

Section 133. Item 407—Corporate Governance, Securities and Exchange Commission

SEC Compliance and Disclosure Interpretations

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¶8102 [Independence Definitions]

Question 133.01

Question: If a non-listed issuer has independence definitions that are more stringent than those of a national securities exchange, may that issuer provide disclosure based on its own independence definitions in accordance with [Item 407\(a\)\(1\)\(i\)](#), rather than provide the disclosure required by [Item 407\(a\)\(1\)\(ii\)](#)?

Answer: The non-listed issuer must provide the disclosure required by [Item 407\(a\)\(1\)\(ii\)](#). If the non-listed issuer believes that its own independence definitions are more stringent than those of the exchange identified in the required [Item 407\(a\)\(1\)\(ii\)](#) disclosure, it may, in addition, disclose that belief and provide the disclosures called for by [Item 407\(a\)\(1\)\(i\)](#) based on its own definitions, provided that it also complies with [Item 407\(a\)\(2\)](#) regarding disclosure of its own definitions of independence.

Reference: [Item 407\(a\)\(1\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8103 [Web Site Descriptions]

Question 133.02

Question: May a company indicate that the nominating committee's processes, policies, or minimum director nominee qualifications are included in the company's governance policies posted on the company's website, rather than including descriptions of the nominating committee's processes, policies, or minimum nominee qualifications in the proxy statement?

Answer: No. [Item 407\(c\)\(2\)](#) requires that the descriptions of the processes, policies, and nominee qualifications be included in the proxy statement, and no mechanism for reference to website posting of this information is provided for with respect to the [Item 407\(c\)\(2\)](#) disclosure.

Reference: [Item 407\(c\)\(2\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8103A [Disclosure of Recommending Persons]

Question 133.03

Question: [Item 407\(c\)\(2\)\(vii\)](#) requires the identification of the category of persons or entities that recommended each nominee for director, other than executive officers or nominees that are directors who are standing for re-election. If a director who did not stand for election by shareholders last year (but rather had been named as a director by the board during the year) is to be nominated for election by shareholders for the first time, is disclosure under [Item 407\(c\)\(2\)\(vii\)](#) required for that nominee?

Answer: Yes. The nominee for director would not be considered as standing for "re-election"; therefore, disclosure of the category of persons or entities that recommended the nominee is required by [Item 407\(c\)\(2\)\(vii\)](#).

Reference: [Item 407\(c\)\(2\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8104 [Financial Statements]

Question 133.04

Question: Does [Item 407\(d\)\(3\)\(i\)\(D\)](#) require the audit committee to state whether it recommended inclusion of the audited financial statements in the [Form 10-K](#) for periods prior to the last completed fiscal year?

Answer: No. [Item 407\(d\)\(3\)\(i\)\(D\)](#) requires the audit committee to state whether it recommended inclusion of the audited financial statements in the [Form 10-K](#). This statement need not cover financial statements for periods prior to the last completed fiscal year.

Reference: [Item 407\(d\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8105 [Compensation Consultants]

Question 133.05

Question: Should all compensation consultants engaged by the company that played a role in determining or recommending the amount or form of executive or director compensation be disclosed, or only those that consulted with the board of directors or the compensation committee?

Answer: All compensation consultants with any role in determining or recommending the amount or form of executive or director compensation must be disclosed under [Item 407\(e\)\(3\)\(iii\)](#).

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8106 [Consents]

Question 133.06

Question: Is the consent of a compensation consultant required under [Securities Act Rule 436](#) if a compensation consultant is identified in accordance with [Item 407\(e\)\(3\)\(iii\)](#) in a filing that is incorporated by reference into a Securities Act registration statement?

Answer: No. [Item 407\(e\)\(3\)](#) requires a "narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation including ... (iii) [a]ny role of compensation consultants in determining or recommending the amount or form of executive and director compensation." Identifying a compensation consultant and the role that the compensation consultant had in determining or recommending the amount or form of executive and director compensation does not result in the compensation consultant being deemed an "expert" for the purposes of the Securities Act, or mean that the compensation consultant has expertized any portion of the disclosure regarding executive and director compensation or compensation committee processes. Therefore, a consent would not be required.

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8107 [Committee Report]

Question 133.07

Question: Which names of directors must be included below the disclosure required in the Compensation Committee Report by [Item 407\(e\)\(5\)](#)?

Answer: [Item 407\(e\)\(5\)\(ii\)](#) requires that the name of each member of the compensation committee (or other board committee performing equivalent functions, or in the absence of any such committee, the entire board of directors) must appear below the required disclosure in the Compensation Committee Report. The members of the compensation committee (or the full board) who participated in the review, discussions and recommendation with respect to the Compensation Discussion and Analysis must be identified. New members who did not participate in such activities and departed members who are no longer directors need not be included. Members who resigned from the compensation committee during the course of the year, but remain directors of the issuer, may need to be named under the disclosure in the Compensation Committee Report pursuant to [Item 407\(e\)\(5\)\(ii\)](#).

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued March 13, 2007.

¶8108 [Compensation Consultants]

Question 133.08 [same as Question 118.06]

Question: Regarding the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, on what basis should a company differentiate between the requirements of [Item 407\(e\)\(3\)\(iii\)](#) and [Item 402\(b\)](#)'s Compensation Disclosure and Analysis disclosure?

Answer: The information regarding "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation" required by [Item 407\(e\)\(3\)\(iii\)](#) is to be provided as part of the company's [Item 407\(e\)\(3\)](#) compensation committee disclosure. See [Release 33-8732A](#) at Section V.D, Corporate Governance Disclosure. If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should discuss that role in the Compensation Disclosure and Analysis section.

Reference: [Item 402\(b\)](#) and [Item 407\(e\)](#) of Regulation S-K

History: Issued July 3, 2008.

¶8109 [Audit Committee Financial Expert—Smaller Reporting Companies]

Question 133.09

Question: When is a smaller reporting company required to provide the audit committee financial expert disclosure as required by [Item 407\(d\)\(5\)](#)?

Answer: While all smaller reporting companies are required to provide the audit committee report required by [Item 407\(d\)\(3\)](#), pursuant to [Item 407\(g\)](#), smaller reporting companies are not required to provide the audit committee financial expert disclosure required by [Item 407\(d\)\(5\)](#) until their first annual report after their initial registration statement under the Securities Act or Exchange Act becomes effective. The statement in the original version of the adopting release for [Item 407\(g\)](#) ([Release No. 33-8876](#), Dec. 19, 2007) that smaller reporting companies are not required to provide an audit committee report was incorrect.

Reference: [Item 407\(d\)](#) and [Item 407\(g\)](#) of Regulation S-K

History: Issued March 2008; modified July 3, 2008.

¶8109A [Additional Services]

Question 133.10

Question: Are the "additional services" provided by executive compensation consultants that are subject to the disclosure requirements of [Items 407\(e\)\(3\)\(iii\)\(A\) and \(B\)](#) limited to services for non-executives?

Answer: No.

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued January 20, 2010.

¶8109B [Consultant Fee Categorization]

Question 133.11

Question: If a compensation consultant's role is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors and to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the consultant does not provide advice, then such services do not need to be disclosed under [Item 407\(e\)\(3\)\(iii\)](#), so long as these are the *only* services provided by the consultant. If the consultant's role extends beyond these two types of services, then disclosure of all of the consultant's services, including consulting on broad-based plans and providing non-customized information, will be required under [Item 407\(e\)\(3\)\(iii\)](#), subject to the disclosure threshold in this item. Are the fees for these two types of services considered to be for "determining or recommending the amount or form of executive and director compensation" or are such fees considered to be for "additional services"?

Answer: The answer depends on the facts and circumstances of each service. Fees for consulting on broad-based, non-discriminatory plans in which executive officers or directors participate and for providing information relating to executive and director compensation, such as survey data (in each case, that would otherwise qualify for the exclusion from disclosure if they are the only services provided), are considered to be fees for "determining or recommending the amount or form of executive and director compensation" for purposes of reporting fees under the rule. However, "consulting" on broad-based non-discriminatory plans does not also include any related services, such as benefits administration, human resources services, actuarial services and merger integration services, all of which are "additional services" subject to the disclosure requirements of [Item 407\(e\)\(3\)\(iii\)\(A\) and \(B\)](#). In addition, if the non-customized information relates to matters other than executive and director compensation, then the fees for such information would be for "additional services".

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued January 20, 2010.

¶8109C [Additional Services]

Question 133.12

Question: Under [Item 407\(e\)\(3\)\(iii\)\(A\)–\(B\)](#), compensation consultant fees are required to be disclosed if the consultant provides advice on executive and director compensation and also provides "additional services" in an amount in excess of \$120,000 during the last completed fiscal year. Is there any limitation on the types of services that are included as "additional services"? If, in addition to services, the consultant also sells products to the company, do the revenues generated from such sales also have to be disclosed?

Answer: There is no limitation on the types of services that are included in "additional services." If the consultant also sells products to the company, then the revenues generated from such sales should be included in "aggregate fees for any additional services provided by the compensation consultant or its affiliates."

Reference: [Item 407\(e\)](#) of Regulation S-K

History: Issued March 12, 2010.