December 2009 *By: Michael T. Campoli and Yavonia G. Wise*

SEC ADOPTS CHANGES TO COMPENSATION AND CORPORATE GOVERNANCE DISCLOSURE RULES

At its open meeting held on December 16, 2009, the U.S. Securities and Exchange Commission (the "SEC") adopted several new and amended rules that are designed to improve the disclosure that shareholders of public companies receive regarding risk oversight, compensation and other corporate governance matters. The SEC also adopted a new Item 5.07 to Form 8-K to accelerate the timing of the disclosure of shareholder voting results. The new rules become effective on February 28, 2010.

Summarily, the amendments require new, or revised, disclosures regarding:

- compensation policies and practices that present material adverse risks to the company;
- the valuation of stock and option awards granted to executives and directors;
- qualifications of directors and nominees for director;
- legal proceedings regarding executive officers, directors and nominees;
- board leadership structure and its role in risk oversight;
- potential conflicts of interests concerning compensation consultants; and
- the timing for reporting the results of shareholder votes.

These new rules will apply for the 2010 proxy season. As a result, companies should recognize the need for immediate attention to the changes adopted, and understand how their own policies and procedures must be altered to comply with the SEC's new requirements.

DISCLOSURES REGARDING COMPENSATION POLICIES AND PRACTICES

Policies and Practices as Related to Risk Management

The SEC has revised its executive compensation disclosure rules to require public companies to discuss and analyze their compensation policies and practices that create risks "reasonably likely to have a material adverse effect on the company". The approved version of the rule raises the disclosure threshold from the standard contained in the proposed rules, which required disclosure of policies and practices that "may have a material effect on the company". Significantly, the new rule applies to the compensation of all employees, not just executive officers. Companies that determine the risks arising from their compensation policies and practices are not reasonably likely to have a material adverse effect on them will not be required to make an affirmative statement to that effect.

To avoid confusion within the Compensation Discussion and Analysis (the "CD&A"), the enhanced disclosure is required in a separate section outside of the CD&A. However, the CD&A must address risk considerations if they are a material aspect of the company's compensation policies or decisions for named executive officers.

The final rule contains a non-exhaustive list of situations where compensation programs have the potential to create material adverse risks for companies. These situations include, among others, compensation policies and practices:

- At a business unit of the company that carries a significant portion of the company's risk profile;

- At a business unit with compensation structured significantly differently than other units within the company;
- At a business unit that is significantly more profitable than others within the company;
- At a business unit where the compensation expense is a significant percentage of the unit's revenues; and
- That vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.

The adopted rules also provide examples of the types of issues that a company may need to address if it has determined that its compensation policies are reasonably likely to have a material adverse effect on the company.

Smaller reporting companies are not subject to this new disclosure requirement.

Changes to Summary and Executive Compensation Tables

Under the amendments, the SEC will require companies to disclose the aggregate grant date fair value of equity awards made during the fiscal year in the Summary Compensation Table and the Director Compensation Table, in each case calculated in accordance with Financial Accounting Standards Board Codification Topic 718 (which was formerly referred to as SFAS 123R). The SEC believes that this valuation method better reflects the compensation committee's decision with regard to stock and option awards than the current approach, which reflects the dollar amount recognized as an expense for financial statement reporting purposes for the fiscal year.

For performance-based equity awards, the final rule clarifies that the SEC will now require reporting of the fair value at the grant date based on the probable outcome of the performance conditions, and not the maximum potential award value. The grant date value of the maximum award for the highest level of performance shall be disclosed in a footnote to the Summary Compensation Table and the Director Compensation Table.

To facilitate year-to-year comparisons of a company's disclosures, the rule requires companies with a fiscal year ending on or after December 20, 2009 to present recomputed disclosure using the new valuation methods for each preceding year required to be included in the Summary Compensation Table. However, companies are not required to include different named executive officers for any preceding fiscal year based on such recalculations, or to amend the executive compensation disclosure in previously filed Forms 10-K and other filings.

ENHANCED CORPORATE GOVERNANCE DISCLOSURE REQUIREMENTS

Disclosures Regarding Qualifications of Directors

The SEC adopted revisions to Item 401 of Regulation S-K to expand the required disclosure regarding the qualifications of directors and nominees. The new rules require annual disclosure for each director and nominee for director, including those put forth by a proponent other than the company, detailing the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director of the company as of the time that a filing containing this disclosure is made with the SEC. The disclosure applies to all existing directors, including those not subject to re-election in a particular year. The new requirement does not replace the specific disclosure currently required regarding the specific minimum qualifications and specific qualities or skills used by the nominating committee.

The SEC did not adopt a proposal to require disclosure of particular criteria that qualify a director to serve as a member of a particular committee, but if the director or nominee is chosen to join the board due to a particular expertise relevant to the committee, then that fact should be disclosed.

Disclosures Regarding Other Directorships

The new rules require a company to disclose for each director or nominee any directorships at public companies and registered investment companies held at any time during the past five years, even if the position is no longer held. This expands the current requirement to disclose only current directorships.

Disclosures Regarding Board Diversity

The SEC amended Item 407(c) of Regulation S-K to require a company to disclose whether, and if so, how, it considers diversity in its selection of director nominees. If a company has such a policy, it must disclose how the policy is implemented and monitored for effectiveness. The SEC did not define "diversity" in the amendments, leaving each company to define "diversity" in the manner it deems appropriate.

