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# Practice Pointers for Better Disclosure of Director and Executive Officer Professional Biographies in SEC Filings

*Item 401 of Regulation S-K requires that companies disclose the business experience of their directors, officers, nominees and significant employees in order for investors and stockholders to evaluate the management of a public company.*

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No other section in a registration statement, proxy statement or Form 10-K is arguably as inconsistent in presentation from company to company as the professional biographies of a public company's executive officers and directors. Some biographies consist of a single sentence about an officer's or director's current occupation while others fill half a page and include detail touting every honorary award received or the financial milestones achieved by companies in which the individual once served as an officer or director as might be found in company marketing materials or on a company's corporate website.

Item 401 of Regulation S-K requires the disclosure by executive officers, directors and director nominees of their business experience so that investors and stockholders can evaluate the management of a public company and provide them with relevant information to make informed investment and voting decisions relating to corporate governance and the election of directors.

This article reviews the requirements of Item 401 of Regulation S-K and notes the ways companies can improve the utility of that information to ensure consistent, proper and appropriate compliance.

Item 401 requires a public company to:

1. **Set forth the names and ages of all directors and executive officers of the company and all persons nominated or chosen to become directors or executive officers.**

A variety of information about a company's directors, executive officers and persons nominated to those positions must be disclosed in a registration statement on Form S-1, proxy or information statement and annual report on Form 10-K, in tabular form (if practicable), under Item 401(a) and (b) of Regulation S-K. Full proper names of a company's directors, officers and nominees should be used in the document.

In a registration statement covering an initial public offering, it is common to include director nominees who will take office upon the closing of the IPO. These director nominees must be listed

in the document and provide a consent to act as such pursuant to Rule 438 under the Securities Act of 1933 to be so named.

For a proxy or information statement relating to a company's annual stockholders meeting, a company may omit listing a director whose term of office will not continue after that meeting. However, if a company includes Item 401 information directly in Part III of its Form 10-K (rather than incorporating by reference to this information in a proxy statement, which is commonly done), the company must provide such information about all current directors, including those directors whose terms will not continue after the annual stockholders meeting.

When making this disclosure in a Form 10-K, information should be furnished for current officers and directors at the time of the filing, rather than for those officers and directors who held such positions during the last fiscal year.

In addition to a public company's officers, directors and nominees, Item 401(c) of Regulation S-K requires listing and separate disclosure regarding the significant employees of the company. Item 401 lists positions such as production managers, sales managers and research scientists as being within the "significant employee" category.

**2. Include all positions and offices with the company held by each such director, executive officer or nominee and the term of office and the periods the person served in that position.**

Directors and executive officers of a company must list all positions and offices held with that company, without the prior five-year time period applicable to outside occupations and employment. This disclosure is especially relevant in connection with determining director and audit committee independence.

**3. Disclose any arrangement or understanding between the director, executive officer or nominee and any other person (naming such person) pursuant to which he or she was or is to be selected as a director, officer or nominee.**

Occasionally, a public company enters into financing arrangements with investors pursuant to which holders of a class or series of preferred stock issued in the financing have the right to appoint a director to the company's board. In this situation, disclosure of the arrangement is required, along with the same Item 401 information about this director as is required about directors nominated by the board. Alternatively, the company may disclose that the preferred stockholders have advised the company that the stockholders have appointed this director and that the Item 401 information of the director has been provided for inclusion in the filing.

**4. State the nature of any family relationship between any director, executive officer or person nominated or chosen by the company to become a director or executive officer.**

"Family relationship" is defined to mean any relationship by blood, marriage or adoption, not more remote than first cousin. For example, disclosure would be required where a director's wife is the

first cousin of an executive officer of the same company since the director and executive officer are related by marriage "not more remote than first cousin." This disclosure should be included in the biographies of each related person.

**5. Provide a brief description of the business experience during the past five years of each director, executive officer and person nominated or chosen to become director or executive officer, including each person's principal occupations and employment during the past five years.**

Under this item, each officer and director must include his or her specific business experience for all outside employment and positions held during the past five years, without gaps or ambiguities as to time. For each employment position listed for a director, executive officer or nominee, the individual must disclose the beginning and ending date of employment, with the month and year typically being sufficient.

An individual should also provide a brief explanation of the nature of his or her responsibilities in the position and the principal business of the named employer, especially if the position and principal business are not obvious from the job title or company name. In the case of a chief financial officer, for example, the SEC staff has sometimes requested supplemental information relating to the level of such person's professional competence including professional licenses and degrees, financial roles at prior employers including accounting firms, and specific practice areas.

