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New Executive Compensation Disclosure Rules

Summary

The Securities and Exchange Commission has adopted sweeping changes to the rules regarding disclosure of compensation paid to executive officers and directors of public companies.¹ The rule changes, proposed in January 2006, are the first comprehensive overhaul of the executive compensation disclosure rules since 1992. A record number of comment letters, over 20,000, were submitted on the proposal.

Among other things, the rules call for new tables showing a variety of compensation-related data, including director compensation. There will be significantly expanded disclosure of pension, severance, perquisites, and change in control benefits, as well as a new "Compensation Discussion and Analysis" section.

In response to recent scrutiny of option granting practices, the new rules require companies, among other things, to highlight any examples of option grants where the exercise price is lower than the market price of the underlying security on the date of grant. The SEC also provided interpretive guidance regarding disclosure of option granting practices, including the timing of option grants, the relationship between option grants and the release of material non-public information, and the determination of option exercise prices.

The rule changes are not limited to executive compensation disclosures. The SEC also rationalized requirements for disclosure of related person transactions, changed Form 8-K current reporting of executive compensation matters and consolidated disclosure regarding board independence and other corporate governance matters.

For the most part, the SEC adopted the rules as proposed. However, several proposals were modified in response to comments. Notably, the SEC decided to retain the compensation committee report, albeit in a slimmed-down form that is comparable to the audit committee report. Another significant change from the proposed rules was the decision to retain the stock performance graph, which many commenters supported as a helpful tool for investors. However, the stock performance graph will no longer be part of the executive compensation disclosures, but will appear in the annual report with other information about the market for the company's stock.

The SEC also decided not to adopt for the time being the proposed rule that would have required disclosure of the total compensation of up to three employees, other than named executive officers, whose compensation exceeds any of the named executive officers. This proposal was strenuously opposed by many commenters. The SEC is seeking comment on a series of questions with respect to a proposed

¹ See Executive Compensation and Related Person Disclosure, Rel. No. 33-8732 (Aug. 11, 2006) ("Executive Compensation Release"). All references to page numbers in the Executive Compensation Release refer to the page numbers on the pdf version of the release that is available on the SEC's website at <http://sec.gov/rules/final/33-8732.pdf>.

modified version of such rule, including whether the pool of potential employees covered by this requirement should be limited and whether the rule should apply only to large accelerated filers.

Public companies will need to adapt their processes and operations to the new rules. Because the rules call for a significant amount of additional disclosure, companies are well advised promptly to begin reviewing their information systems and disclosure controls and procedures so that they are positioned to collect, analyze and compile the data necessary to prepare the new disclosures. Much of the new disclosure will require careful coordination among people responsible for disclosure, legal, benefits, financial reporting and/or accounting matters. Further, because the new rules require quantification of a number of items not previously required to be quantified in the same manner, companies may wish to do “dry run” calculations of such amounts prior to the end of 2006, with a view to possibly making changes to underlying contractual arrangements.

Compliance Dates and Phase-In Period

A company with a fiscal year ending on December 31 will be required to comply with the new rules for its proxy statement in connection with the 2007 annual meeting. Companies are not required to “restate” disclosure for prior fiscal years under the new rules or to repeat disclosure that was previously required.² So, for example, in the first year of adoption, the Summary Compensation Table need only include disclosure for the most recent fiscal year. This same approach applies to related person transaction disclosures under Item 404(a) of Regulation S-K.³ The box below provides additional details about the compliance dates for the new rules.

Background—Executive Compensation Disclosure

When the rules regarding executive compensation disclosure last were amended comprehensively in 1992, the then-new emphasis on highly formatted tables, together with the introduction of a report by the compensation committee and a stock performance graph, was heralded as innovative and even radical.⁴ In recent years, however, a

Compliance Dates for New Rules

- Proxy or information statements filed on or after December 15, 2006 that are required to include executive compensation and related person disclosure for fiscal years ending on or after December 15, 2006.
- Forms 10-K and 10-KSB for fiscal years ending on or after December 15, 2006.
- Forms 8-K for triggering events that occur 60 days or more after publication of the new rules in the Federal Register.
- Registration statements under the Securities Act of 1933 and the Securities Exchange Act of 1934 that are filed on or after December 15, 2006 and that are required to include executive compensation and related person disclosure for fiscal years ending on or after December 15, 2006.

Note: Registered investment companies have slightly different compliance dates.

² Executive Compensation Release at 196-197.

³ Unless otherwise noted, all references to “Items” in this advisory refer to Items of Regulation S-K.

⁴ W. Alan Kailer, *Preparing the Executive Compensation Tables*, The Corporate Counsel (Dec. 1994), at 1.

number of factors have contributed to a growing groundswell of support for updating and expanding these rules. As the SEC observed in

the release proposing the new rules, compensation arrangements, especially for retirement and other post-employment benefits, have grown increasingly varied and complex in recent years, as companies and their executives have sought to craft arrangements that balance factors such as tax rules, disclosure requirements and market trends.⁵

Following the adoption of the Sarbanes-Oxley Act of 2002, shareholder advocates have made the case for corporate governance reform generally and more accountability with respect to executive compensation in particular. These arguments have been bolstered by highly publicized examples of large payouts and apparent misalignments between pay and performance, as well as an ever-widening gap between the average compensation of executives and that of salaried employees.⁶ Recently, these concerns have found expression in a number of venues. For example, institutional shareholders have submitted a growing number of shareholder proposals focused on oversight of executive compensation, including most recently proposals requiring an annual shareholder advisory vote regarding the report of the compensation committee.⁷ In November 2005, legislation was introduced in Congress aimed at requiring greater disclosure about executive compensation and annual shareholder approval of each public company's executive compensation plan.⁸

Against this backdrop, the SEC and its staff in recent years have signaled their desire to improve executive compensation disclosure. In a speech in October 2004, the Director of the SEC's Division of Corporation Finance made note of a number of the trends described above and reminded his audience of the need to disclose **all** compensation.⁹ The SEC also demonstrated renewed focus on disclosure of executive compensation in enforcement proceedings in 2004 and 2005.¹⁰ Responding to the growing pressure for action, in January 2006 the SEC proposed the new rules. In their final form, the new rules also reflect the SEC's multi-pronged response to irregularities in public companies' option granting practices that were widely reported in the months following the rule proposal.¹¹

⁵ See Executive Compensation and Related Party Disclosure, Rel. No. 33-8655 (Jan. 27, 2006) ("Proposing Release"), at 9. All references to page numbers in the Proposing Release refer to the page numbers on the pdf version of the release that is available on the SEC's website at <http://sec.gov/rules/proposed/33-8655.pdf>.

⁶ See Eric Dash, *Off to the Races Again, Leaving Many Behind*, N. Y. Times (Apr. 9, 2006), at Sect. 3, p. 1.

⁷ Among others, the Employees Pension Plan of the American Federation of State, County and Municipal Employees submitted such a proposal in 2006 to a number of companies. In a speech in May, 2006, SEC Commissioner Campos called such a proposal "intriguing." Roel C. Campos, Commissioner, U.S. Securities and Exchange Commission, *Remarks at Harvard University, Kennedy School of Government* (May 9, 2006) <http://www.sec.gov/news/speech/2006/spch050906rcc.htm>.

⁸ H.R. 4291, "The Protection Against Executive Compensation Abuse Act." The bill would also require separate shareholder approval of so-called "golden parachute" packages.

⁹ Alan L. Beller, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, *Remarks Before Conference of the NASPP, The Corporate Counsel and the Corporate Executive* (Oct. 20, 2004) ("Beller Speech") <http://www.sec.gov/news/speech/spch102004alb.htm>.

¹⁰ See *In the Matter of General Electric Company*, Rel. No. 34-50426 (Sept. 23, 2004); *In the Matter of Tyson Foods, Inc. and Donald Tyson*, Rel. No. 34-51625 (Apr. 28, 2005).

¹¹ See, e.g., *The Next Big Scandal? Stock Option Practices Under Scrutiny*, Covington & Burling LLP Client Advisory (May 26, 2006). Many companies have announced governmental investigations into their practices, and there is an expectation of an (continued...)

In retaining an emphasis on highly formatted tables to present compensation-related data in a useful layout, the new rules endorse the essential framework of the 1992 rules. However, the new rules expand the number of tables, modify in important respects the format of nearly every existing table, and add a requirement to include narrative disclosure to supplement the data presented in the tables. The rules also generally require that any disclosures required by the new rules must be written in “Plain English.”

New “Compensation Discussion and Analysis” Section

One of the most significant changes to the executive compensation disclosure regime is the addition of a new introductory section called Compensation Discussion and Analysis, or CD&A.¹²

Purpose and Content of CD&A

The new CD&A section is similar in spirit to the original concept of the compensation committee report. It advances the concept of such report in a number of respects, however, and is intended to provide a more comprehensive and meaningful discussion than the compensation committee report has elicited.

