

Document Summary

This document provides a compilation of questions asked and answers given during the Stock & Option Solutions Webinar presented on January 30th, 2009: “Potential Proxy Pitfalls & Perils (for Stock Plans)... And How to Avoid Them”.

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The slides for the presentation are available here:

<http://www.sos-team.com/PDFS/ProxyPitfalls.pdf>

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Reg S-K Item 402

Named Executive Officers (NEOs) – Whom to Include?

If an NEO is being replaced by another NEO due to changes in total compensation, do we only include the new NEO in the compensation tables and exclude the former NEO from the disclosure?

Yes. The NEO determination is made on an annual basis. Therefore, only those executive officers who qualify as NEOs for the last completed fiscal year are required to be included in the disclosure. A former NEO who does not qualify as either the PEO, PFO, or one of the three most highly-compensated executive officers for the last completed fiscal year (and who is not a former executive officer whose total compensation would have made him or her one of the most highly-compensated executive officers but for the fact that he or she was not serving in that capacity at fiscal year end) does not need to be included in the disclosure for the last completed fiscal year.

If our CFO retires during the current fiscal year, is he or she included in the executive compensation disclosure for the current year and is he or she to be included in the disclosure for the next two fiscal years (beginning next year) as well?

He or she will be included in your company's executive compensation disclosure for the current fiscal year because he or she was a PFO for a portion of the year. However, he or she should be excluded completely from the disclosure in subsequent years as long as he or she did not serve as an NEO for any portion of any such year. Typically, once a PEO, PFO or NEO leaves the employ of the Company, there is no ongoing obligation to include the individual in a company's executive compensation disclosure beyond the year in which he or she left the company.

On slide 10, you mentioned for point 2 that you would need to include all three years, but the point says only year 3, please clarify.

In the case of named executive officers (NEOs) other than the Principal Executive Officer (PEO) or Principal Financial Officer (PFO), if they served as an executive officer during any portion of either of the prior fiscal years covered in the Summary Compensation Table, you should include their compensation data for each of these years (as appropriate) in the SCT.

Interestingly, this rule does not apply to your PEO or PFO. In the case of your PEO or PFO, the requirement is different. In the case of the PEO and PFO, you are only required to include compensation data for the prior fiscal year's covered in the Summary Compensation Table only if they served in the same capacity in either (or both) of those years. If the PEO or PFO was an NEO in the fiscal years prior to assuming the PEO/PFO position, some companies include the compensation data for those years in the SCT as a best practice, even though it is not required.

Summary Compensation Table

In calculating salary earned, does one include vacation earned during the year, whether or not paid?

Generally, no. Benefits available to substantially all employees, such as vacation time earned, need not be disclosed in the Summary Compensation Table. However, to the extent that accrued vacation is paid out in cash, these amounts should be reported in the “Salary” column of the SCT.

Should we include dividends on vested and held Restricted Stock (RS) in the Summary Compensation Table? We don't pay dividends on unvested Restricted Stock Units (RSUs).

Generally, no. If the shares are vested, they are considered to be outstanding shares of common stock (as a contractual matter, they are no longer “restricted”) and, therefore, are no longer compensatory in nature. As a result, they are not included in the executive compensation disclosure. This applies to dividends related to these shares as well.

How would we report Paid Time Off (PTO) that was voluntarily surrendered by the CEO and NEOs?

Since there was no receipt of compensation by the NEOs, it is not necessary to include this amount in the compensation tables. However, in the interests of transparency, it may be desirable to disclose by way of a footnote to the Summary Compensation Table and via a discussion in your Compensation Discussion & Analysis that these amounts have been surrendered.

Currently, for expense accruals, we do a true-up for forfeitures at vesting. So if we have a former NEO with forfeited equity awards that are included in column E of the Summary Compensation Table, we could possibly be reporting a negative number due to the reversals of expense as a result of the forfeitures. Would it then make sense for the awards to be included in the table as such?

