

Publications

Securities Alert: Securities and Exchange Commission Adopts Final Hedging Disclosure Rules

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On December 18, 2018, the Securities and Exchange Commission (SEC) adopted a final rule implementing Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act which required the SEC to establish rules requiring companies to disclose whether their employees or directors are permitted to hedge the market value of equity securities granted as compensation to, or held by, employees or directors.

The final rule establishes a new Item 407(i) to Regulation S-K that requires U.S. public companies to describe any practices or policies adopted by the company regarding the ability of its employees, officers or directors (or their designees) to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) or engage in transactions intended to hedge or offset any decrease in the market value of equity securities granted as compensation to, or held by, the employee, officer or director. Equity securities covered by the final rule include equity securities issued by the company and any parent or subsidiary of the company or any subsidiary of any parent of the company.

The required disclosure must either provide a fair and accurate summary of the practices or policies that apply (including the categories of persons covered and any categories of hedging transactions that are specifically permitted or specifically disallowed) or disclose the practices or policies in full. In addition, if the company does not have any such practices or policies regarding hedging, the company must disclose that fact or disclose that the company generally permits its employees, officers and directors to engage in hedging transactions.

Item 407(i) requires the hedging disclosure to be included in proxy and information statements relating to the election of directors. The final rule expands the SEC's current hedging disclosure framework pursuant to which companies typically disclose hedging policies applicable to their named executive officers in the Compensation Discussion and Analysis. The disclosure required by Item 407(i) may be provided within

or outside of the Compensation Discussion and Analysis. In addition, unlike the Compensation Discussion and Analysis, the hedging disclosure requirements implemented by the final rule also apply to “smaller reporting companies” and “emerging growth companies.”

The final rule only requires disclosure of existing hedging practices or policies and does not require companies to adopt or implement any hedging practices or policies for their employees, officers or directors. The disclosure requirements apply to both oral and written hedging practices and policies. The final rule does not require disclosure of any actual hedging transactions or any waivers from or violations of the company’s hedging practices or policies.

Hedging Disclosure Rules Compliance Dates

Companies that do not qualify as “smaller reporting companies” or “emerging growth companies” must comply with the new hedging disclosure requirements for proxy statements and information statements relating to the election of directors during fiscal years beginning on or after July 1, 2019. Companies that qualify as “smaller reporting companies” or “emerging growth companies” must comply with the new hedging disclosure requirements for proxy statements and information statements relating to the election of directors during fiscal years beginning on or after July 1, 2020.

Contact Vorys for more information regarding the SEC’s final rule and for assistance complying with the new hedging disclosure requirements in connection with your annual meeting of shareholders. Vorys represents issuers and investors in nearly all aspects of federal and state securities law compliance and nearly all types of public and private securities and capital markets transactions.

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