The CD&A is intended broadly to cover all elements of the company’s compensation program and must explain all material elements of the company’s compensation paid to the named executive officers.¹³ In particular, the CD&A section must describe the following:

- the objectives of the company’s compensation programs;
- what such programs are designed to reward;
- the elements of compensation;
- why the company chooses to pay each such element;
- how the company determines the amount (and, where applicable, the formula) for each element to pay; and
- how such elements and the company’s decisions regarding such elements fit into the company’s overall compensation objectives.¹⁴

To encourage flexibility in CD&A disclosures, the new rules do not specify what specific disclosures must be made. Instead, the CD&A requirement is principles based—it identifies the disclosure concept and provides a number of illustrative examples.¹⁵ (See the box below for examples of suggested

inevitable wave of enforcement and related actions. See, e.g., SEC v. Gregory L. Reyes, et. al., Civil Action No. C-06-4435 (N.D. Cal.), Lit. Rel. No. 19768 (Jul. 20, 2006) (“Brocade Action”); SEC v. Jacob (“Kobi”) Alexander, David Kreinberg and William F. Sorin, Civil Action No. CV-063844 (E.D.N.Y.), Lit. Rel. No. 19796 (Aug. 9, 2006) (“Comverse Action”).

¹² Item 402(b).

¹³ The new rules change the definition of “named executive officer,” as discussed in greater detail below.

¹⁴ Item 402(b)(1).

¹⁵ See Item 402(b)(2).

topics.) The SEC has made it clear that topics on the illustrative list need not be addressed if they are not material to the company and that the list is not exhaustive—each company must tailor its CD&A to its own individual circumstances and avoid boilerplate disclosure.¹⁶

In preparing their CD&As, companies should identify material differences in compensation policies and decisions for individual named executive officers where such identification is appropriate. Where the policy for a named executive officer is materially different from the policy for other named executive officers, such as may be the case for a principal executive officer, such officer's compensation should be discussed separately. Materially similar policies or decisions regarding named executive officers may be grouped together.¹⁷

As was the case under the prior rules with regard to the compensation committee report, qualitative and quantitative performance targets for performance-based executive compensation are not required to be disclosed in the CD&A if they involve confidential commercial or business information, the disclosure of which would have an adverse effect on the company.¹⁸ However, in a change from the proposed rules, if such factors or criteria are omitted in reliance on this exception, the company must disclose how difficult it will be for the executive, or how likely it will be for the company, to achieve the undisclosed target levels or other factors.¹⁹

"Filed" Status of CD&A

One of the significant changes flowing from the new CD&A section is that, unlike the compensation committee report, the CD&A will be "filed," not furnished.²⁰ Consequently disclosures in the CD&A will be subject to liability under the proxy rules and Section 18 of the Exchange Act. Further, to the extent that the CD&A is incorporated by reference into a company's annual report on Form 10-K along with other executive compensation information, it would be covered by the certifications that principal executives officers and principal financial officers are required to make in such reports. The CD&A must also be included in registration statements under the Securities Act, unlike the compensation committee report.

¹⁶ Executive Compensation Release at 30; Instruction 3 to Item 402(b).

¹⁷ Executive Compensation Release at 35.

¹⁸ See Instruction 4 to Item 402(b). A company is not required to seek confidential treatment under Securities Act Rule 406 or Exchange Act Rule 24b-2 in order to omit any factors or criteria involving confidential commercial or business information. In determining whether such information may be omitted, a company should use the same standard used to determine whether information to be filed with the SEC is eligible for confidential treatment. Notably, to the extent a performance target has otherwise been disclosed publicly, disclosure under Item 402 would be required. See Executive Compensation Release at 37-38.

¹⁹ Instruction 4 to Item 402(b).

²⁰ See generally David B.H. Martin and Graham Robinson, *To Be or Not to Be "Filed"* Insights (Sep. 2003), at 1.

Topics to Consider Addressing in CD&A

- Policies for allocating between types of compensation (long-term vs. currently paid-out compensation, cash vs. non-cash compensation).
- For long-term compensation, the basis for allocating compensation to each form of award.
- How the company determines when awards are granted, including equity-based awards such as options.
- What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions.
- How specific forms of compensation are structured and implemented to reflect the executive's individual performance and/or the above items of corporate performance (including whether discretion can be or has been exercised).
- Company policies and decisions regarding adjustment or recovery of awards or payments if relevant company performance measures are restated or adjusted so as to reduce the award.
- Factors considered in decisions to increase or decrease compensation materially.
- How amounts realizable from prior compensation (e.g., gains from prior stock or option awards) are considered in setting other elements of compensation.
- Basis for selecting particular events as triggering post-termination payments.
- Impact of accounting and tax treatments of a particular form of compensation.
- The company's equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership.
- Whether the company engaged in any benchmarking of total compensation or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies).
- Role of executive officers in the compensation process.

Practices Relating to Granting of Options

In recent months, practices of public companies relating to the granting of stock options have received great attention. There have been academic studies, media reports and government proceedings questioning the timing of option grants, as well as related disclosure, accounting, tax and governance issues.²¹ Partly in response to this development, the SEC has provided interpretive guidance regarding the

²¹ See Stephanie Saul, *Study Finds Backdating of Options Widespread*, N.Y. Times (Jul. 17, 2006); Erik Lie, *On the Timing of CEO Stock Option Awards*, Management Science Vol. 51 No. 5 (May 2005). See also Brocade Action; Converse Action. Also, the (continued...)

types of disclosures about option granting practices that would be required in the new CD&A section.²² The guidance covers two general topics: (i) the timing of stock option grants, including in relation to release of material non-public information, and (ii) the setting of option exercise prices.

With regard to the timing of stock option grants, the SEC suggests that companies consider addressing the following questions in the CD&A section:

- Does the company have any program, plan or practice to time option grants to its executives in coordination with the release of material non-public information?²³
- How does any program, plan or practice to time option grants to executives fit in the context of the company's program, plan or practice, if any, with regard to option grants to employees more generally?
- What role is played by the compensation committee in approving and administering such a program, plan or practice? How did the board or compensation committee take such information into account when determining whether and in what amount to make those grants? Did the compensation committee delegate any aspect of the actual administration of a program, plan or practice to any other persons?
- What was the role of executive officers in the company's program, plan or practice of option timing?
- Does the company set the grant date of its stock option grants to new executives in coordination with the release of material non-public information?

CD&A vs. MD&A

Although the CD&A is not a complete analogue to the disclosures a company must make in the MD&A, there are some parallels. Like the MD&A in relation to financial statements, the CD&A should provide an overview that puts into context the compensation disclosure provided elsewhere. Also like MD&A, a company's CD&A should be tailored to its specific practices and policies and should avoid boilerplate disclosure. For example, like the MD&A, the CD&A disclosures should change year to year in tandem with changes in a company's compensation decisions and policies. Unlike MD&A, however, the new CD&A does not require a period-to-period comparison of executive compensation awards or practices.

Public Company Accounting Oversight Board issued guidance to public company auditors regarding the implications of certain option granting practices for financial statements and internal control over financial reporting. See Public Company Accounting Oversight Board, Staff Audit Practice Alert No. 1, *Matters Relating to Timing and Accounting for Option Grants* (Jul. 28, 2006).

²² Executive Compensation Release at 23-27.

²³ The SEC noted that if a company had such a program, plan or practice in place in the last fiscal year, or intends to have one during the current fiscal year, such information is presumptively material and should be disclosed. Executive Compensation Release at 25.

- Does a company plan to time, or has it timed, its release of material nonpublic information for the purpose of affecting the value of executive compensation?²⁴

In addition to suggesting the above topics for consideration, the SEC noted that certain information regarding timing of option grants would be presumptively material to investors and therefore should be disclosed in the CD&A. For example, if a company has a program, plan or practice to time option grants in coordination with the release of material non-public information, it should disclose that the board of directors or compensation committee may grant options at times when the board or compensation committee is in possession of material non-public information. The SEC was careful to note that it expresses no view about whether a company may or may not have valid reasons for such timing of option grants—it merely has an interest in promoting full disclosure.²⁵

With regard to disclosures regarding setting of option exercise prices, the SEC observed that any program, plan or practice of awarding options and setting the exercise price based on the company's stock price on a date other than the actual grant date is presumptively material and should be disclosed in the CD&A. Similarly, the SEC stated that disclosures would be required if a company has a plan or practice of determining the exercise price of option grants by using formulas based on average prices (or lowest prices) of the company's stock in a period preceding, surrounding or following the grant date.²⁶

Changes to Compensation Committee Report

Although the SEC had proposed deleting the compensation committee report altogether, the final rules retain it, albeit in a slimmed-down form.²⁷ The revised version requires the compensation committee to state whether it has reviewed and discussed the CD&A with management and, based on such review and discussion, whether it has recommended to the board of directors that the CD&A be included in the company's proxy statement or annual report. Like the prior form of the report, the names of the members of the compensation committee must appear below the report. Also as under prior rules, the compensation committee report will be deemed furnished, not filed.²⁸

The SEC's decision to retain the compensation committee report responds to concerns expressed by commenters that the proposed rules would have diminished to an unacceptable level the role of the compensation committee in overseeing executive compensation disclosures. In its modified form, the new compensation committee report serves as a mechanism for ensuring that the compensation committee will remain involved in reviewing and overseeing executive compensation disclosures.

