

DISCLOSURE OF REMUNERATION OF EXECUTIVES AND DIRECTORS OF PUBLIC COMPANIES AND STATE-OWNED OR STATE- CONTROLLED COMPANIES

There is a strong international trend to require disclosure regarding the remuneration of directors and executives of both publicly traded, non-state affiliated companies as well as for SOEs. For instance, the OECD Guidelines on Corporate Governance call for the disclosure of compensation to individual board members and key executives,¹ termination and retirement provisions,² and any specific facility or in-kind remuneration provided to management.³ The European Union has for several years been working on a model set of disclosure requirements for companies in the EU.⁴

This Section provides brief summaries of the disclosure regimes in various countries throughout the world. The discussion below focuses in part on disclosure requirements applicable to non-state affiliated, publicly traded companies (and not SOEs). However, the disclosure requirements applicable to non-state affiliated, publicly traded companies should apply equally to SOEs where the same issues regarding lack of information, agency conflicts and need for development of best practices in the area of remuneration are just as, if not more, acute.

a. United States

Under rules promulgated by the United States Securities & Exchange Commission (the “SEC”), non-state affiliated, publicly traded companies listed on a national stock exchange in the United States must, on an annual basis, disclose detailed information regarding the remuneration of all directors as well as the Chief Executive Officer, Chief Financial Officer and the three other most highly paid officers.⁵ The rules generally call for three types of disclosure of executive remuneration paid or earned during the prior year: (1) tabular disclosures regarding executive remuneration⁶ and director remuneration;⁷ (2) narrative description of other

¹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD PRINCIPLES OF CORPORATE GOVERNANCE 22 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

² *Id.*

³ *Id.* at 52.

⁴ See 2004 O.J. (L 385) 55, 14.12.2004, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:385:0055:0059:EN:PDF>; see also European Union: European Commission, *Report on the Application by Member States of the EU of the Commission Recommendation on Directors' Remuneration*, 13 July 2007, SEC (2007) 1022, available at http://ec.europa.eu/internal_market/company/docs/directors-remun/sec20071022_en.pdf; Statement of the European Corporate Governance Forum on Director Remuneration 1 (March 23, 2009), available at http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-remuneration_en.pdf.

⁵ The particular rules for disclosure are set forth in the provisions of the SEC's Regulation S-K, specifically, Item 402 (Executive Compensation), Item 403 (Security Ownership), and Item 404 (Related Party Transactions). 17 C.F.R. §§ 229.402-.404 (2008).

⁶ 17 C.F.R. § 229.402(c) (2008) (summary compensation table); 17 C.F.R. § 229.402(d) (2008) (grants of plan-based awards table); 17 C.F.R. § 229.402(f) (2008) (outstanding equity awards at fiscal year-end table); 17 C.F.R. § 229.402(g) (2008) (Option exercises and stock vested table); 17 C.F.R. § 229.402(h) (2008) (pension benefits table).

⁷ 17 C.F.R. § 229.402(k) (2008).

types of remuneration and any information material to an understanding of the tabular information,⁸ and (3) a Compensation Discussion and Analysis (“CD&A”).⁹ All of this information is required to be included in a company’s annual proxy statement, which is made publicly available through the SEC’s website.¹⁰

The information required to be included in the tabular disclosures for executives includes information for the three preceding fiscal years regarding yearly salary, bonus remuneration, remuneration in the form of equity awards, and remuneration that is deferred. Tabular disclosures required for directors are similar (although slightly less detailed, particularly with regard to equity remuneration).¹¹ Detailed rules apply in determining the value to be reported for equity remuneration which are beyond the scope of this commentary paper.¹² These tabular disclosures must be accompanied by narratives that are to “provide a narrative description of any material factors necessary to an understanding of the information disclosed in the tables.”¹³

The largest recent change in disclosure requirements for public companies in the United States was the addition of a requirement that a company’s annual proxy statement must include, generally as of December 15, 2006, a CD&A which is to discuss “all material elements of the [company’s remuneration] of the named executive officers.”¹⁴ The SEC has indicated that a company must address six items in its CD&A: (i) the objectives of the company’s remuneration programs; (ii) what the remuneration programs of the company are designed to reward; (iii) what is each element of remuneration; (iv) why the company chooses to pay each element of remuneration; (v) how the company determines the amount for each element of remuneration; and (vi) how each element of remuneration and the company’s decisions regarding that element fit into the company’s overall compensation objectives and affect decisions regarding other elements of remuneration.¹⁵

In revising the disclosure rules to require a CD&A, the SEC indicated that the CD&A was “intended to provide investors with a clearer and more complete picture” of remuneration practices of the company and accordingly the CD&A “needs to be focused on *how* and *why* a company arrives at specific executive [remuneration]

⁸ 17 C.F.R. § 229.402(e) (2008).