In some instances, an executive officer or director may wish to provide his or her business experience information for periods prior to the past five years. There are risks of doing so, however, as demonstrated in a March 2016 decision by the U.S. District Court for the Northern District of Illinois against Textura Corporation. In a registration statement in connection with the company's IPO, the chief executive officer's business positions went beyond the five-year period. The problem was that the CEO selectively provided details of his previous jobs, omitting a position in which he was the chief executive officer of a company that was involved with notorious convicted stock fraudsters and in which the company's auditor alleged the executive provided false accounting information. The court found that having elected to disclose the executive's business experience beyond five years, the company had a duty to do so in a manner that was not misleading. The company's omission of his time with that company was a materially misleading omission because the company touted his prior experience, and therefore had a duty to disclose all of the experience, including any negative experience.

Finally, many officers and directors include their educational background including the university and graduate degrees they have received. This practice is often not followed consistently even within the same SEC document. Occasionally, the SEC has also asked for the year in which those degrees were received, though this is not normally provided.

**6. List any other directorships of public companies held by each director or person nominated or chosen by the company to become a director during the past five years.**

Many companies list directorships of privately-held firms as well as public companies on which a director sits or was once a member, especially if service on the board of the private firm demonstrates specialized knowledge or background in the particular industry in which the company is engaged.

Public companies should be aware, however, that over-inclusion of board positions may result in an unintended comment from Institutional Shareholder Services, a leading provider of corporate governance research and recommendations. ISS generally recommends a withhold vote with regard to a director at a company's annual stockholders meeting if that director serves on too many boards of directors.

The SEC staff has specifically commented with regard to other directorships in the area of special purpose acquisition companies, or SPACs, which raise funds in a public offering to engage in a business combination. In one instance, the SEC staff requested supplemental disclosure to a director's background of not only the other SPACs with which the director was affiliated, but as to whether each such company completed a business combination, liquidated or changed its intentions from those disclosed in its IPO prospectus.

**7. Furnish a description of certain legal or regulatory proceedings during the past ten years involving any director, person nominated to become a director, or executive officer of the company.**

Under Item 401(f), directors, executive officers, promoters and control persons are required to provide disclosure with respect to any personal petitions filed under the federal bankruptcy laws or any state insolvency laws filed by or against a director or officer of the company. The SEC staff has stated that such disclosure may be material to an evaluation of the ability or integrity of any such person.

In addition to personal bankruptcies, disclosure is required if a director or officer was an executive officer of an entity that filed for bankruptcy while such person was an executive officer of that entity or within two years prior to such bankruptcy filing.

The SEC staff has interpreted this item to also capture comparable bankruptcy and insolvency events in foreign countries. For example, disclosure should be provided when a director of a U.S. public company is also the CEO of a non-U.S. company and a receiver is appointed for the non-U.S. company.

Item 401(f) also requires disclosure of a director's or officer's conviction in a criminal proceeding, unless that proceeding involves merely "traffic violations and other minor offenses." The SEC staff has indicated that conviction of a financial crime (e.g., securities fraud, tax evasion, embezzlement and forgery), regardless of the dollar amount involved, is disclosable as it bears on the integrity of the person.

This disclosure requirement is not applicable to persons in the "significant employees" category.

**8. Discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person nominated or chosen by the company should serve as a director.**

Item 401(e)(1) of Regulation S-K requires a company to disclose, on an individual basis, why the person's particular and specific experience, qualifications, attributes or skills led to the conclusion that the person should serve as a director, in light of the company's business and structure, at the time that a filing containing the disclosure is made. For example, a media company might describe

a director's relevant film and TV experience, rather than previous experience in the life sciences. Likewise, it would not be sufficient to disclose simply that a person should serve as a director because he or she is an audit committee financial expert.

It is worth noting that even in the case of a classified board where a director is not up for re-election at the upcoming annual stockholders meeting, this disclosure for each director is nevertheless required because the composition of the entire board is important for stockholder voting decisions. The SEC staff has indicated that the purpose of this disclosure requirement is to elicit current information about all directors on the board. For some boards of directors, particularly those that do not conduct annual self-evaluations, this may require implementing additional disclosure controls and procedures to ensure such information about directors who are not up for re-election in a particular year is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms.