addition to providing this vote, TARP recipients (other than non-reporting companies) must disclose in their proxies the existence, purpose and general effect of the vote, including its advisory nature. The SEC has not prescribed any specific form of resolution for this say-on-pay vote.

4. **Further extension of attestation report exemption for non-accelerated filers.**

The SEC has further amended its rules concerning the filing of an attestation report of the independent auditor on internal control over financial reporting (“Attestation Report”).¹⁰ The amendments extended once again the exemption for a non-accelerated filer with a fiscal year ending before June 15, 2010. Non-accelerated filers choosing to rely on this exemption must state in Management’s Report on Internal Control Over Financial Reporting that the Annual Report does not include the Attestation Report.

5. **Elimination of broker discretionary voting authority.**

The New York Stock Exchange (“NYSE”) has amended its Rule 452.¹¹ Rule 452 permits brokers to exercise discretion in voting “routine” matters on behalf of beneficial owner clients if those clients have not provided them with voting instructions at least 10 days prior to meetings of shareholders. Prior to this amendment, an uncontested election of directors was considered a “routine” matter. Effective January 1, 2010, NYSE-member brokers will not be permitted to exercise discretionary voting in director elections at any public company, **including companies not listed on the NYSE**. As a result of the rule change, companies with majority-voting bylaws may find it more difficult to secure the election of the board’s slate of director nominees. Additionally, a company that does not request ratification of independent auditors (or another “routine” item on which a broker may exercise discretionary voting) may have difficulty obtaining a necessary quorum for its annual meeting.

6. **Changes to NASDAQ corporate governance rules.**¹²

The Nasdaq Stock Market LLC (“NASDAQ”) adopted rule changes, effective on December 7, 2009.¹³ These rule changes require that NASDAQ listed companies provide the NASDAQ Market Watch Department with at least 10 minutes notification prior to releasing material information. Except in emergency situations, this notice must be made through the electronic disclosure submission system available at www.nasdaq.net. Companies that repeatedly fail to provide timely notice may be subject to public reprimand or delisting. The following is a non-exclusive list of material information to which NASDAQ’s advance notice requirement applies:

- Financial-related disclosures, including quarterly or yearly earnings releases, earnings restatements, pre-announcements or “guidance.”

¹⁰ SEC Release No. 34-60813 (October 13, 2009).

¹¹ SEC Release No. 34-60215 (July 1, 2009).

¹² On November 25, 2009, the SEC also approved a series of amendments to the NYSE corporate governance requirements, which amendments became effective on January 1, 2010. These amendments impact areas such as director independence, compliance transition periods and website posting requirements, among others.

¹³ SEC Release No. 34-61008 (November 16, 2009).

- Corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies.
- New products or discoveries, or developments regarding customers or suppliers, *e.g.*, significant developments in clinical or customer trials, or receipt or cancellation of a material contract or order.
- Senior management changes of a material nature or a change in control.
- Resignation or termination of independent auditors or withdrawal of a previously issued audit report.
- Events regarding the company's securities, *e.g.*, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes in the rights of security holders, or public or private sales of additional securities.
- Significant legal or regulatory developments.
- Any other event requiring the filing of a Form 8-K.

7. **Form 10-K considerations.**

As a company prepares its Annual Report on Form 10-K, special care should be taken to provide early warning to investors in the event the company faces specific, material risks that, if triggered, could have a material adverse effect on its liquidity, capital resources or results of operations. In our recent dealings with the SEC we have noticed increased focus on both risk factor disclosure and providing known trends and uncertainties in the MD&A sections of Forms 10-K and 10-Q.

Companies should avoid “boilerplate” risk factors that may not accurately represent the company's unique circumstances. As well as failing to satisfy Item 1A of Form 10-K (not required for smaller reporting companies) and risking comments from the SEC, failure to identify important factors that could cause results to differ materially from those in the forward looking statements could affect the company's ability to rely on the safe harbor for forward-looking statements provided by the Private Securities Litigation Reform Act of 1995. A company that has not received SEC review of its Form 10-K and other public filings during the past two years should pay particular attention to this since it is likely to receive an SEC review in 2010.¹⁴

8. **Heightened regulatory oversight and enforcement.**

The SEC has reacted to recent criticism from Congress, the SEC's Inspector General, a federal judge and the public by devoting more resources to the investigation and enforcement of securities laws. As a result, there has been an increase in civil fraud cases and administrative proceedings, as well as investigations disclosed by companies. In addition to traditional financial reporting cases and the fall-out from the financial crisis, there has been renewed focus on insider trading and compliance with Regulations FD and G, which address fair disclosure and use of non-GAAP financials, respectively.

¹⁴ The SEC, through its Division of Corporation Finance, is statutorily obligated to review SEC filings no less frequent than once every three years. See Section 408(a) of The Sarbanes-Oxley Act of 2002.

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— ATTORNEYS & COUNSELLORS —

Should you have any questions about how these changes will affect your company, please feel free to call or email any of us who work in our financial institutions practice.

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Appendix A

Model Certification – Principal Executive and Financial Officers (First Year).