Changes to the Summary Compensation Table

With its basic structure intact, the Summary Compensation Table remains the core disclosure vehicle for executive compensation, but the new rules effect a number of important modifications. The new format of the Summary Compensation Table is shown in *Annex A*.

²⁴ Executive Compensation Release at 26.

²⁵ *Id.* at 24.

²⁶ *Id.* at 27.

²⁷ Item 407(e)(5).

²⁸ Instruction 1 to Item 407(e)(5).

Named Executive Officers

The new rules alter the composition of the group of executive officers that is the principal focus of executive compensation disclosure—that is, the “named executive officers”—and modify the method of determining which officers are included.

Changes to Definition of “Named Executive Officer”

- The principal financial officer must be included as a named executive officer regardless of whether the principal financial officer is one of the five most highly compensated executives.
- Status as a named executive officer is determined based on *total compensation* during the year, *excluding* changes in the actuarial present value of accumulated pension benefits and above-market earnings on deferred compensation during such year; under prior rules, just annual salary and bonus were counted.
- Unusually large, non-recurring cash compensation in the most recent fiscal year will now be included in the determination of which executive officers constitute named executive officers.

Under the new rules, the named executive officers are the principal executive officer, the principal financial officer and the three other most highly compensated executive officers whose total compensation (excluding certain items, as described below) exceeds \$100,000.²⁹ This is a change from prior rules, which defined the named executive officers to be the chief executive officer and the four other most highly compensated executive officers. In adding the principal financial officer, the SEC noted that compensation disclosure should cover the officer with principal responsibility for the fair presentation of the company’s financial statements, as well as ensuring that both of the officers responsible for certifying the company’s periodic reports are covered.³⁰ Of course, by including the principal financial officer, disclosure regarding another more highly-compensated executive might be excluded which would have been required under prior rules.

The new rules provide that all individuals who served as principal executive officer or principal financial officer during the last completed fiscal year are named executive officers, even if not still serving at the end of the last completed fiscal year. The new rules also require the inclusion of up to two additional individuals (other than the principal executive officer and principal financial officer) for whom disclosure would have been required but for the fact that they were no longer serving as executive officers at the end of the last completed fiscal year.³¹

More significantly, the new rules provide that status as one of the three other most highly compensated executives is determined based on the officer’s total compensation for the most recent fiscal year, excluding changes in the actuarial present value of accumulated pension benefits and above-market earnings on deferred compensation during such year.³² This approach represents a compromise from the approach initially proposed by the SEC, which would have used total compensation. Commenters

²⁹ Item 402(a)(3) and Instructions thereto.

³⁰ Executive Compensation Release at 117; Proposing Release at 80-81.

³¹ Item 402(a)(3)(iv).

³² Instruction 1 to Item 402(a)(3). Prior rules counted only annual salary and bonus.

observed that using total compensation to determine the named executive officer group could introduce variability in the composition of the group from year to year as total compensation fluctuated with the changing value of deferred compensation and post-retirement benefits.

The use of this modified total compensation standard may have unexpected consequences for the determination of the named executive officer group. Under the new rules, for example, the value of severance packages and other post-termination benefits paid to former executives will be counted in determining whether they are included as a named executive officer. This may produce the somewhat illogical result that a former executive remains, or even is first recognized as, a named executive officer for proxy statement purposes due to his or her post-employment compensation package.

The new rules also remove an exception in the prior rules that permitted a company to exclude an executive officer (other than the principal executive officer) due to an unusually large amount of cash compensation that is not part of a recurring arrangement and is unlikely to continue.³³ The SEC eliminated this exception because it concluded companies had interpreted it inconsistently and due to a concern that such exception was prone to manipulation.

New Column for Total Compensation

The Summary Compensation Table must include a new column to show total compensation (expressed in dollars), equal to the sum of the amounts shown in the other seven columns in the table.³⁴ Simple on the surface, this new requirement represents an important change from the prior format of the Summary Compensation Table, which included one column expressed in number of securities and all other columns expressed in dollar amounts. To accommodate the new total compensation column, as discussed in greater detail below, the new rules require that amounts expressed under the prior rules as a number of securities underlying awards be expressed instead as the fair value of such awards (in dollars). The SEC adopted this change because it concluded that investors and other users of the executive compensation disclosure needed a better tool for comparing aggregate compensation across years or companies.

Stock Awards and Option Awards

The Summary Compensation Table continues to include two columns relating to equity-based compensation during each fiscal year, although these columns have been renamed Stock Awards and Option Awards. As noted above, the new rules require all such awards to be shown based on their fair

Employees Covered under Section 162(m) of the Internal Revenue Code

A company may not deduct certain compensation in excess of \$1 million that it pays to “covered employees.” This requirement is found in section 162(m) of the Internal Revenue Code, which defines “covered employees” to include the chief executive officer and the four highest paid officers whose compensation must be reported to shareholders in proxy statements or annual reports filed pursuant to the Exchange Act. The SEC’s changes to the definition of “named executive officer” could alter the composition of the group of officers subject to the \$1 million deduction limit in section 162(m). We understand that Treasury and the IRS currently are considering whether to modify their regulations to respond to the SEC’s changes.

³³ However, the SEC retained the exception for cash compensation relating to overseas assignments attributed predominantly to such assignments. See Instruction 3 to Item 402(a)(3).

³⁴ Item 402(c)(2)(x) and Instruction 2 to Item 402(c).

value on the date of grant.³⁵ This value is to be calculated in accordance with FASB Statement of Financial Accounting Standards No. 123 (revised 2004), *Share-Based Payment*, or FAS 123(R).³⁶ The SEC took this approach to permit the calculation of a single total compensation figure expressed in dollars. While achieving such goal, this approach has some important disclosure implications.

First, the new disclosure requirements assess fair value as of the grant date and require that the full amount of such fair value be disclosed as compensation in the year of grant. This approach differs from the treatment of such awards in the company's income statement, where generally accepted accounting principles, or GAAP, generally provide that equity-based awards be booked as compensation expense over a longer period of time corresponding to an award's vesting or performance schedule. Thus, in the year of grant, the full value of the award will be shown in the Summary Compensation Table, whereas only a portion of such value will be recognized as compensation expense in the company's income statement.³⁷

New Emphasis on Grant Date Fair Value

While the awards described are substantially the same as under prior rules, the method of quantifying them is new. Whereas the prior rules required disclosure of the number of securities underlying options, the new rules require disclosure of the fair value of all equity-based awards, including options, on the date of grant, as determined in accordance with FAS 123(R) for financial reporting purposes.

Second, although the total compensation amount will allow greater comparability of executive compensation across reporting companies, the use of FAS 123(R) fair value estimates inevitably will produce apples-to-oranges comparisons as companies use different valuation models to value share-based payments. This potential confusion is ameliorated somewhat by the requirement to refer to the discussion of the relevant assumptions in the notes to the company's financial statements or MD&A. Nevertheless, it is unlikely that casual observers or media representatives will take the time to comprehend fully or appreciate significant distinctions among different valuation models.

Third, despite the assignment of a dollar amount to option awards based on the award's grant date fair value determined in accordance with FAS 123(R), it is unclear how close a relationship such dollar amount will bear to the value ultimately realized as compensation from such award by the executive. The value of such awards is likely to fluctuate over time and is likely to depend on a variety of factors outside the executive's control. The grant date fair value for accounting purposes may not represent the true compensation value of such award.

The Stock Awards column requires disclosure of any stock award that does not have option-like features, including restricted stock, restricted stock units, phantom stock, phantom stock units, common

³⁵ Item 402(c)(2)(v) and (vi).

³⁶ A new instruction also requires a footnote that discloses relevant assumptions used in determining such values by referencing the discussion of such assumptions in the company's financial statements, notes to the financial statements or Management's Discussion and Analysis of Financial Condition and Results of Operations, or MD&A. See Instruction 1 to Item 402(c)(2)(v) and (vi).

³⁷ The SEC responded to this concern in the adopting release by noting that its rules have long required disclosure in the Summary Compensation Table of the full amount of stock and option awards in the year granted. Executive Compensation Release at 57-58.

stock equivalent units or other similar instruments.³⁸ The grant date fair value of both incentive awards and awards that vest over time would be included in this column.

The Option Awards column requires disclosure of any award of options, stock appreciation rights, or SARs, and similar equity-based compensation instruments that have option-like features.³⁹ The amount to be shown is the grant date fair value of the award as determined under FAS 123(R) for financial reporting purposes. Both incentive awards and awards that vest over time are to be included.

In a change from the proposed rules, the final rules provide that earnings on equity-based awards, such as dividends on awards of restricted stock, need not be reported in the Stock Awards or Option Awards column to the extent that they are already factored into the determination of the grant date fair value.⁴⁰ In addition, if the company reprices or otherwise materially modifies any previously-awarded options or freestanding SARs, the new rules require the incremental value of such repricing or modification, computed in accordance with FAS 123(R), to be included in the applicable column.⁴¹ This represents a change from the proposed rules, which would have treated a repricing or material modification like a new award, with the full value of such award required to be disclosed.