Disclosures Regarding Legal Proceedings

The SEC extended from five to ten years the period during which disclosure is required of the involvement of directors, nominees or executive officers in specific legal proceedings material to an evaluation of the integrity of such persons. The SEC also amended Item 401(f) of Regulation S-K to require disclosure of additional legal proceedings, including:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity;
- Any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking, or insurance laws and regulations, or any settlement of such actions; and
- Any disciplinary sanctions or orders imposed by a stock, commodities, or derivatives exchange or other self-regulatory organization.

Disclosure is not necessary for settlement of a civil proceeding among private parties.

Disclosures Regarding Board Leadership Structure and The Board's Role in Risk Oversight

The new rules amend Item 407 of Regulation S-K and Item 7 of Schedule 14A to require disclosure of a company's leadership structure and why the company believes that structure is the most appropriate structure for it at the time of the filing. This discussion would include disclosure of whether and why a company has chosen to combine or separate the principal executive officer and board chairman positions, and the reasons for doing so. If the two positions are held by the same person, the company must disclose if it has designated a lead independent director, and what role the lead independent director plays in the leadership of the company.

The company must also discuss the board's involvement in the oversight of the company's risk management process, including how the board administers this function (such as through the whole board, or through a separate committee of the board). Where relevant, companies may want to indicate how those who supervise risk management report that information to the board.

NEW REQUIREMENTS FOR COMPENSATION CONSULTANT DISCLOSURE

Under the new rules, companies must disclose fees related to the retention of compensation consultants who provide services to the company in addition to advice regarding executive and director compensation under certain circumstances.

Specifically, if the board, compensation committee, or any other person serving an equivalent purpose (collectively, the "board") has engaged its own consultant for recommendations regarding the amount or form of executive compensation, and this same consultant (or its affiliates) provides other non-executive compensation consulting services to the company in excess of $120,000 during the fiscal year, then the company must disclose:

- The aggregate fees paid for services provided to either the board or the company with regard to determining or recommending the amount or form of executive and director compensation;
- The aggregate fees paid for any non-executive compensation consulting services provided by the consultant or its affiliates; and
- Whether the decision to engage the compensation consultant or its affiliates for the non-executive compensation consulting services was made, or recommended by, management and whether the board approved such other services.

If the board has not engaged its own consultant, the company must disclose if management has engaged a consultant to provide both executive compensation consulting services and non-executive compensation consulting services to the company, provided that the fees for the non-executive compensation consulting services were in excess of $120,000 during the company's fiscal year. Here, companies must disclose:

- The aggregate fees paid to the consultant or its affiliates for determining or recommending the amount or form of executive and director compensation; and
- The aggregate fees paid for any non-executive compensation consulting services provided by the consultant or its affiliates.

If there are distinct compensation consultants for the board and management, no fee disclosure is required, even if management's consultant provides additional services to the company. Furthermore, disclosure is not needed when the consultant's compensation recommendations are limited to broad-based plans that do not discriminate in favor of executive officers or directors of the company, or when providing information that is not customized for the company.

The SEC did not adopt a proposed rule change that would require companies to disclose the nature and extent of additional services provided by the compensation consultant and its affiliates to the company, given the potentially sensitive nature of this information.

NEW REQUIREMENTS FOR REPORTING SHAREHOLDER VOTING RESULTS

The SEC added a new Item 5.07 of Form 8-K, which requires companies to disclose shareholder voting results on Form 8-K within four business days after the end of the meeting at which the vote was held. The SEC is moving the requirement for disclosure from Forms 10-Q and 10-K to reduce the significant time delay between when meetings occur and when shareholders learn the results of their voting decisions. If final results have not been determined within the four business day period, companies must file preliminary voting results within four days, and then file an amended Form 8-K within four business days after the final results are known.

IMPORTANT CONSIDERATIONS

To facilitate compliance with the SEC's enhanced disclosure requirements for the 2010 proxy season, companies should take some initial steps as soon as possible, including:

- Adjusting D&O questionnaires to highlight the changes to disclosure requirements calling for more information about directors, executive officers and nominees, and extending the time periods for which such information is required; and
- Reviewing the structure of the company to ensure that the proper policies and procedures for disclosure, corporate governance, risk oversight, diversity, and the engagement of compensation consultants are in place.

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The foregoing is intended to summarize the compensation and disclosure rules recently adopted by the SEC, and does not constitute legal advice. Please contact the Pryor Cashman attorney with whom you work with any questions you may have. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael Campoli at (212) 326-0468 or Yavonia Wise at (212) 326-0105.

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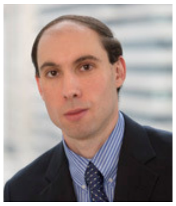

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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, securities law compliance, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, M&A initiatives and compliance with the reporting requirements of the Securities and Exchange Commission (SEC)
- Representation of Javelin Pharmaceuticals, Inc. (NYSE Amex: JAV) as outside general counsel in connection with its equity financings and compliance with the reporting requirements of the SEC and other regulatory agencies
- Representation of Henry Schein, Inc. (NASDAQ: HSIC) in connection with the acquisition of various private companies in the medical equipment and software industries
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc. (NASDAQ: MAIN), the largest T.G.I. Friday's franchisee
- Represented The Kushner Companies in connection with its acquisition of the office building located a 666 Fifth Avenue, New York, New York
- Represented a private telecommunications company in connection with the issuance of a $260 million secured note to the Rural Utilities Service of the U.S. Department of Agriculture, and the concurrent placement of $110 million of preferred stock to venture capital investors

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