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SECURITIES LAW ALERT

Squire, Sanders & Dempsey L.L.P.

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Preparing for the 2008 Proxy Season - Executive Compensation Disclosure

On October 9, 2007 the Securities and Exchange Commission staff released a report summarizing its initial views concerning the disclosures made by 350 public companies during 2007 under the new executive compensation disclosure rules. On that same day, John White, director of the SEC's Division of Corporation Finance, delivered a speech regarding the extent to which he believed companies had succeeded or failed in achieving meaningful executive compensation disclosure under the new rules. The principal message of his speech is perhaps best captured by its title: "Where's the Analysis?" The report is available online at http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm. A copy of Mr. White's speech is available online at www.sec.gov/news/speech/2007/spch100907jww.htm.

The SEC staff report and Mr. White's speech are the first public reactions from the SEC to the initial efforts of public companies under what was a sea change in executive compensation disclosure requirements. This *Securities Law Alert* highlights the principal themes from the report and speech for consideration in preparing 2008 executive compensation disclosures, as well as specific actions we believe public companies should consider in light of the report and speech.

Principal Themes

- **More Analysis Is Needed.** The largest shortcoming identified in the executive compensation disclosures was a lack of meaningful analysis. Put simply, in the view of the SEC staff, the Compensation Discussion and Analysis, or CD&A, should discuss **how** and **why** the company reached specific compensation decisions. This "how and why" analysis should be applied to each material aspect of a company's executive compensation program, including the role of the company's philosophies, policies and processes in determining the compensation to be paid to top executives. Examples given by the SEC staff of areas in which analysis was deficient included use of performance targets, benchmarking to peer groups, reasons for change-in-control and termination arrangements, and use of discretion in compensation decisions.
- **Presentation Matters.** The SEC staff emphasized that presentation is important in providing clear and understandable executive compensation disclosure. The manner of presentation and the formatting of information presented, as well as the use of plain English principles, were identified by the SEC staff as important tools in crafting clear and concise disclosure. Presentation should be used to focus the reader on the substantive analysis by highlighting the "how and why" analytical discussion and de-emphasizing discussions of mechanics and other non-analytical matters.

What Companies Should Consider

- The SEC staff has warned that its expectations for executive compensation disclosures will be much higher in 2008 than in 2007, when companies were engaged in good-faith initial attempts to comply with new rules.
- It is not too early to start. The executive compensation disclosure process will continue to be extremely time-consuming, as new SEC staff interpretations and learning from SEC staff comment letters will result in different disclosures and the need to collect additional information.
- Companies should evaluate their processes from last year to identify desirable modifications.
  - The composition of the executive compensation disclosure team should be reviewed, to confirm that all appropriate areas are represented.
  - Information-gathering processes should be reviewed to determine whether information could be collected more efficiently, whether additional information should be collected and if

additional tools (such as tally sheets, wealth accumulation analysis or internal pay analysis) would be helpful.

  - Communication and coordination processes with the compensation committee, compensation consultants, legal counsel and accountants should be evaluated to ensure sufficiently early and efficient contact.

- The SEC staff indicated that virtually all public companies should improve their executive compensation disclosures. In light of the anticipated higher expectations for 2008 disclosures, companies should consider how they can better explain their compensation policies and decisions through enhanced analysis and clearer, more concise presentation.
  - Companies that received SEC staff comments will have a blueprint of specific areas in which their disclosure should be improved as they engage in the comment response process with SEC staff.
  - Companies that did not receive SEC staff comments will not have a specific blueprint, but rather should review last year's disclosures in light of the observations contained in the SEC staff report and should consider how comments furnished to other companies can be applied to their own compensation programs and processes.

For more information about the executive compensation disclosure requirements or any other matters relating to disclosure and securities law compliance, please call your regular Squire Sanders contact or any of the individuals listed in this *Alert.*

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