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## **SEC Adopts Final Rules for Disclosure of Hedging Policies**

After several years of consideration, the Securities and Exchange Commission has adopted final rules to require disclosure of hedging practices or policies in proxy and information statements relating to the election of directors. The final rules provide additional flexibility and clarification to registrants as to how they comply with the new disclosure requirements. Domestic registrants must comply with the new requirements for fiscal years beginning on or after July 1, 2019 – which, for calendar year-end companies, means that compliance will begin in 2020. Smaller reporting companies and emerging growth companies have an additional year to comply.

These rules implement Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) and were among the group of Dodd-Frank Act executive compensation-related provisions waiting to be finalized. Final rules related to incentive compensation clawbacks and pay-for-performance disclosure remain outstanding, and the SEC has not yet indicated the timing for their adoption.

### **Requirements of the Final Rules**

The final rules add new Item 407(i) to Regulation S-K to require a registrant to describe any practices or policies it has adopted regarding the ability of its employees (including officers) or directors, or any of their designees, to purchase securities or other financial instruments, or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of equity securities granted as compensation, or held directly or indirectly by the employee or director. The equity securities for which disclosure is required are those of the registrant, any parent or subsidiary of the registrant or any subsidiary of any parent of the registrant, regardless of whether or not the securities are registered under Section 12 of the Securities Exchange Act of 1934.

Unlike the proposed rules, the final rules specify that a registrant may satisfy this disclosure requirement by either providing a fair and accurate summary of the practices or policies that apply – including the categories of persons they affect and any categories of hedging transactions that are specifically permitted or specifically disallowed – or, alternatively, by disclosing the practices or policies in full. The proposed requirement to disclose categories of persons covered by the hedging policies, categories of hedging transactions permitted and prohibited or sufficient detail regarding permitted hedging transactions has been eliminated. If the registrant does not have any such practices or policies, the registrant must disclose that fact or state that hedging transactions are generally permitted.

Registrants have flexibility as to where they include such disclosure in their proxy and information statements, including within or outside of the Compensation Discussion and Analysis. To reduce potentially duplicative disclosure in proxy and information statements, the final rules add an instruction to Regulation S-K providing that a registrant may satisfy its existing Compensation Discussion and Analysis hedging disclosure obligation by cross-referencing to the new Item 407(i) disclosure. Additionally, the SEC revised Item 402 of Regulation S-K and Item 7 of Schedule 14A to streamline its current provisions by more succinctly cross-referencing disclosure items.

The final rules require disclosure in proxy and information statements for the election of directors for domestic registrants. Listed closed-end funds, investment companies registered under the Investment Company Act and foreign private issuers are not subject to these requirements. Disclosure is not required in registration statements or proxy and information statements not related to director elections, and further, is not deemed to be incorporated by reference in any registration statement unless explicitly so stated.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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