Yes. As noted on Slide 18, forfeitures should be included (as negative amounts) in the Summary Compensation Table. As demonstrated by the question, in some situations this may result in a negative amount being reported in the SCT. Further explanation in a footnote to the SCT may be warranted.

How do you reconcile the concept of disclosing forfeiture “true-ups” (credits) with the requirement that stock compensation amounts be disclosed without taking into consideration forfeiture estimates?

Estimated forfeitures is a provision under SFAS 123(R) that permits companies to reduce the compensation cost associated with equity awards, by the expected employee (and award) attrition. However, the SEC does not permit amounts being reported in the Summary Compensation Table for equity awards to be adjusted for estimated forfeitures, in part because this estimate, which is based largely on patterns of employee behavior, is not relevant when dealing with senior executives. On the other hand, because companies are required to report the full grant-date fair value for equity awards in the SCT, to the extent that previously recorded expense amounts are reversed for accounting purposes,

those amounts can also be reversed in the SCT. So if the award doesn't vest in full, either because service-based vesting conditions aren't satisfied or where the probability of satisfying a performance condition changes, you can make an adjustment in your SCT to stay consistent with your accounting treatment.

Where are the actual gains realized from stock option exercises or restricted stock vesting reported in the Summary Compensation Table? (amounts are reflected on the NEO's Form W-2)

The Form W-2 income associated with a stock option exercise or equity award vesting is not reportable in the Summary Compensation Table. However, these amounts are to be reported in the Option Exercises and Stock Vested Table.

Grants of Plan-Based Awards Table

We pay bonus plan bonuses quarterly. Do we need to report each quarterly bonus on a separate line as a separate award?

Generally, no. If the bonuses are based on the same performance criteria, with separate quarterly target levels, the bonus amounts can be aggregated with footnote disclosure that the payments are made quarterly.

Outstanding Equity Awards at Fiscal Year-end Table

Where would I report equity awards that vest on the basis of performance criteria, but also provide that, if the performance goal is missed, they will vest on a later date on the basis of continued service?

While the outcome of the performance criteria is still unknown, the awards should be reported in the "unearned" columns (column (d) or column (i) of the table, depending on whether the award involves an option or stock award). Once the performance criteria is no longer relevant and only the service-based vesting condition remains, the awards should be reported in columns (b) or (c) for options that are unexercisable or column (g) for stock awards that are "not yet vested".

Director Compensation Table

How do we report restricted stock awards made in lieu of director fees?

You must include the compensation expense accrued for the awards in the Director Compensation Table, and then provide a footnote disclosing the grant and the fact that it was made in lieu of other compensation.

General

Where and how do we report the acquisition of shares through the ESPP Plan on the compensation tables?

Purchases of stock under ESPP plans that are qualified under Section 423 of the Internal Revenue Code do not need to be reported in the SCT or otherwise, since this is a benefit generally available to substantially all salaried employees.

Beneficial Ownership Table

Are RSAs and RSUs that are not vested or expected to vest within 60 days included in the Beneficial Ownership Table ?

No. Only shares which are currently owned, plus shares representing options or awards becoming vested/exercisable within 60 days of the “as of” date of the Table need to be included.

Are the 5% shareholders required to be included in the table determined based on their holdings as of the end of year or is it based on holdings throughout the year (if %'s have changed)?

The Beneficial Ownership Table should be prepared as of a date that is as close to the annual shareholder meeting as is reasonably practical. The ownership of 5% shareholders should be calculated as of this reporting date.

For beneficially owned shares, do we include shares from RSAs where the shares are votable, but are not saleable since they are still restricted shares?

Generally, yes. Under Rule 13d-3, a person is deemed to beneficially own any common stock as to which he or she has or shares (or has the right within 60 days to acquire solo or shared) voting power or investment power. Typically RSAs are not treated like options for purposes of the beneficial ownership table because the executive has voting power (even though he or she doesn't have dispositive control until the shares vest). Use a footnote to disclose the vesting conditions.

Links to Regulations:

[Regulation S-K, Item 201](#)

[Regulation S-K, Item 402](#)