KIRKLAND & ELLIS LLP

ALERT

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The Media and Executive Compensation Disclosures

As more and more companies have been filing their proxy statements under the new SEC executive compensation disclosure rules, it has been interesting to observe how the media interpret and report the disclosures. For example, the Associated Press ("AP") — a wire service that is often relied upon not just by local and regional newspapers but also by the *Wall Street Journal*, other national newspapers and Internet websites (such as Yahoo! and MSN) — is not simply copying the "total compensation" number out of proxy statements, but is trying to take a more reasoned approach to what it discloses in news reports about executive pay.

The AP calculation of "total pay" is not the same as the SEC's calculation of "total compensation." Total compensation under the SEC's rules is the sum of the following categories in the Summary Compensation Table ("SCT"):

Salary	Bonus	Stock Awards	Option Awards	Non-Equity Incentive Plan Compensation	Change in Pension Value and Nonqualified Deferred Compensation Earnings	All Other Compensation

However, the AP's calculation only includes "Salary," "Bonus," "Non-Equity Incentive Plan Compensation," "All Other Compensation," above-market returns on deferred compensation (but not actuarial change in pension value) and the "estimated value" of stock and option awards. AP uses the FAS 123R grant date fair value of the stock and option awards (which is found in the last column of the Grant of Plan-Based Awards Table) and not the financial accounting compensation expense shown in the SCT under the Stock Awards and Option Awards columns.

The AP has indicated that it is trying to show a more realistic picture of what an executive was offered during a given fiscal year and to create parameters that permit better comparability between peer companies. Although using the grant date fair value as the "estimated value" of stock and option awards still overstates the amount of compensation (because such awards are likely subject to time- and/or performance-based vesting), the AP reported amount is a closer indicator of how much an executive was offered in a given fiscal year than is the SEC's total compensation amount. Some (but not all) local and regional newspapers are following the AP or a similar formulation. Because it is the local papers that usually focus most intensively on hometown executives, it is important that the PR staff at the company understand the AP formulation and why in many cases they may want to encourage the local or regional newspaper to follow it.

Investors, the SEC, the public, employees and activists often obtain their initial information about executive compensation from "sound bites" in news stories. Although companies can make CD&A and the narrative disclosure accompanying the tables as clear as crystal, the key talking points may still get lost in the reporters' rush to get the story out. Because all reporters have deadlines, it is critical that companies be proactive with the media on the day the proxy statement is filed. It appears that most of the AP and local reporters have been generating their stories on the very day proxy statements have been filed with the SEC.

Below are five points to consider as part of your proxy PR planning process:

1. Prior to releasing the proxy statement to the public, brief the company's PR staff on the key talking points and educate them about the numbers disclosed in the various compensation tables. The PR staff should develop a well-informed talking points agenda that is consistent with the information disclosed in the proxy statement.

2. Don't be naive; be proactive. Expect the AP (and most likely the local paper) to report on the compensation disclosed in the company's proxy statement. If you want the story told right, open the lines of communication with the media. Most reporters welcome a phone call from a well-informed PR executive who can explain the numbers and any nuances. For example, one company was recently required to report a "super-charged" level of equity compensation in the SCT for a retirement-eligible executive solely as a result of accounting rules. Although the CD&A and narrative disclosure discussed the accounting rules were causing the anomaly, it was the PR executive's conversation with the reporter — focusing him on the key messages in the proxy statement — that convinced the reporter to indicate in the article that the new SEC rules forced the company to disclose the "super-charged" amount and that such amount was not actually received.

   Making sure the key messages are adequately described in the proxy statement will assist the PR staff in focusing reporters on the overarching messages.

3. Don't neglect the footnotes. Clear disclosure in the CD&A and the narrative disclosure accompanying the tables is important, but reporters only have time to skim the tables and footnotes (especially since many proxy statements are much longer this year). If you want to make an important point, make it in CD&A and the narrative disclosure but also add a footnote next to the likely headline-generating number in the table. This will flag the key point for the reporter and direct him or her to the more descriptive disclosure found elsewhere in the proxy statement.

4. Sensitize the compensation committee and board of directors on what the media may report and why. Many compensation committees have expressed frustration that the new SEC rules obscure how the compensation committee (and its consultant) look at compensation for a given year. Being proactive with the media on the day the proxy statement is filed will go a long way to address this frustration.

5. Compile, study and learn. Once the company's proxy statement is on file with the SEC, collect every news story written about the proxy statement and the information disclosed therein. Determine what key messages were missed or distorted by the media and formulate a game plan on how to address those deficiencies next year.

Should you have any questions about the matters addressed in this Alert, please contact the following Kirkland & Ellis author or the Kirkland & Ellis attorney you normally contact:

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