Non-Equity Incentive Plan Compensation

The column for non-equity incentive plan compensation must include the dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-equity incentive plans.⁴² This column would include amounts earned under all incentive plan awards not included in the Stock Awards and Option Awards columns. An award is deemed to be earned in the fiscal year in which the executive satisfies the performance criteria. Amounts earned during a fiscal year are reportable in that year, even if not payable until a later date, and are not reportable again in the year paid.⁴³ Earnings on outstanding awards will also be required to be included in the Summary Compensation Table, whether paid out during the year or deferred.⁴⁴

This column reflects a significant change from the analogous column under the prior rules, which focused on long-term incentive plan awards. By removing the “long-term” qualifier, the new rules will likely result in some reported compensation moving from the bonus column to this column. Further, the requirement to include compensation under such plans in the year earned contrasts with the prior rules which only required disclosure of amounts actually paid out under such plans. The requirement to show

³⁸ See Item 402(a)(6)(i).

³⁹ *Id.*

⁴⁰ However, any such earnings that are not included in the grant date fair value must be included in the “All Other Compensation” column of the Summary Compensation Table in the year paid. See Item 402(c)(2)(ix)(G).

⁴¹ Instruction 2 to Item 402(c)(2)(v) and (vi).

⁴² Item 402(c)(2)(vii). Non-equity incentive plans are defined under the new rules as incentive plans under which awards are granted that do not fall within the scope of FAS 123(R). See Item 402(a)(6)(iii). The SEC has identified return on assets, return on equity and performance of a division as examples of performance measures to which awards to be disclosed in this column may be tied. See Proposing Release at 37.

⁴³ Instruction 1 to Item 402(c)(2)(vii).

⁴⁴ Item 402(c)(2)(vii) and Instruction 2 thereto.

non-equity incentive plan awards in the year earned also contrasts with the approach under the new rules to disclosing stock and option awards in the year granted.⁴⁵

Change in Actuarial Value of Pension Benefits and Deferred Compensation Earnings

To make transparent the mathematical calculations used to determine named executive officer status, the SEC has added a new column to show the sum of changes in the actuarial present value of accumulated pension benefits and above-market earnings on deferred compensation during the year.⁴⁶

Change in actuarial value of accumulated pension benefits. This new provision requires companies to determine the annual change in the actuarial present value of each named executive officer's accumulated benefits under defined benefit and pension plans.⁴⁷ This requirement applies to any plan that provides for payment of retirement benefits, including tax-qualified defined benefit plans and supplemental employee retirement plans, but not including defined contribution plans.⁴⁸

The amount required to be included in this column is the change in the actuarial present value of the officer's accumulated pension benefits from the pension plan measurement date used for financial statement reporting purposes for the prior completed fiscal year to the pension plan measurement date used for the covered fiscal year.⁴⁹ In determining the aggregate value of such benefits as of the applicable pension plan measurement date, the company is required to use the same assumptions used for financial reporting purposes under GAAP, except that retirement age is to assumed to be the normal retirement age as defined in the applicable plan.⁵⁰ If the change in the value of such benefits is a negative number, it must be disclosed by footnote but not included in the sum reported in the table.⁵¹

The SEC adopted this measurement methodology in response to concerns voiced by commenters that the measurement methodology initially proposed by the SEC would have created undue burdens on companies while also generating a great variety of data that would not easily be comparable. By linking the approach to the company's financial reporting process, the SEC intends the disclosure to include the increase in value of benefits due to an additional year of service, compensation increases, and plan

⁴⁵ New grants of awards under non-equity incentive plans will, however, be disclosed, in the year of grant, in the Plan-Based Awards Table. See Item 402(d)(2)(iii).

⁴⁶ Item 402(c)(2)(viii). Although the figure shown in the column will be the sum of these amounts, a footnote must quantify separately the amounts attributable to the change in the actuarial present value of accumulated pension benefits and above-market earnings on deferred compensation. Instruction 3 to Item 402(c)(2)(viii).

⁴⁷ Item 402(c)(2)(viii)(A).

⁴⁸ Instruction 1 to Item 402(c)(2)(viii).

⁴⁹ An instruction to this Item clarifies that the aggregate value of such pension benefits as of the measurement date for each year will be the same as the aggregate value of the pension benefits required to be disclosed in the revised pension table (discussed below). Instruction 1 to Item 402(c)(2)(viii).

⁵⁰ See Instruction 2 to Item 402(h)(2). More specifically, the company should use the same assumptions regarding interest rate, form of benefit, years of service, and level of compensation as it applies pursuant to Financial Accounting Standards Board Statement of Financial Accounting Standards No. 87, *Employers' Accounting for Pensions* ("FAS 87"). Executive Compensation Release at 69 (footnote 194).

⁵¹ Instruction 3 to Item 402(c)(2)(viii).

changes, as well as the increase (or decrease) in value attributable to interest.⁵²

Above-market earnings on non-tax qualified deferred compensation. Unchanged from the prior rules, this amount represents the above-market or preferential earnings on non-tax qualified deferred compensation. The SEC had proposed expanding this requirement to cover *all* earnings on deferred compensation. Many commenters argued, however, that such approach would have overstated compensation, since earnings on deferred compensation that are generated solely from investments made at prevailing market rates are more akin to interest earned on a savings account, as opposed to compensation paid by the company. Although the SEC had expressed concern when it proposed the new rules that the “preferential” and “above-market” standard allowed companies too much leeway to choose not to disclose such earnings, the SEC accepted the arguments put forth by commenters and retained the prior rule with no changes.⁵³ The SEC addressed its concerns on this issue, in part, by deciding to require a new, separate table on nonqualified deferred compensation (discussed below) which must include a column showing *all* earnings on deferred compensation during the most recent fiscal year (whether above-market or not).⁵⁴ This met the SEC’s goal of disclosing the “all earnings” figure to investors, but not treating the full amount of such earnings as compensation.

All Other Compensation

As reformatted by the new rules, the Summary Compensation Table will include a single column to capture compensation not covered by other columns in the table.⁵⁵ This new column is intended to simplify the table by replacing two columns in the prior format of the table (“Other Annual Compensation” and “All Other Compensation”) which had caused some confusion about where or whether to disclose certain items. Any individual item of compensation exceeding \$10,000 must be separately identified and quantified in a footnote (except that the threshold for separately quantifying the value of perquisites is different, as described below).

For a list of items to be included under “All Other Compensation,” see the box below.

⁵² Executive Compensation Release at 67-69.

⁵³ See Executive Compensation Release at 65-66. Like the prior rules, the new rules provide that interest on deferred compensation is above-market only if the interest rate exceeds 120% of the applicable federal long-term rate, and dividends are preferential only if earned at a rate higher than dividends on the company’s common stock. Instruction 2 to Item 402(c)(2)(viii). Companies may, if they wish, include footnote or narrative disclosure explaining their criteria for determining any portion of such earnings to be above-market. *Id.*

⁵⁴ Item 402(i).

⁵⁵ Item 402(c)(2)(ix).

“All Other Compensation” Should Include:

- Perquisites and other personal benefits, except if they total less than \$10,000 in a fiscal year.
- Tax gross-ups and similar reimbursements related to tax payments.
- Compensation cost (computed in accordance with FAS 123(R)) of any discount on company stock purchased by the named executive officer from the company (unless available to all shareholders or all salaried employees).
- Amounts paid or accrued pursuant to plan or arrangements in connection with termination of employment or change of control.
- Company contributions to vested and unvested defined contribution plans (such as 401(k) plans).
- Company-paid life insurance premiums.
- Dividends or other earnings paid on stock or option awards to the extent not factored into the grant date fair value of such awards.

Perquisites and Other Personal Benefits

The new rules tighten the disclosure requirements with respect to perquisites and other personal benefits.

New Disclosure Standards. The tightening of the disclosure rules with respect to perquisites was foreshadowed by a number of SEC and staff actions in the years leading up to the proposal to revise the executive compensation rules. In September 2004, the SEC entered a cease-and-desist order against General Electric, finding, among other things, that GE failed to disclose fully and accurately the various benefits to be provided to its CEO under post-employment and consulting arrangements.⁵⁶ Shortly thereafter, in a highly publicized speech addressing executive compensation disclosure issues, the Director of the Division of Corporation Finance voiced his concern that companies were being overly creative in characterizing perquisites as business expenses.⁵⁷ And, in April 2005, the SEC settled an enforcement action it brought against Tyson Foods, Inc. and its former chairman and CEO, Don Tyson, for misleading disclosures of perquisites provided to Don Tyson before and after his retirement.⁵⁸ These actions were, in some measure, a response to concerns that had been expressed for some time by institutional shareholder activists.

⁵⁶ See *In the Matter of General Electric Company*, Rel. No. 34-50426 (Sept. 23, 2004).

⁵⁷ Beller Speech.

⁵⁸ See *In the Matter of Tyson Foods, Inc. and Donald Tyson*, Rel. No. 34-51625 (Apr. 28, 2005).