⁹ 17 C.F.R. § 229.402(b) (2008).

¹⁰ See generally <http://www.sec.gov>.

¹¹ To view a sample summary compensation table for a US company listed on the NASDAQ stock exchange, see <http://www.sec.gov/Archives/edgar/data/1288741/000119312509078820/ddef14a.htm> at 19.

¹² For an excellent summary of the considerations and calculations that companies subject to the disclosure regime should take into account in preparing this tabular disclosure see W. Alan Kailer (Partner at Hunton & Williams), *The Securities and Exchange Commission’s 2006 Executive Compensation Rules: Preparing the Executive Compensation Tables*, (Hunton & Williams LLP, Dallas, TX) January 2008, available at http://www.utcle.org/eLibrary/preview.php?asset_file_id=14930.

¹³ 17 C.F.R. § 229.402(e)(1) (2008).

¹⁴ 17 C.F.R. § 229.402(b)(1) (2008).

¹⁵ *Id.*

decisions and policies.”¹⁶ Thus, the CD&A is an effort to move beyond a tabular presentation of numerical information regarding remuneration and towards a more complete discussion of how remuneration is set at public companies, thereby providing shareholders with more detailed information regarding the process taken by management in setting remuneration for directors and executives.

In addition to the above disclosures and the CD&A, other regulations are intended to increase transparency in remuneration practices of public companies and corporate governance generally. For example, disclosure is required regarding (i) beneficial ownership of public company securities by persons owning 5% or more of any class of the company’s voting securities and executives and directors;¹⁷ (ii) transactions between the company and related persons (generally defined to include officers, directors, 5% beneficial holders, and close family members of these individuals);¹⁸ and (iii) disclosure regarding a company’s processes and procedures for the consideration and determination of executive and director remuneration.¹⁹

The United States disclosure regime is one of the most comprehensive disclosure regimes in the world and has served as a model for numerous other countries in developing their own disclosure regimes. As the above summary demonstrates, this disclosure regime places emphasis on both (i) detailed disclosure of “straightforward” remuneration information in a format that readily allows comparison across companies and (ii) disclosure regarding the general remuneration processes and decisions of public companies and corporate governance matters related to remuneration practices. Moreover, recent indications are that the SEC’s emphasis on disclosure is going to increase. Just this year, the SEC has indicated that it is considering expanding disclosure requirements to require enhanced disclosure about the company’s compensation policies and practices, including disclosure for non-executive officers, if such policies have a material impact on the company’s risk profile.²⁰

b. Canada

The current disclosure regime in Canada is very similar to that of the United States, an unsurprising fact when one considers that many Canadian companies are subject to the disclosure rules in the United States by virtue of being listed on stock exchanges in the United States. Although certain differences exist in the exact information that must be disclosed and how information must be presented, the

¹⁶ *Staff Observations in the Review of Executive Compensation Disclosure*, Division of Corporate Finance, U.S. Securities and Exchange Commission, September 10, 2007, available at <http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm>.

¹⁷ 17 C.F.R. § 229.403 (2008).

¹⁸ 17 C.F.R. § 229.404 (2008).

¹⁹ 17 C.F.R. § 229.407 (2008).

