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SEC Proposes Rules Requiring Disclosure of Hedging by Employees, Officers and Directors

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On February 9, 2015, the Securities and Exchange Commission (the "SEC") proposed amendments to Item 407 of Regulation S-K to require public companies to disclose in any proxy or information statements related to the election of directors whether directors or employees, including officers, are permitted to engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities. The proposed amendments would not require a company to prohibit hedging transactions or to otherwise adopt hedging practices or policies. The rulemaking was mandated by Section 14(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), that was added to the Exchange Act pursuant to Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The proposed rules would apply to smaller reporting companies, emerging growth companies and listed closed-end funds, but would exclude other types of registered investment companies and foreign private issuers.

The proposed rules would require disclosure in respect of all equity securities (1) granted to the employee or board member as compensation, or (2) held directly or indirectly by the employee or board member. The proposed rules require each company to disclose whether it permits employees and directors to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities. In addition to these financial instruments, which are identified in Section 14(j) of the Exchange Act, the proposed rules also require a company to disclose whether it permits employees and directors to engage in any other transactions which are designed to or have the same effect of hedging or offsetting any decrease in the market value of equity securities. This would include any other type of transaction that establishes any downside price protection, such as the sale of a security future. The SEC's rationale for broadening the types of transactions for which disclosure is required is to avoid an incomplete disclosure and to avoid discouraging or promoting the use of particular hedging transactions.

A proposed instruction would instruct companies to disclose, with respect to each category of persons, which categories of transactions it permits (along with sufficient detail to explain the scope of such transactions) and which categories it prohibits. However, to avoid a potentially unlimited disclosure of each specific category, a company would be permitted to generalize by disclosing, for example, that it permits all hedging transactions other than any specifically listed prohibited categories of transactions.

The proposed amendments would also clarify that (a) the term "employee" includes officers of the company and (b) equity securities for which disclosure is required are only equity securities of the company, any parent of the company, or any subsidiary of the company or its parents that are registered under Section 12 of the Exchange Act.

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The disclosure required by the proposed amendments would need to be provided at any time action is to be taken with respect to the election of directors, regardless of whether such action is to be taken at an annual or special meeting of the shareholders or in connection with an action authorized by written consent. The disclosure would also be required in an information statement filed on Schedule 14C.

The SEC is soliciting comments on the proposed rules which must be submitted on or before April 20, 2015.

If you have any questions, please contact your Seyfarth attorney, or Michelle L. Barnett at *mbarnett@seyfarth.com*.

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