

SEC Adopts Final Rule Regarding Disclosure of Hedging by Employees, Officers and Directors

I. Background

The Securities and Exchange Commission (the “Commission”) issued a release on December 20, 2018 (the “Release”) adopting certain amendments to Items 407 and 402 of Regulation S-K (17 C.F.R. Part 229) to require disclosure about whether a company has adopted practices and policies with respect to hedging of its equity securities by its employees, officers and directors.¹ The Commission initially proposed the amendments on February 9, 2015 to implement a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act.² The amendments are scheduled to take effect on March 8, 2019 and many companies will have to comply with the new disclosure requirements for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019 (see the discussion of compliance dates below).

II. Overview of the Amendments

Scope. The amendments added a new Item 407(i) which requires a company to disclose any practices or policies adopted by it regarding the ability of its employees or directors, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of company equity securities held, directly or indirectly, by the employee or director or granted to the employee or director by the company as part of the compensation of the employee or director. If a company has any such practices or policies (whether written or not), it must either provide a fair and accurate summary thereof, including the categories of persons covered, any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed, or disclose the 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.³

Securities covered. The “equity securities” for which disclosure of policies or practices is required are equity securities issued by the company, any parent or subsidiary of the company, or any subsidiary of any parent of the company.⁴

Persons covered. Disclosure of any practices or policies that apply to employees (including officers) or directors of the company, or any of their designees, is required and is not narrowed by any materiality qualifier.⁵

Location and manner of disclosure. The new Item 407(i) disclosure is required to be included in any proxy statement or information statement with respect to the election of directors but is not required to be included in Part III of Form 10-K.⁶ Companies have flexibility in choosing where in the proxy or information

¹ See [Securities and Exchange Commission, Disclosure of Hedging by Employees, Officers and Directors, Release No. 33-10593 \(December 20, 2018\)](#).

² See Release No. 33-9723 (February 9, 2015).

³ Release No. 33-10593 (December 20, 2018). p. 17-18,

⁴ *Id.*, p. 24

⁵ *Id.*, p. 29

⁶ *Id.* p. 32-34

statement they present the new Item 407(i) disclosure.⁷ A new instruction to Item 402(b) of Regulation S-K clarifies that a company may satisfy its obligation to disclose any company policies regarding hedging by named executive officers in its compensation discussion and analysis (“CD&A”) by cross-referencing the information disclosed pursuant to Item 407(i) outside of the CD&A to the extent that such information also satisfies the CD&A disclosure requirement.

The SEC further noted in the Release that, to the extent a company has disclosed its practices or policies regarding hedging transactions in its CD&A (either in full or in a summary that would meet the requirements of Item 407(i)), the company is not required to revise its practices or policies – or its disclosure;⁸ to the extent a company has disclosed a policy that covers only a subset of employees or directors, the company is not required to further disclose that it did not have a policy with regard to the company’s other employees or directors;⁹ and no disclosure is required about any hedging transactions that have occurred.¹⁰

Issuers subject to Item 407(i). The new Item 407(i) disclosure requirement does not apply to listed closed-end funds¹¹ or foreign private issuers¹² but does apply to business development companies,¹³ smaller reporting companies (“SRCs”),¹⁴ and emerging growth companies (“EGCs”).¹⁵

III. Compliance Dates

Companies that do not qualify as SRCs or EGCs must comply with the new disclosure requirements for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019. Companies that qualify as SRCs or EGCs must comply with respect to the election of directors during fiscal years beginning on or after July 1, 2020.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Donna M. Bryan at 212.701.3690 or dbryan@cahill.com.

⁷ *Id.*, p.37

⁸ *Id.*, p.21

⁹ *Id.*, p.21

¹⁰ *Id.*, p.22

¹¹ *Id.*, p.41

¹² *Id.*, p.47

¹³ *Id.*, p.42

¹⁴ *Id.*, p.44

¹⁵ *Id.*, p.44