²⁰ See SEC’s Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>; see also, *SEC Acts on Proxy Disclosure and Voting Issues*, ROPES & GRAY CLIENT ALERT (Ropes & Gray LLP, Boston, MA), July 6, 2009, available at <http://www.ropesgray.com/secaactsproxydisclosurevotingissues/>.

required disclosure is generally as robust as in the United States.²¹ Thus, under rules promulgated by the Canadian Securities Administrators (“CSA”), non-state affiliated, publicly traded companies listed on the Toronto Stock Exchange must include in annual filings summaries of remuneration for the CEO, Chief Financial Officer and the three next most highly compensated officers and for all directors as well as a “Compensation Discussion & Analysis” which is very similar to the CD&A required for U.S. public companies discussed above. This information is publicly available through the CSA’s online database.²²

c. Europe

In October 2004, the EU Commission recommended that publicly traded companies disclose their policies on executive remuneration, as well as the levels and form of each individual executive’s pay.²³ The EU Commission recommendations are not legally binding, and accordingly there exists a range of mandatory disclosure regimes in Europe. At one end of the spectrum are the UK, Ireland and France, which have mandatory disclosure regimes that are similar to those in the US (e.g. individual level reporting). Other countries such as Portugal and Denmark only require aggregate reporting with limited breakdown of individual amounts.²⁴

Below is a brief description of the disclosure regimes in the United Kingdom (the country with the most disclosure in Europe) and Germany (the country with the most similar disclosure regime to Chile in Western Europe).

i. United Kingdom

The United Kingdom has the most extensive set of disclosure requirements with respect to management compensation in Europe. Under the Companies Act 2006 and the UK Listing Rules, the UK requires publicly traded companies listed on a national stock exchange to disclose executive compensation in their annual reports. The disclosure regime requires the disclosure of salary, fees, bonus benefits, pension

²¹ For comparisons of the disclosure regimes in the United States and Canada *see Proposed New Canadian Executive Compensation Disclosure Rules Released*, UPDATE (Osler, Hoskin & Harcourt LLP, Toronto, Ontario, Canada), May 11, 2007, *available at* <http://www.osler.com/uploadedFiles/Resources/Publications/12098-Updated%20Sept%202014-Proposed%20New%20Canadian%20Executive%20Compensation%20Disclosure%20Rules%20Released.pdf>; and DELOITTE & TOUCHE LLP, ENHANCED DISCLOSURE OF EXECUTIVE COMPENSATION: THE DELOITTE PERSPECTIVE (2007), *available at* http://www.deloitte.com/dtt/cda/doc/content/ca_en_ExecutiveCompensation_may07.pdf.

²² CSA’s online database can be found at <http://www.sedar.com/>.

²³ *Western European Executive Pay Disclosure Trends Bode Well for Better Credit Analysis*, MOODY’S GLOBAL CORPORATE GOVERNANCE: SPECIAL COMMENT 5 (Moody’s Investors Service, New York, NY), December 2007, *available at* <http://v3.moodys.com/sites/products/AboutMoodysRatingsAttachments/2007000000459228.pdf>.

²⁴ *See generally*: Velma Roberts et al., *Executive Compensation Disclosure in Europe*, PERSPECTIVE (Mercer Limited, London, England), Sept. 25, 2007, *available at* <http://www.mercer.com/referencecontent.htm?idContent=1282000> (follow “Download Perspective” hyperlink) [hereinafter *Mercer Report*]; Guido Ferrarini, A European Perspective on Executive Remuneration (September 2008) (unpublished presentation), *available at* http://www.ecgi.org/remuneration/documents/ferrarini_presentation.pdf; and Ferrarini, Moloney & Vespro, *supra* note 3.

and long term incentives in a tabular format.²⁵ In addition, companies are required to provide a detailed description of several compensation elements including: executive compensation philosophy, overview of bonuses, overview of long term incentive plans, description of pensions, payouts to departing executives, and the peer groups used to help determine remuneration.²⁶ Most notably, the United Kingdom requires a vote of the shareholders to approve the remuneration report.²⁷ This is a level of disclosure that is not prevalent in the rest of the world but has been cited as “best practices” for listed companies in Europe.²⁸

ii. Germany

In Germany, the Corporate Governance Code, as amended on June 18, 2008, requires the disclosure of compensation of directors of German listed companies.²⁹ Mandatory executive compensation disclosure rules are contained in the German Commercial Code and require that the notes to the annual balance sheet and profit and loss statement of medium-sized and large corporations report the total remuneration of members of the company’s leadership.³⁰ Remuneration that must be disclosed includes salaries, profit participations, options and other share-based payments, expense allowances, insurance payments, commissions and fringe benefits of every kind.³¹ German disclosure requirements do not, however, require the qualitative description of the compensation.³² For instance, the philosophy behind the executive compensation and the explanations of the bonuses are typically not provided in all annual reports.

