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Dodd-Frank Wall Street Reform Act: SEC Proposes Rules for Hedging Policy Disclosure

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The Securities and Exchange Commission has proposed rules to implement the disclosure of hedging policies as required by ***Section 955 the Dodd-Frank Wall Street Reform and Consumer Protection Act.*** If adopted, these rules would require a registrant to disclose, in its proxy or information statement, whether employees (including officers) or members of the board of directors are permitted to engage in transactions to hedge or offset any decrease in the market value of their equity securities, whether granted as compensation or otherwise held directly or indirectly by the employee or board member. The proposed rules require disclosure for all employees of an issuer, and relate to securities of the issuer's affiliates.

As proposed, the rules would require each issuer to disclose in its proxy or consent solicitation material for its annual meeting of shareholders whether any employee or member of the board of directors of the issuer is permitted to purchase financial instruments such as prepaid variable forward contracts, equity swaps, collars, and exchange funds, or to engage in any types of transactions that are designed to establish downside protection. The proposed rules would require issuers to distinguish between any employees or directors who are permitted to engage in hedging transactions and those who are not and to disclose any specific permitted or prohibited transactions. The SEC clarified that these rules would not require any company to prohibit hedging transactions or adopt policies addressing hedging. The proposed disclosure would be added to Item 407 of Regulation S-K of the Securities Act as a governance-related disclosure.

Notably, the proposed rules do not exempt emerging growth companies, smaller reporting companies or closed-end investment companies with shares listed and traded on a national securities exchange from the disclosure requirements. Currently, these issuers are not required to provide a compensation discussion and analysis in their proxy statements, which prescribes disclosure of an issuer's hedging policy related to its named executive officers. The proposed rules would not apply to foreign issuers since their securities are not subject to the proxy rules under Section 14 of the Securities Exchange Act. The SEC has requested public comment on the proposed rules, raising several specific questions in the proposing release. Comments must be received on or before the date that is 60 days after the proposed rules are published in the Federal Register.