

As Seen In

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LAW

SEC to companies: To compensate, you must elucidate

By JEREMY HARRELL

Securities lawyers will soon have to shelve their legalese tomes and dust off their English textbooks.

Last month, the Securities and Exchange Commission adopted a wide-ranging set of rules that should make it easier for the average investor to understand what a public company executive earns. The new rules, which have yet to be officially published, will take effect in December, in time for next year's round of proxy statements.

"What the SEC has tried to do here – and I think they've succeeded – was to strike a balance between increased disclosure and the need of companies to retain sensitive, competitive information," said Alon Kapen, a securities lawyer and partner at Farrell Fritz in Uniondale.

The rules emphasize new SEC chief Christopher Cox's belief that the agency shouldn't pass judgment on compensation but on the quality of information a company provides to normal people. "It's in keeping with their philosophy that disclosure is the best remedy," Kapen said.

That disclosure will come in two forms: a chart detailing compensation packages for five top executives and directors, and a narrative component that translates the chart into plain language spelling out a company's compensation policies and decisions. Until now, some proxy statements seemed to have been written in an obscure tongue possibly related to Hungarian.

This section of the proxy is to be called Compensation Discussion and

Analysis ("If you want to sound like a hip securities lawyer, call it CD&A," Kapen said.) It won't replace the compensation committee's report, Kapen said, but unlike the committee report, the CD&A is considered "filed" by the SEC, which means that the chief executive officer and chief financial officer certify it and can be held liable if the document proves fraudulent.

The SEC published a draft version of the new rules in January and fielded more than 20,000 public comments, which Cox has said is by far the most interest any SEC rule has ever generated. In the six months between drafting and completing the rules, the stock-option backdating scandal erupted, and the SEC responded by highlighting a new provision requiring an explanation of the options and how they were issued.

Kapen said the SEC, in its original draft, barely touched on backdating and springloading, a related practice in which a company issues options just before releasing favorable news sure to drive up the stock price.

"It was really a reaction to perceived abuse in the last few months," Kapen said.

The SEC also did away with a proposed measure that's become known as the Katie Couric clause. The rules require companies to disclose the compensation of the CEO, CFO and three highest paid executives. The SEC had also proposed that companies disclose the earnings of three other employees who are paid more than the executives. That would have meant divulging the annual salary of actors, athletes and big traders at some firms, Kapen said.

Instead, the SEC said it would come

out with a new proposal later this year that will require disclosure of three other employees, but only if they hold policymaking decisions with companies. Firms will only have to reveal the employees' titles, not their names, Kapen said, and it only applies to the nation's 3,500 largest companies.

Speculation has already grown that the new rules, with their emphasis on transparency, will foster intense bidding among corporations, now that the suits occupying executive suites will know how much their counterparts make. But Kapen said whether an impending bidding war lies ahead is "anybody's guess," and he prefers to think of the new rules as a way to make better comparisons.

"Before these rules, there was no frame of reference," he said. "It was apples to oranges. Now it will be apples to apples."

Banker's lawyer

Bethpage Federal Credit Union last week hired Uniondale firm Ruskin Moscou Faltishek to be its general counsel.

The credit union, which has assets of \$2.3 billion and 137,000 members, ranks among the 20 largest credit unions in the country.

"This relationship is very important to our firm," Ruskin Moscou's co-managing partner, Douglas Cooper, who also serves as chairman of Bethpage's client service team, said in a prepared statement. "We will be providing legal services on a broad scale, from regulatory and compliance work to employee relations, drawing on our own wide-ranging legal experience."