d. Brazil

In Brazil, the city of São Paulo has shown leadership in disclosing the salaries of public officials and officials of public companies. Although under no legal obligation to do so, the City Hall of São Paulo has been publishing the salaries of public officials and officials of public companies since June 2008.³³ Publishing the salaries was a response to a municipal law (Lei n 14.720/2008)³⁴ which requires information – including the name, the position and the unit where the official works – to be published on the web. A decree signed by the Mayor implements the above

²⁵ Jonathan Baird (Partner at Altheimer & Gray) & Peter Stowasser (Partner at Schulte Rechtsanwälte), *Executive Compensation Disclosure Requirements: The German, UK and US Approaches*, GLOBAL COUNSEL (Practical Law Company, London, England) 29, 33 (October 2002), available at <http://crossborder.practicallaw.com/4-101-7960> (follow “Download PDF” hyperlink).

²⁶ *Mercer Report* at 3.

²⁷ *Id.*

²⁸ See Ferrarini, *supra* note 54; see also Moody’s *supra* note 53 at 5.

²⁹ Handelsgesetzbuch [HGB] [Commercial Code] June 18, 2009, BGBl. I, available at http://www.corporate-governance-code.de/eng/download/E_CorGov_Final_Version_June_2009.pdf.

³⁰ Baird & Stowasser, *supra* note 56, at 30

³¹ *Id.*

³² *Mercer Report* at 3.

³³ Salaries are available at: <http://deolhonascontas.prefeitura.sp.gov.br/index.htm>.

³⁴ Available at <http://www.camara.sp.gov.br/legislacao.asp>.

mentioned law.³⁵ As for public companies, they are mentioned in the Constitution³⁶ and are defined in the decree as well. According to the decree: “II - *Empresa Pública - a entidade dotada de personalidade jurídica de direito privado, com patrimônio próprio e capital exclusivo da União, criado por lei para a exploração de atividade econômica que o Governo seja levado a exercer por força de contingência ou de conveniência administrativa podendo revestir-se de qualquer das formas admitidas em direito.*”³⁷

On June 16, 2009, the Mayor of São Paulo decided that the new website, Keeping an Eye on Public Costs, should include a list of all civil servants attached to the municipality – including 147,000 employees of the central administration and another 15,000 employed indirectly – with their posts, salaries and places of work.³⁸

Two associations of civil servants (representing professors, engineers and architects) filed lawsuits against this decision. They were granted an urgent provisional decision by the Superior Court of São Paulo, and the information was taken off-line. The two associations argued that the disclosures would, among other things, breach their constitutional rights to privacy and security of person. The São Paulo Superior Court held that the information could put people at risk, and also accepted some procedural arguments. The Municipality appealed to the Supreme Court.

On July 8, 2009, the Supreme Court upheld the Mayor’s decision to order the posting on-line of the salaries of all municipal civil servants.³⁹ Justice Gilmar Mendes, who ruled on the case, referred to the fact that the Internet has transformed the citizen-State relationship, particularly in relation to social control over public expenditure. He recognized that in some cases, openness could legitimately be limited. However, in this case, the public interest in having the information was stronger than the rights of civil servants. Moreover, enforcing a judicial decision that undermined the Municipality’s policy of transparency in favor of individual rights would violate the “public order.”

e. Israel

In Israel, the Treasury publishes an annual report that lists the salaries of several thousand officials in the public sector, including those employed by government-controlled companies, companies controlled by local authorities, and companies or legal entities that receive more than 25% of their funding from the state (including, e.g., public health service providers). Companies are required to disclose

³⁵ Decree N 50.070, 2008, available at http://74.125.113.132/search?q=cache:A122u2ghdPQJ:ftp://ftp.saude.sp.gov.br/ftpsssp/bibliote/informe_eletronico/2008/iels.out.08/iels188/M_DC-50070_021008.pdf+DECRETO+N%C2%BA+50.070,+DE+2+DE+OUTUBRO+DE+2008&cd=1&hl=pt-BR&ct=clnk.

