July 28, 2010

Disclosure of Employee and Director Hedging

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law. The bill contains a number of provisions related to accountability and executive compensation which will require additional disclosures by public companies. One such provision relates to the disclosure of hedging by employees and directors.

As initially proposed in the Senate bill, disclosure of employee and director hedging is included in Section 955 of the Dodd-Frank Act. Section 955 amends Section 14 of the Securities Exchange Act to require the SEC to adopt rules requiring proxy disclosure of whether any employees or directors of the company or their designees are permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director. Actual hedging transactions need not be disclosed.?

Some insider trading policies currently prohibit these transactions, but largely with respect to executive officers and directors but not employees. The new disclosure requirement may prompt public companies to revise current polices or adopt new policies to prohibit hedging transactions for directors and employees.

Item 403 of Regulation S-K currently requires public companies to disclose whether their executive officers and directors have pledged any shares, which includes disclosure of hedging transactions in certain circumstances. Additionally, Section 16 of the Securities Exchange Act currently requires executive officers and directors to disclose transactions in derivative securities (such as puts, calls, warrants, convertible securities, or other rights or obligations to buy or sell securities) on beneficial ownership reports.

The Dodd-Frank Act does not specify a deadline as to when the SEC is required to issue these rules.?