“I, [identify certifying individual, _____, of _____ (the “Company”)], certify, based on my knowledge, that:

(i) The compensation committee of the Company has discussed, reviewed, and evaluated with senior risk officers at least every six months during the period beginning on the later of September 14, 2009, or ninety days after the closing date of the agreement between the Company and Treasury and ending with the last day of the Company’s fiscal year containing that date (the applicable period), the senior executive officer (SEO) compensation plans and the employee compensation plans and the risks these plans pose to the Company;

(ii) The compensation committee of the Company has identified and limited during the applicable period any features of the SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the Company, and during that same applicable period has identified any features of the employee compensation plans that pose risks to the Company and has limited those features to ensure that the Company is not unnecessarily exposed to risks;

(iii) The compensation committee has reviewed, at least every six months during the applicable period, the terms of each employee compensation plan and identified any features of the plan that could encourage the manipulation of reported earnings of the Company to enhance the compensation of an employee, and has limited any such features;

(iv) The compensation committee of the Company will certify to the reviews of the SEO compensation plans and employee compensation plans required under (i) and (iii) above;

(v) The compensation committee of the Company will provide a narrative description of how it limited during any part of the most recently completed fiscal year that included a TARP period the features in:

(A) SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the Company;

(B) Employee compensation plans that unnecessarily expose the Company to risks;
and

(C) Employee compensation plans that could encourage the manipulation of reported earnings of the Company to enhance the compensation of an employee;

(vi) The Company has required that bonus payments, as defined in the regulations and guidance established under section 111 of EESA (“bonus payments”), of the SEOs and 20 next most highly compensated employees be subject to a recovery or “clawback” provision during any part of the most recently completed fiscal year that was a TARP period if the bonus payments were

based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(vii) The Company has prohibited any golden parachute payment, as defined in the regulations and guidance established under section 111 of EESA, to an SEO or any of the next five most highly compensated employees during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009, and ending with the last day of the Company's fiscal year containing that date;

(viii) The Company has limited bonus payments to its applicable employees in accordance with section 111 of EESA and the regulations and guidance established thereunder during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009, and ending with the last day of the Company's fiscal year containing that date;

(ix) The board of directors of the Company has established an excessive or luxury expenditures policy, as defined in the regulations and guidance established under section 111 of EESA, by the later of September 14, 2009, or ninety days after the closing date of the agreement between the Company and Treasury; this policy has been provided to Treasury and its primary regulatory agency; the Company and its employees have complied with this policy during the applicable period; and any expenses that, pursuant to this policy, required approval of the board of directors, a committee of the board of directors, an SEO, or an executive officer with a similar level of responsibility were properly approved;

[Not applicable to TARP recipients that do not have securities registered with the SEC or the FDIC.] (x) The Company will permit a non-binding shareholder resolution in compliance with any applicable federal securities rules and regulations on the disclosures provided under the federal securities laws related to SEO compensation paid or accrued during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009, and ending with the last day of the Company's fiscal year containing that date;]

(xi) The Company will disclose the amount, nature, and justification for the offering during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009 and ending with the last day of the Company's fiscal year containing that date of any perquisites, as defined in the regulations and guidance established under section 111 of EESA, whose total value exceeds \$25,000 for any employee who is subject to the bonus payment limitations identified in paragraph (viii);

(xii) The Company will disclose whether the Company, the board of directors of the Company, or the compensation committee of the Company has engaged during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009, and ending with the last day of the Company's fiscal year containing that date, a compensation consultant; and the services the compensation consultant or any affiliate of the compensation consultant provided during this period;

(xiii) The Company has prohibited the payment of any gross-ups, as defined in the regulations and guidance established under section 111 of EESA, to the SEOs and the next twenty

most highly compensated employees during the period beginning on the later of the closing date of the agreement between the Company and Treasury or June 15, 2009, and ending with the last day of the Company's fiscal year containing that date;

(xiv) The Company has substantially complied with all other requirements related to employee compensation that are provided in the agreement between the Company and Treasury, including any amendments;

(xv) The Company has submitted to Treasury a complete and accurate list of the SEOs and the twenty next most highly compensated employees for the current fiscal year and the most recently completed fiscal year, with the non-SEO's ranked in descending order of level of annual compensation, and with the name, title, and employer of each SEO and most highly compensated employee identified; and

(xvi) I understand that a knowing and willful false or fraudulent statement made in connection with this certification may be punished by fine, imprisonment, or both. (See, for example, 18 USC 1001)."

Appendix B

Model Certification – Compensation Committee

“The compensation committee of [identify TARP recipient] (the Company”) certifies that:

(1) It has reviewed with senior risk officers the senior executive officer (SEO) compensation plans and has made all reasonable efforts to ensure that these plans do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the Company;

(2) It has reviewed with senior risk officers the employee compensation plans and has made all reasonable efforts to limit any unnecessary risks these plans pose to the Company; and

(3) It has reviewed the employee compensation plans to eliminate any features of these plans that would encourage the manipulation of reported earnings of the Company to enhance the compensation of any employee.”