

## MEDIA COMPANIES AWAIT SEC'S FINAL ACTION ON PROPOSED "KATIE COURIC CLAUSE"

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The U.S. Securities and Exchange Commission (SEC) caught the attention of many media companies in January when it included what has come to be known as the "Katie Couric Clause" in its proposed revisions to executive compensation disclosure requirements. If adopted, the proposal will require the public disclosure of the compensation paid to many well-known media personalities.

Public companies are generally required to provide information about the compensation of their five most highly compensated executive officers in their annual meeting proxy statements. However, the SEC has

For these companies, this new disclosure requirement may be the most significant aspect of the proposals.

Under the proposal, companies would not have to name the nonexecutive employees, but they would have to provide job descriptions for them. For many media companies, it will not be possible to describe the jobs of their highly paid employees without revealing their identities. If CBS describes an employee as "our new evening news anchor" and reveals her compensation, will there be any doubt to whom they are referring? This will be the case for many other

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proposed a new requirement—disclosure of the total compensation paid to up to three nonexecutive employees whose total compensation exceeds that of any of the named executive officers. Various press accounts of the SEC's proposals have referred to this provision as the "Katie Couric Clause" on the assumption that Ms. Couric's total compensation as the CBS Evening News anchor will exceed that of top CBS management, forcing CBS to disclose it each year in its proxy statement.

Ms. Couric will likely not be alone in this. Indeed, for many media companies, the most highly compensated individuals are often not senior management, but rather nonexecutive "talent," such as actors, directors, writers, sports figures, and on-screen personalities.

high-profile employees of publicly traded media companies.

Media companies are concerned that competitors seeking to lure away their top talent will now have ready access to proprietary compensation information. In addition, all media companies, public and private, may find that the disclosure of amounts paid to top talent at public companies will establish industry benchmarks that impact the negotiation of compensation for their employees in comparable positions.

Note that the SEC's definition of "total compensation" is a very broad one, and so the amounts disclosed may be quite high. Compensation includes not just traditional "W-2" items such as salary and any bonuses, but also the employer's incremental cost of

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### Special Notice

Gregory Hessianer, former national director of the Screen Actors Guild and prior executive director of the American Federation of Television and Radio Artists, has joined Morgan Lewis as of counsel in our Labor and Employment Law practice ([ghessianer@morganlewis.com](mailto:ghessianer@morganlewis.com)).

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providing any perquisites or "perks" (assuming the total exceeds \$10,000). Perks include the use of company aircraft, office space, and secretarial service for personal matters; club memberships; wardrobe, travel and entertainment expenses; personal assistants and trainers; and other similar benefits. The rules will not require a company to separately identify or quantify these various items. Rather, only the total amount of all compensation will need to be provided. However, in order to include the total amount in a public document, the

underlying information must be properly tracked, recorded, and reviewed. This could turn out to be a time-consuming process given the breadth of the covered items. In addition, public media companies should consider the possibility that, once the detailed information regarding the perks and other compensation items provided to a high-profile employee is assembled and reviewed, it will leak out to the public.

For the foregoing reasons, the "Katie Couric Clause" has received a considerable amount of attention and criticism. Current speculation is that it will not survive in the final rules. The answer will come from the SEC in the fall of this year when it is

expected that the amended rules will be finalized in order to be effective for the spring when most public companies distribute proxy statements and hold their annual meetings. ■

Details about this proposal and other relevant matters of interest to public companies can be found at the "Public Company Resource Center" on our firm's web site, [www.morganlewis.com](http://www.morganlewis.com).

**EDITOR'S CORNER** Updates From Past Issues

In our Winter 2005 issue, we reported on the investigations and litigations concerning the circulation reporting at various newspapers and magazines. In late May, the Securities and Exchange Commission (SEC) and the Tribune Company reported that they reached a settlement concerning the circulation figures reported by the Tribune Co.'s New York papers, Newsday and Hoy. The SEC found that from January 2002 through March 2004, the Tribune Co. reported inflated circulation figures for the two newspapers in regulatory filings, press releases and earnings conferences. The SEC also found that the Tribune Co. misstated circulation revenues and expenses, as well as accounts receivable and payable, because it lacked the proper internal controls. Nine former employees or contractors of the two papers have pled guilty in federal court in Brooklyn to criminal mail fraud charges related to the alleged scheme. Under the settlement, the Tribune Co. will not pay any fine (due in large part, according to the SEC's news release, to the company's cooperation in the investigation.) However, the Tribune Co. was ordered by the SEC to "cease and desist" from violating record-keeping and reporting requirements. In making the settlement, the company did not admit any wrong doing.

In our Spring 2006 edition, we reported on the pending legislation relating to the copyright status of so-called "orphan works" – i.e., works whose copyright owners cannot be located through the exercise of "reasonable diligence." On May 20, 2006, the Orphan Works Act of 2006 [HR 5439] was marked up by the House Subcommittee on the Courts, the Internet and Intellectual Property. It was approved by voice vote and sent to the full Judiciary Committee the following week. During mark-up in the

Subcommittee, the original text of the bill as sponsored by the Copyright Office underwent significant changes (12 in all), most of which are meant to redress comments of smaller entities and individuals who expressed concern about the bill. One of the more significant changes includes a provision allowing a court to award attorneys' fees and costs to a copyright owner if a user of a protected work fails to negotiate in good faith regarding the amount of reasonable compensation for that use. The bill also includes provisions spelling out the steps that users must take in order to search for copyright owners to be deemed "reasonably diligent," including a review of information maintained by the Copyright Office and use of expert assistance and reasonably available technology even if such resources may impose costs. These provisions make clear that it does not suffice to simply rely on a lack of identifying information on a work, and impose the searching duty not only on the infringer, but also on "a person acting on behalf of the infringer, or any person jointly and severally liable for the infringement of the work." (In-house attorneys, beware!) The bill would also require the Copyright Office to study the feasibility of alternative dispute resolution for small infringement claims, such as those involving photographs where the value of an individual use may be small. In addition, the revised bill has a two year "sunrise" provision, the purpose being to delay the effective date of the orphan works law so that copyright owners, especially visual artists, have time to take steps to ensure that their copyright interests are available for search (e.g., through registering the works with the Copyright Office, or developing collective databases) so that the works do not fall into the category of orphan works.

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