

WHEN WHAT GOES DOWN COMES UP – REPORTING NEO COMPENSATION RESTORATION

Sep 30, 2020

As the COVID-19 pandemic unfolded, public companies took action in response to the impact and potential impact of the pandemic on their businesses and the economy. The actions often included temporary compensation reductions (voluntary and otherwise) for a company's principal executive officer, principal financial officer and/or named executive officers (collectively, "NEOs").

As would be expected, many companies reported these changes under Item 5.02(e) of Form 8-K, which is triggered when a company enters into, adopts or materially amends a material compensatory plan or arrangement with NEOs or in which they participate. Some companies, however, reported the reductions under Item 7.01 or 8.01 of Form 8-K or, sometimes, in a stand-alone press release or not at all. As we [previously noted](#) in March, companies that did not report the reductions under Item 5.02(e) likely were comfortable that, based on their specific facts and circumstances, the decreases were not material to the executives' compensation arrangements or, in the case of voluntary compensation reductions where employment agreements were in place, perhaps by analogy to SEC C&DI 117.13, that Item 5.02(e) was not triggered.

As we move into the final quarter of 2020, and in view of developments following the initial compensation reductions relative to the continuing effects of the pandemic, a number of industries and companies have had relatively positive financial performance in the face of the pandemic, and may have a more favorable business outlook or simply better visibility into the effects of the pandemic. As a result, some companies have been reversing all or a portion of their COVID-19 driven compensation reductions for NEOs. Other companies may have reversed all or a portion of these reductions for other reasons, including NEO retention. All of these compensation increases raise a new disclosure decision: should a company report the increases and, if so, how?

For reductions earlier reported on Form 8-K, the decision may not always be as simple as making a corresponding disclosure under the same Item of Form 8-K. Disclosure considerations may be different this time around. Companies must independently assess the materiality of the increases and, in line with SEC guidance, apply principles-based analysis of current facts and circumstances and consider, among other things, the magnitude of the compensation increase and other components of an executive's compensation package.

Companies may understandably hesitate to report increases under Item 5.02(e) when earlier reductions were reported under Items 7.01 or 8.01 – and vice versa – fearing that inconsistencies may call their prior or current disclosures into question. Still, each action requires an independent analysis, and the conclusion may be different. A company that disclosed reductions under Item 7.01 or 8.01 may determine that the increases are sufficiently material to require a filing under Item 5.02(e). A company that disclosed reductions under Item 5.02(e) may determine that the increases do not trigger reporting under Item 5.02(e) (e.g., where a company restores only a portion of a reduction).

As might be expected, it appears most companies that initially reported reductions on Form 8-K have been reporting the restoration of NEO compensation under the same Item(s) of Form 8-K used for reporting the reductions (i.e., 5.02(e), 7.01 and/or 8.01). There have, however, been exceptions where companies have apparently made a different materiality assessment (e.g., Aramark, which in April 2020 disclosed reductions under Item 7.01 and in September 2020 disclosed corresponding increases under Item 5.02(e)).

Finally, there may be other disclosure considerations in reporting the restoration of NEO compensation, aside purely from the Item 5.02(e) compensation analysis. For example, to signal that NEOs are not receiving special treatment, companies sometimes add to their disclosures that other employees' compensation is likewise being restored. Also, companies that reported NEO compensation reductions under any Item of Form 8-K as a positive, proactive cost-saving measure affecting even those at the very top may wish to think twice before deciding not to disclose related increases on Form 8-K (e.g., under Items 7.01 and 8.01) even if Item 5.02(e) reporting is not triggered, lest they be viewed as cherry-picking their Form 8-K disclosures.

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Robert J. Endicott

St. Louis

rob.endicott@bclplaw.com

+1 314 259 2447

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