³⁶ Constitution of Brazil, promulgated in 1988, Article 173, available at http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm.

³⁷ 1967, article 5, available at <http://www.planalto.gov.br/ccivil/decreto-lei/Del0200.htm>

³⁸ Article 19 press release, “Brazil: Supreme Court OKs Publication of Civil Servants’ Salaries,” July 14, 2009, <http://www.article19.org/pdfs/press/brazil-supreme-court-oks-publication-of-civil-servants-salaries.pdf>.

³⁹ See Decision of the Supreme Court, in Portuguese, submitted with these Comments.

the compensation of all employees; the salaries of employees that exceed a certain threshold (currently 17,000 NIS – approximately USD \$4,000 – per month) are made publicly available through an online database.⁴⁰ Companies must disclose information regarding salary, any bonus or other remuneration, and pension and other deferred payments. The Treasury publishes two reports: one is very long and includes the full data on several thousand posts, and the other is a shorter report that includes just those entries that seem not to be in line with the Treasury’s guidance. Although the reports do not include names, they do include positions, and it is easy for the media and the public to decipher to whom an entry refers (e.g., the deputy director of XYZ hospital).

Table of Disclosure Regimes in Europe

	Finland	France	Germany	Ireland	Italy	Netherlands
Executive compensation disclosed in the annual report and accounts	✓	✓	✓	✓	✓	✓
Executive directors covered	All directors	Board members	Board members	Board members	Board members	Board members
Executive remuneration only provided as aggregated amount	✓					
Executive compensation provided for each executive by name separately	CEO only	✓	✓	✓	✓	✓
Elements of compensation disclosed in tabular format:						
■ Salary		✓	✓	✓	✓	✓
■ Fees		✓	✓	✓	✓	✓
■ Bonus		✓	✓	✓	✓	✓
■ Benefits		✓		✓	✓	✓
■ Pension		✓	✓	✓		✓
■ Long Term Incentives (LTI)		✓	✓	✓	✓	✓
■ Other		Severance		Severance		Severance
Description of compensation element:						
■ Executive compensation philosophy	✓	✓	[✓]	✓	✓	✓
■ Overview of bonus	✓	✓	[✓]	✓	✓	✓
■ Overview of LTI plans	✓	✓	[✓]	✓	✓	✓
■ Description of pension	✓	✓	[✓]	✓		
■ Any payouts to departing executives		✓	[✓]	✓		✓
■ Any peer groups used		✓		✓		
Disclosure of performance required						
Shareholders vote on the remuner. report			✓			

⁴⁰ See <http://hsgs.mof.gov.il/ViewReportPage.aspx>.

	Norway	Portugal	Spain	Sweden	Switzerland	UK
Executive compensation disclosed in the annual report and accounts	✓	✓	✓	✓	✓	✓
Executive directors covered	Board members	Board members	Board members	Board members	Board members and senior management	All directors
Executive remuneration only provided as aggregated amount		✓	✓	✓	✓	
Executive compensation provided for each executive by name separately	✓			CEO only	Highest paid executive	
Elements of compensation disclosed in tabular format:						
■ Salary	✓		✓	✓	✓	✓
■ Fees	✓		✓	✓	✓	✓
■ Bonus	✓		✓	✓	✓	✓
■ Benefits	✓		✓	✓	✓	✓
■ Pension	✓		✓	✓		✓
■ Long Term Incentives (LTI)	✓		✓	✓	✓	✓
■ Other	Severance, long term costs		Severance, small perks		Change of control provisions	Performance graph
Description of compensation element:						
■ Executive compensation philosophy			[✓]	✓	✓	✓
■ Overview of bonus	✓		[✓]	✓	✓	✓
■ Overview of LTI plans	✓		[✓]	✓	✓	✓
■ Description of pension	✓		[✓]	✓	✓	✓
■ Any payouts to departing executives	✓			✓	✓	✓
■ Any peer groups used						✓
Disclosure of performance required	✓	✓		✓		✓
Shareholders vote on the remuner. report		✓	✓	✓		✓

Note: The disclosure rules in each country typically relate to all companies listed on that country's stock market. Shareholder vote typically advisory. © 2007 Mercer LLC.

[✓] = Typically not provided in all annual reports.