Consistent with this trend, the new rules tighten the disclosure requirements for perquisites in a number of respects. Most importantly, the threshold for including perquisites and other personal benefits in the Summary Compensation Table has been lowered significantly—all perquisites must be included once the aggregate annual value exceeds \$10,000 (compared with a threshold of the lesser of \$50,000 or 10% of annual salary plus bonus under prior rules).⁵⁹ The SEC noted that the prior rules permit too much information that may be considered material by investors to be omitted.⁶⁰

If the \$10,000 threshold is exceeded, each perquisite and personal benefit must be identified by specific type in a footnote.⁶¹ Consistent with its recent enforcement actions in this area, the SEC confirmed that perquisites must be described in sufficient detail so as to identify the particular nature of the benefit received. So, for example, it is generally not sufficient to describe a perquisite as “travel and entertainment” when the specific perquisites provided consisted of clothing, jewelry, artwork, theater tickets and housekeeping services.⁶²

Finally, the new rules require each perquisite to be both identified and individually quantified if the amount of such perquisite exceeds the greater of \$25,000 or 10% of the aggregate amount of all perquisites for any named executive officer (compared with a requirement under the prior rules to quantify individually perquisites that exceed 25% of the total value of all perquisites for a named executive officer).⁶³

The practical effect of these tightened disclosure requirements undoubtedly will be a significant expansion of the disclosure of perquisites and other personal benefits provided to named executive officers. Given the level of detail required by the new rules, registrants with voluminous data to disclose may wish to consider using a separate table to present the required information. In addition, information systems, as well as disclosure controls and procedures generally, will need to be reviewed and possibly modified to ensure that all necessary data is captured to facilitate preparation of required disclosures. In some cases, this may require named executive officers and/or their assistants to adapt to new record-keeping and information-gathering procedures.

What is a Perquisite? Despite calls from some quarters to provide a definition of the term perquisite, the SEC reiterated its longstanding position that it would not be appropriate to do so. The SEC’s rationale for not providing a definition of the term is that different forms of perquisites and personal benefits continue to develop, and, therefore, any definition would be susceptible to becoming outdated. The SEC also expressed a concern that a bright line definition might provide registrants with an incentive to craft benefits in a manner that would circumvent the bright line standard.⁶⁴

⁵⁹ Instruction 4 to Item 402(c)(2)(ix).

⁶⁰ Executive Compensation Release at 72.

⁶¹ Instruction 4 to Item 402(c)(2)(ix).

⁶² Executive Compensation Release at 72; Proposing Release at 45.

⁶³ Instruction 4 to Item 402(c)(2)(ix). The requirement to identify and quantify individual perquisites only applies to compensation for the most recent fiscal year. *Id.*

⁶⁴ Executive Compensation Release at 73; Proposing Release at 45.

Notwithstanding its decision not to adopt a definition of perquisite, the SEC, in proposing and adopting the new disclosure rules, offered its first interpretive guidance on this term since 1983 (when it rescinded all prior interpretive releases on the subject).⁶⁵ According to the SEC, an item *is* a perquisite if it “confers a direct or indirect benefit that has a personal aspect,” regardless of whether it may be provided for some business reason or for the convenience of the company, unless it is “generally available on a non-discriminatory basis to all employees.” An item *is not* a perquisite or personal benefit if it is “integrally and directly related to the performance of an executive’s duties.”⁶⁶

In addition to these general statements of principle, the SEC’s guidance includes a number of other statements of principle that should be kept in mind in making determinations regarding whether certain items are perquisites.

First, the concept of a benefit that is “integrally and directly related” to job performance is a narrow one—in effect, the item must be provided by the company because the executive needs it to do his or her job.⁶⁷

Second, a company may determine that an expense is an “ordinary” or “necessary” business expense for tax or other purposes or that an expense is for the benefit or convenience of the company. Such a determination will not predetermine, however, whether or not the expense provides a perquisite or other personal benefit for purposes of the SEC’s disclosure rules.⁶⁸

Third, the mere fact that an expense has a business purpose will not rule out characterization of that item as a perquisite, if it is not integrally and directly related to job performance. So, for example, the provision of personal security services (whether at an executive’s residence or while traveling), even if for a legitimate business purpose, does not change the characterization of such services as a perquisite.⁶⁹

These general principles seem on their face to be both logical and sensible. In most cases, it is likely that the characterization of an item as either a perquisite or a business expense will be readily apparent. The SEC’s guidance clearly allows registrants a good deal of leeway, however, to exercise judgment in characterizing specific items. Whether a particular item is actually integrally and directly related to the performance of an executive’s duties is likely to be a slippery concept in close cases.

⁶⁵ Executive Compensation Release at 73-77; Proposing Release at 45-49.

⁶⁶ Executive Compensation Release at 74; Proposing Release at 46.

⁶⁷ Executive Compensation Release at 75.

⁶⁸ Executive Compensation Release at 75; Proposing Release at 46-47.

⁶⁹ Executive Compensation Release at 76; Proposing Release at 46-47.

To help flesh out its general statements of principle, the SEC gave some helpful examples of items that would, and would not, normally be expected to be characterized as perquisites. These examples are listed in the box below.

Below are examples of items that the SEC believes normally would and would not be characterized as perquisites:

Perquisites

- Personal travel using vehicles owned or leased by the company or otherwise financed by the company
- Personal use of other property owned or leased by the company
- Personal tax or financial advice
- Club memberships not used exclusively for business entertainment purposes
- Housing and other living expenses (including, but not limited to, relocation assistance and payments for the executive to stay at his or her personal residence)
- Security provided at a personal residence or during personal travel
- Reimbursement of commuting expenses (whether or not for the company's convenience or benefit)
- Discounts on company products and services not generally available to all employees on a non-discriminatory basis
- Clerical or secretarial services devoted to personal matters

Not Perquisites

- Travel to and from business meetings and other business travel
- Business entertainment
- Security services provided during business travel
- Itemized expense accounts the use of which is limited to business purposes
- Club memberships used exclusively for business entertainment purposes
- Office space at a company business location
- A reserved parking space that is closer to business facilities but is not otherwise preferential
- Clerical or secretarial services devoted to company matters

Determining Cost of Perquisites. As under prior rules, the value of a perquisite is to be determined based on its "aggregate incremental cost" to the company.⁷⁰ The SEC rejected some alternatives to this standard that had been suggested, including using a standard that would have been tied to the retail value

⁷⁰ Instruction 4 to Item 402(c)(2)(ix).

of the benefit (or its equivalent). In proposing and adopting the new rules, the SEC declined to provide any meaningful guidance or further definition on how aggregate incremental cost should be determined. The SEC did confirm a position previously articulated by its staff, however, that ordinarily it is not permissible to use the amount attributed to a particular benefit for federal income tax purposes as the incremental cost for purposes of the SEC's disclosure rules.⁷¹ Merely as one example of this principle, the SEC noted that the cost of aircraft travel attributed to an executive for federal income tax purposes using the Standard Industry Fare Level rules is not generally the incremental cost of such benefit for purposes of the SEC's rules.⁷²

In a significant change from prior rules, companies are now also required to disclose in a footnote the methodology used to determine aggregate incremental cost.⁷³ This reflects a trend by some companies that have voluntarily provided such disclosure already.

Relocation Benefits

The new rules delete an exception under prior rules for information regarding non-discriminatory relocation plans. Accordingly, the value of any benefits paid under such plans would need to be reported to the extent it constitutes compensation.

Grants of Plan-Based Awards Table

To supplement the Summary Compensation Table, the new rules replace the existing table for option and SAR grants in the last fiscal year with a redesigned table aimed at providing additional detail about a broader range of plan-based awards that were part of compensation in the last fiscal year.⁷⁴ The new plan-based awards table is shown in *Annex B*.

The disclosures in this table are meant to supplement the single data point (*i.e.* dollar value) regarding stock, option and non-stock awards in the Summary Compensation Table, by showing additional details about such awards. The table will cover all plan-based awards granted during the most recent fiscal year, including incentive plan awards (equity-based and non-equity-based) and other plan-based awards.

As part of the SEC's focused response to option granting practices, this new table must highlight any option grants having an exercise price below the market price on the date of grant, by showing the two prices in separate, side-by-side columns and explaining in a footnote or narrative disclosure the methodology used to determine the exercise price.⁷⁵ The table must also show the date the board or compensation committee took action with respect to an option grant, if such date differs from the official grant date of the option.⁷⁶

⁷¹ The amount attributed to the benefit for federal income tax purposes may be the incremental cost, however, if such amount constitutes the incremental cost of the benefit, independent of the tax characterization. Executive Compensation Release at 78 (footnote 213); Proposing Release at 49.

⁷² *Id.*

⁷³ Instruction 4 to Item 402(c)(2)(ix).

⁷⁴ Item 402(d).

⁷⁵ Item 402(d)(2)(vii) and Instruction 3 to Item 402(d).

⁷⁶ Item 402(d)(2)(ii).

The table must include all incentive plan awards that were made during the most recent fiscal year, whether equity-based or non-equity-based. Equity incentive plan awards are awards that are subject to a performance condition or a market condition, as those terms are defined in FAS 123(R).⁷⁷ Non-equity incentive plan awards are awards not subject to FAS 123(R) and which are intended to serve as an incentive for performance to occur over a specified period.⁷⁸ For all incentive plan awards (equity-based and non-equity-based), the rules require tabular disclosure of estimated future payouts, including separate columns for threshold (*i.e.*, minimum), target, and maximum payments. If the target payment amount is not determinable, companies must show a representative amount based on the previous fiscal year's performance.⁷⁹ For any non-equity incentive plan awards denominated in units or rights, the rules require a separate column showing the number of units or other rights.⁸⁰

This table also makes a number of changes from the prior table for option and SAR grants in the last fiscal year. The new rules eliminate the requirement under the prior rules to show the potential realizable value of option grants under 5% or 10% increases in market value or the present value of each grant. In addition, the new rules eliminate the prior requirement to show the percentage that a named executive officer's option grants represent of all option grants made during the year.

Narrative Disclosures to Accompany Summary Compensation and Plan-Based Awards Tables

New Narrative Disclosures

The new rules require a narrative description of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table and the Grant of Plan-Based Awards Table.⁸¹ This essentially adds a layer of contextual and supplementary disclosure to the tabular data and is intended to help reveal how well a company aligns its executive compensation with the performance of its executives and the company as a whole. Many of the disclosures required under this Item should amplify for investors how compensation for the relevant fiscal year matched up with the performance of the company and the executives, and how closely the company followed its own established compensation policies.

This narrative disclosure is not intended to merely repeat the Compensation Discussion and Analysis required under new Item 402(b). Rather, it is aimed at including additional information to enable investors to better understand how the data disclosed in the tables was determined.⁸² Whereas the CD&A

⁷⁷ See Executive Compensation Release at 61. FAS 123(R) defines a performance condition as "a condition affecting the vesting, exercisability, exercise price or other pertinent factors used in determining the fair value of an award that relates to both (a) an employee's rendering service for a specified (either explicitly or implicitly) period of time and (b) achieving a specified performance target that is defined solely by reference to the employer's own operations (or activities)..." FAS 123(R) defines a market condition as "a condition affecting the exercise price, exercisability, or other pertinent factors used in determining the fair value of an award under a share-based payment arrangement that relates to the achievement of (a) a specified price of the issuer's shares or a specified amount of intrinsic value indexed solely to the issuer's shares or (b) a specified price of the issuer's shares in terms of a similar (or index of similar) equity security (securities)." See Appendix E of FAS 123(R).

⁷⁸ See Item 402(a)(6)(iii).

⁷⁹ Instruction 2 to Item 402(d).

⁸⁰ Instruction 6 to Item 402(d).

⁸¹ Item 402(e)(1).

⁸² See Proposing Release at 60.

focuses on the principles underlying a company's executive compensation policies generally, this narrative disclosure focuses on material factors that affected the actual compensation awarded to the named executive officers in the relevant fiscal year.⁸³

The new rules offer a number of examples of factors that may be necessary to an understanding of the information disclosed in the two tables. One such factor is the material terms of each named executive officer's employment agreement (whether written or unwritten).⁸⁴ The SEC noted that merely filing an employment agreement with the proxy statement may not satisfy the new disclosure requirement if doing so would not adequately describe the material aspects of the arrangement as they relate to the disclosures contained in the tables.⁸⁵ To provide further context to the total compensation disclosures, the new rules suggest that companies provide an explanation of the level of salaries and bonuses of the named executive officers in proportion to their total compensation.⁸⁶ Other examples of material factors set forth in the new rule include descriptions of any material modifications to outstanding options, SARs or other equity-based awards, including extension of exercise periods, changing of vesting of forfeiture conditions and repricings.⁸⁷

This new narrative discussion is also intended to enhance the data disclosed in the plan-based awards table with respect to incentive plan awards. Unlike traditional awards with time-based vesting, incentive plan awards often have vesting criteria that are complex. The new rules therefore suggest that companies disclose the formula or criteria used to determine the amounts and vesting schedule of such grants, as well as any other material terms. Further, the new rules suggest that companies disclose the performance and market conditions applicable to the awards shown in the table.⁸⁸ Importantly, however, the SEC retained the existing exclusion for confidential commercial or business information the disclosure of which would adversely affect the company's competitive position.⁸⁹

Tabular Disclosure About Outstanding Equity Awards

Whereas the two tables discussed above focus on compensation paid and awards granted in prior periods, the two tables discussed in this section are intended to provide a detailed snapshot of the current status and value of outstanding equity awards, as well as value realized from outstanding equity awards during the most recent fiscal year. Although much of this information was required under the prior rules, certain portions of it were disclosed in footnotes to the Summary Compensation Table. The new tables

⁸³ Executive Compensation Release at 87-88.

⁸⁴ Item 402(e)(1)(i). This "suggested" disclosure Item replaces prior Item 402(h)(1), which mandated such disclosure.

⁸⁵ See Executive Compensation Release at 88.

⁸⁶ Item 402(e)(1)(iv).

⁸⁷ Item 402(e)(1)(ii). No narrative disclosure is required for repricings pursuant to a pre-existing formula or mechanism, such as an anti-dilution provision, or repricings that occur as a result of a recapitalization equally affecting all holders of the class of securities underlying the awards. See Instruction 1 to Item 402(e)(1).

⁸⁸ Item 402(e)(1)(iii).

⁸⁹ Instruction 2 to Item 402(e)(1). This standard is the same one that would apply when companies request confidential treatment of confidential trade secrets and commercial or financial information that otherwise is required to be disclosed in registration statements or reports filed with the SEC. *Id.*

give greater prominence to such information by moving it to its own table, as well as requiring additional detail not required under prior rules.

Outstanding Equity Awards at Fiscal Year-End

This new table provides an overview, as of the end of the most recent fiscal year, of all outstanding equity awards not yet exercised or vested.⁹⁰ The table is intended to provide a clear picture of the value of outstanding equity awards yet to be realized by the named executive officers.

For options, SARs and other option-like instruments, the table must show, for each individual award, the number of shares underlying such instruments that are outstanding but unexercised, the exercise price, and the option expiration date.⁹¹ As initially proposed, the table would have shown only in-the-money options and would have disclosed the year-end value of such options. However, in response to comments, the SEC decided to expand the table's coverage to include all outstanding options, regardless of whether they are in the money or not. In making this change, the SEC removed the column that would have shown the year-end value of in-the-money options. Investors can now form their own judgment about the potential realizable value of all outstanding option awards, and, if they wish, can calculate for themselves the value of in-the-money options using current stock prices.⁹²

For restricted stock, restricted stock units and similar instruments that do not have option-like features, the table must show the number and market value (at fiscal year-end) of such shares or units that are not yet vested. For stock awards under equity incentive plans, the table must show the total number of shares, units or other rights awarded that have not yet vested or been earned, and the aggregate market or payout value of such shares, units or rights.⁹³

Certain additional details about the awards disclosed in the table must be disclosed in footnotes accompanying the table. The outstanding equity awards table is shown in *Annex C*.

Option Exercises and Vesting of Stock Awards

This table expands upon the disclosures required in the prior table on option and SAR exercises by also covering vesting of restricted stock and similar awards in the most recent fiscal year.⁹⁴ The table requires disclosure of the number of shares acquired during the most recent fiscal year upon the exercise of options and upon the vesting of restricted stock, as well as the value realized upon exercise of options and vesting of restricted stock. For options, the value realized is computed by multiplying the number of shares acquired upon exercise by the difference between the market value of the shares on the date of

⁹⁰ Item 402(f).

⁹¹ Multiple awards may be aggregated where the expiration date and exercise price of the awards are identical. Instruction 4 to Item 402(f)(2).

⁹² Executive Compensation Release at 100-101.

⁹³ The number of shares or units subject to outstanding equity incentive plan awards, and the payout value for such awards that are stock awards, shall be based on achieving the threshold (*i.e.* minimum) performance goals for such awards, except where the previous fiscal year's performance has exceeded the threshold, in which case the disclosure shall be based on the next higher performance measure (*i.e.* target or maximum) that exceeds the previous fiscal year's performance. See Instruction 3 to Item 402(f)(2).

⁹⁴ Item 402(g).

exercise and the exercise or base price. For restricted stock, such value is determined by multiplying the number of vested shares by the market value of the shares on the vesting date.⁹⁵

The SEC departed from its proposals with respect to this table in one respect. The SEC had proposed that, in addition to showing the value realized upon exercise of options and vesting of restricted stock, the grant date fair value of such awards (as previously reported in the Summary Compensation Table in the year of grant) would also be shown. Commenters voiced concern about the utility of this information and the potential for confusion caused by possible “double counting.”⁹⁶ In response to these concerns, the SEC deleted the column that would have required grant date fair value from the final version of the table.

The table on option exercises and vesting of stock awards is shown in *Annex D*.

Post-Employment and Retirement Payments

The new rules regarding disclosure of post-employment and retirement compensation represent a significant change from the prior disclosure regime and are in line with the SEC’s emphasis on disclosure of total compensation paid to executive officers and directors. According to SEC Chairman Christopher Cox, these new rules are designed to eliminate the “Aha! moments” when shareholders learn the details of the “golden goodbye.”⁹⁷ In brief, the new rules

- substantially revise the pension plan table and eliminate the prior alternative plan disclosure and certain related narrative descriptions;
- add a new table covering nonqualified defined contribution and other deferred compensation plans;
- require supplemental narrative disclosure of the material features of such plans; and
- require enhanced narrative disclosure of compensation arrangements triggered upon termination and on changes in control.

Pension Table

The pension table has been substantially revised, and now requires companies to disclose the actuarial present value of each named executive officer’s accumulated benefit under each defined benefit plan in which the named executive officer participates.⁹⁸ The table must also show the number of years of credited service under each such plan. Each of these calculations is to be made using the named executive officer’s current compensation and the same pension plan measurement date used by the

⁹⁵ Instruction to Item 402(g)(2).

⁹⁶ Executive Compensation Release at 104.

⁹⁷ Christopher Cox, Chairman, U.S. Securities and Exchange Commission, *Remarks Before the Council of Institutional Investors* (Mar. 30, 2006) <http://www.sec.gov/news/speech/spch033006cc.htm>.

⁹⁸ Item 402(h).

company for financial statement reporting purposes with respect to the company's audited financial statements for the company's last completed fiscal year.⁹⁹

In calculating the figures for the pension table, the company must use the same assumptions that it uses to derive the amounts disclosed in its GAAP financial statements, but must assume that the applicable retirement age is the normal retirement age (as defined in the particular plan) or if not defined, the earliest date at which a plan participant may retire without any benefit reduction due to age.¹⁰⁰ The valuation methodology and all material assumptions used in the calculation of the present value of the accrued benefit must be described in narrative disclosures accompanying the pension table.¹⁰¹ If the named executive officer's credited years of service under a plan differs from that named executive officer's actual number of years of service with the company, footnote disclosure must be made quantifying the difference and any resulting benefit increase.¹⁰²

The pension table also must show the pension benefits paid to each named executive officer during the company's last fiscal year.¹⁰³ This represents a change from the proposed rules, which would have required this disclosure in the Summary Compensation Table. The SEC noted that including pension benefits in the last fiscal year in the pension table, rather than in the Summary Compensation Table, will result in pension benefits being disclosed only once in the Summary Compensation Table (*i.e.*, in the column reflecting changes in the value of the named executive officer's accrued pension benefit).¹⁰⁴

The approach for the pension plan table adopted by the SEC is a change from the proposed rules, which would have required companies to make estimates of the annual retirement benefit payable at normal retirement age and early retirement age. Commenters voiced concern about the challenges involved in making such estimates, as well as the potential lack of comparability and possibility of manipulation under the proposed approach. Heeding these concerns, the SEC determined that the disclosures in this table should be based on the same methodology that a company uses for financial reporting purposes.

The tabular disclosures must be supplemented by narrative disclosure of any material features necessary to an understanding of each plan disclosed in the pension table. The new rules provide a non-exclusive list of examples of such material factors:

- the material terms and conditions of payments and benefits available under the plan, including the plan's normal retirement benefit formula and eligibility standards, and the effect of the form of benefit elected on the annual benefit amount;

⁹⁹ Item 402(h)(2)(iii) and (iv).

¹⁰⁰ Instruction 2 to Item 402(h)(2).

¹⁰¹ Instruction 2 to Item 402(h)(2). Alternatively, the company may refer to a discussion of these assumptions in its financial statements, notes to financial statements, or MD&A. *Id.*

¹⁰² Instruction 4 to Item 402(h)(2).

¹⁰³ Item 402(h)(2)(v).

¹⁰⁴ See Executive Compensation Release at 109. Benefits paid pursuant to pension plans may, however, be required to be disclosed in the Summary Compensation Table (under "All Other Compensation") if such payments are accelerated pursuant to a change in control. See Instruction 2 to Item 402(c)(2)(ix).

- identification of any named executive officer currently eligible for early retirement under any plan and description of the plan's early retirement benefit formula and eligibility standards;
- the specific elements of compensation, such as salary and bonus, included in applying the payment and benefit formula, identifying each such element;
- regarding participation in multiple plans, the purposes for each plan; and
- the company's policies with regard to such matters as granting extra years of credited service.¹⁰⁵

The revised format of the pension table is shown in *Annex E*.

Table on Nonqualified Deferred Compensation

A new table for nonqualified defined contribution and other deferred compensation plans requires disclosure of contributions by the named executive officers and the company, all earnings on deferred compensation, and the aggregate balances at fiscal year end under such plans.¹⁰⁶ This tabular disclosure expands significantly companies' disclosure obligations with respect to potential post-employment compensation. As noted above, the prior disclosure regime, as well as the newly adopted changes to the Summary Compensation Table, only elicit disclosure of compensation when earned and only above-market earnings on nonqualified deferred compensation. The new deferred compensation table, by contrast, requires disclosure of the full value and growth of such earnings.

The new table requires, with respect to each nonqualified deferred compensation plan in which a named executive officer participates, disclosure of

- the named executive officer's contributions to his or her plan account in the last fiscal year;
- the company's contributions to the named executive officer's plan account in the last fiscal year;
- the aggregate earnings on the named executive officer's plan assets in the last fiscal year;
- the aggregate withdrawals and/or distributions taken from the named executive officer's plan account; and
- the aggregate balance of the named executive officer's plan account at the end of the last fiscal year.

¹⁰⁵ Item 402(h)(3).

¹⁰⁶ Item 402(i).

Under the rules as initially proposed by the SEC, both this table and the Summary Compensation Table would have reported *all* earnings on deferred compensation. This double reporting was avoided in the final rules, since, as described above, the Summary Compensation Table is only required to show above-market or preferential earnings on deferred compensation.

The deferred compensation table must include footnote quantification of (i) any amounts reported in the contributions and earnings columns that are reported as compensation in the year in question and (ii) other amounts reported in the aggregate balance column of this table that were reported in the company's Summary Compensation Table for prior years.¹⁰⁷ The SEC takes the position that these footnotes will prevent double counting of deferred amounts by clarifying the extent to which amounts reported as deferred compensation represent compensation previously reported, rather than additional current compensation.¹⁰⁸

No "Double Reporting" of Amounts in Deferred Compensation and Summary Compensation Tables

By requiring disclosure of all earnings on deferred compensation in the deferred compensation table but only of above-market or preferential earnings on such compensation in the Summary Compensation Table, the SEC accomplished two goals. First, the new rules make transparent the total amount earned on deferred compensation, a figure previously not readily available to investors. Second, the "total compensation" figure in the Summary Compensation Table is a more accurate representation of the named executive officer's compensation. Commenters roundly criticized the SEC's initial proposal to include all earnings on nonqualified deferred compensation in both tables as unnecessary "double reporting." The new rules fix this perceived problem.

Similar to the requirements for the pension table, the deferred compensation table must be supplemented by narrative disclosure of any material factors necessary to understand each plan disclosed in the table. The new rules provide a non-exclusive list of examples of such material factors:

- the type(s) of compensation permitted to be deferred, and any limitations (by percentage of compensation or otherwise) on the extent to which deferral is permitted;
- the measures of calculating interest or other plan earnings (including whether such measure(s) are selected by the named executive officer or the company and the frequency and manner in which such selections may be changed), quantifying interest rates and other earnings measures applicable during the company's last fiscal year; and
- material terms with respect to payouts, withdrawals and other distributions.¹⁰⁹

The new table on non-qualified deferred compensation is shown in *Annex F*.

¹⁰⁷ See Instruction to Item 402(i)(2).

¹⁰⁸ See Executive Compensation Release at 112.

¹⁰⁹ Item 402(i)(3).

Disclosure Regarding Termination and Change in Control Provisions

The new rules expand disclosure obligations related to termination or change in control arrangements. Significantly, the new rules eliminate the \$100,000 threshold applicable to disclosures under prior rules.¹¹⁰ The new rules require companies to disclose the specific aspects of written or unwritten arrangements that provide for payments to named executive officers following or in connection with resignation, severance, retirement, termination, or change in responsibilities of the named executive officer or a change in control of the company. The new rules go beyond the prior rules by setting forth a number of specific disclosures that companies must provide with respect to each termination or change in control arrangement, including

- the specific circumstances that would trigger payment(s) or the provision of other benefits under the arrangement (including perquisites and health care benefits);
- the estimated payments and benefits that would be provided in each covered circumstance, and whether they would or could be paid in a lump-sum or annually, disclosing the duration and by whom they would be provided;¹¹¹
- the specific factors used to determine the appropriate payment and benefit levels under the various circumstances that would trigger payments or provision of benefits;
- any material conditions or obligations applicable to the receipt of payments or benefits, including, but not limited to, non-compete, non-solicitation, nondisparagement or confidentiality covenants; and
- any other material factors regarding each such contract, plan or arrangement.¹¹²

The new rules require quantitative disclosure even where uncertainties exist as to the amount that would actually be payable under given circumstances. Variables that could affect the calculation but which would not be known prior to an actual change in control or termination event might include such things as the company's stock price, the consideration to be paid in a change in control transaction, applicable tax rates, and years of credited service of the executive. If such uncertainties exist, companies are required to make reasonable estimates of the amounts payable or benefits to be provided and disclose the material assumptions on which the estimates are based.¹¹³ As appropriate, the disclosure would be considered forward-looking information that falls within the SEC's safe harbor for such information.¹¹⁴

¹¹⁰ New Item 402(j) replaces prior Item 402(h)(2).

¹¹¹ Perquisites and other personal benefits provided to the named executive officer upon termination or change in control may be excluded from the disclosure required under Item 402(j) if the aggregate amount of such compensation will be less than \$10,000. See Instruction 2 to Item 402(j). However, once the \$10,000 threshold is exceeded, post-termination or change in control perquisites must be identified and quantified as required by Item 402(c)(2)(ix). *Id.*

¹¹² By way of example, the SEC noted that this would require disclosure of whether an executive simultaneously receives both severance and retirement benefits. See Executive Compensation Release at 114 (footnote 317).

¹¹³ Instruction 1 to Item 402(j).

¹¹⁴ See Securities Act §27A and Exchange Act §21E.

Although this calculation could, in some cases, yield a very substantial figure, the amount calculated may be much less or greater than the amount determined upon an actual change in control, termination, or similar event that occurs in the future. To ease the task of making the estimates required by this rule, the SEC specified that the required quantitative disclosure be based on the assumptions that the triggering event took place on the last business day of the most recent fiscal year and that the price per share of the company's stock was the closing market price on that date.¹¹⁵ Notwithstanding this clarification, some companies are likely to find it challenging to comply with this new disclosure requirement.

The final rules also clarify that

- disclosure with respect to named executive officers who are not named executive officers at the end of the company's fiscal year is required only with respect to a triggering event that has actually occurred for such named executive officer;¹¹⁶ and
- health care benefits provided as a result of a triggering event must be disclosed and are to be quantified based on the assumptions that the company uses for financial reporting purposes.¹¹⁷

Director Compensation

At last implementing a proposal that the SEC has long considered, new Item 402(k) requires tabular disclosure and an accompanying narrative for compensation paid to directors. The components of this table are substantially the same as those in the Summary Compensation Table.¹¹⁸ However, only compensation for the last completed fiscal year must be disclosed, as opposed to three years of data in the Summary Compensation Table. Although separate disclosures are contemplated for each director, if the elements of director compensation are identical for some or all of a company's directors, those disclosures may be made in a single line.¹¹⁹ Further, as long as a company includes in the Summary Compensation Table any sums paid to executive officers for services as a director and itemizes those amounts in a footnote, that compensation does not need to be disclosed in the director compensation table.¹²⁰

The last column of the director compensation table requires disclosure of "all other compensation" not properly reportable in any other column. This would include, among other things, consulting fees paid or payable by the company or a subsidiary (including joint ventures) and payments made toward "director legacy programs" or other similar charitable award programs. For any such director legacy or charitable

¹¹⁵ Instruction 1 to Item 402(j).

¹¹⁶ Instruction 4 to Item 402(j).

¹¹⁷ See Item 402(j)(1) and Instruction 2 to Item 402(j).

¹¹⁸ The instructions to Item 402(c) govern the same disclosures in Item 402(k). See Executive Compensation Release at 123; Instruction to Item 402(k). Item 402(k) also requires footnote disclosure of any outstanding stock and option awards at the end of the fiscal year with respect to each director. Instruction to Item 402(k)(2)(iii) and (iv).

¹¹⁹ Instruction to Item 402(k)(2).

¹²⁰ Item 402(k)(2)(i). See *also* Instruction 3 to Item 402(c). Additionally, payments to executive officers for services rendered as a director must be disclosed in any other table required by Item 402 that may be applicable to such payments.

award programs, footnote disclosure must be included of the total dollar amount payable under the program, along with the material terms of each such program.¹²¹

The director compensation table must be accompanied by narrative disclosure addressing material factors necessary to an understanding of the information in the table.¹²² This requirement is substantially the same as the narrative disclosure requirement with respect to the Summary Compensation Table. Material factors may include a description of any standard compensation arrangements, such as retainer fees or compensation for attendance at board meetings, and, if applicable, how director compensation arrangements differ among directors.¹²³ Additionally, information regarding option granting practices may be considered material and therefore subject to disclosure in this narrative.¹²⁴

The new director compensation table is shown in *Annex G*.

Executive Compensation Disclosure for Small Business Issuers

The SEC has amended the rules applicable to small business issuers¹²⁵ to correspond with some, but not all, of the changes to Item 402 of Regulation S-K. This reflects the SEC's acknowledgement that small business issuers typically have less complex compensation arrangements.¹²⁶

Small business issuers must provide only the Summary Compensation Table, the table on outstanding equity awards at fiscal year-end, and the Director Compensation Table, along with the related narrative discussions. With respect to the Summary Compensation Table, disclosure is required only of compensation of the principal executive officer and the other two most highly compensated officers for the last two completed fiscal years (rather than three, as required for other companies).¹²⁷ Further, small business issuers will not be required to provide a CD&A.

Proposal Regarding Compensation of Other Employees

One aspect of the SEC's proposed rules that received significant attention was the proposal to require disclosure, in narrative form, of the total compensation of up to three additional employees whose compensation for the last completed fiscal year was greater than that of any of the named executive officers.¹²⁸ This proposal met with significant opposition from commenters, and, as a result, the SEC decided to seek further comment on a modified version of this provision.¹²⁹ Notably, the SEC did not

¹²¹ Instruction 1 to Item 402(k)(2)(vii).

¹²² Item 402(k)(3).

¹²³ *Id.*

¹²⁴ Executive Compensation Release at 126.

¹²⁵ Small business issuers are those U.S. or Canadian companies with annual revenues of less than \$25,000,000. Item 10(a)(1) of Regulation S-B.

¹²⁶ Executive Compensation Release at 126.

¹²⁷ Small business issuers are not required to provide pension plan disclosure in the Summary Compensation Table. See Executive Compensation Release at 128.

¹²⁸ See original proposed Item 402(f)(2); Proposing Release at 62-63.

¹²⁹ Executive Compensation Release at 90-98.

propose any actual text of a new rule, but, rather, is seeking comment on a number of issues raised during the comment period for the initial proposal.

A number of commenters emphasized that the initial proposal was too broad to provide investors with useful information regarding the company's compensation practices. The requirement would have applied to all employees, including those performing a wide variety of roles (e.g., entertainment personalities, professional athletes, and commission-based sales personnel). Commenters argued that the proposed disclosure would not have provided investors with a principled way to compare their companies' practices with those of other companies.¹³⁰ Moreover, without any limitations on the types of employees that might trigger this disclosure requirement, it was uncertain whether a company's compensation committee or board of directors would even have been involved in establishing the compensation disclosed pursuant to the proposed rule.

In response to these concerns, the SEC has suggested excluding from this provision employees who have no responsibility for "significant policy decisions" for the company or any significant subsidiary or principal business unit, division, or function of the company.¹³¹ This is intended to limit the disclosure requirement to those additional employees whose compensation packages are most likely to be considered material by investors. In explaining this modified proposal, the SEC noted that responsibility for significant policy decisions could include the exercise of strategic, technical, editorial, creative, managerial, or similar responsibilities.¹³² Entertainment personalities, athletes, sales personnel and investment professionals normally would not fall within this pool of employees.¹³³

As repropoed, the rule would require disclosure of the job description and total compensation for the three qualifying employees.¹³⁴ The SEC initially had proposed not requiring companies to name any such employees; however, it now is seeking comment on that suggestion. Additionally, the SEC has sought comment on whether this disclosure requirement should only be imposed on large accelerated filers.¹³⁵ Comments are due within 45 days of the date of publication of the adopting release in the Federal Register.

Disclosure Regarding Related Person Transactions

The new rules streamline and modernize the related person disclosure requirements, as well as introduce a more pronounced element of principles-based disclosure to this area. Although the rule changes significantly modify prior disclosure requirements, the SEC noted that the purposes of the new

¹³⁰ See Comment Letter of The Business Roundtable, dated April 10, 2006.

¹³¹ Executive Compensation Release at 94.

¹³² Executive Compensation Release at 92. Further, according to the SEC, examples of employees that might be subject to this rule would be the director of the news division of a major network, the principal creative leader of the entertainment function of a media conglomerate, or the head of a principal business unit developing significant technological innovations. Id.

¹³³ Investment professionals with broader responsibilities within a firm may, however, be considered to have significant policy influence. See Executive Compensation Release at 93.

¹³⁴ The reproposal requests comment as to whether total compensation should be determined on the same basis as total compensation of the named executive officers. See Executive Compensation Release at 95.

¹³⁵ Large accelerated filers are companies that have, among other qualifications, \$700 million in unaffiliated outstanding equity market value.

rules remain unchanged from the prior disclosure rules – that is, to elicit disclosure regarding transactions and relationships, including indebtedness, involving the company and related persons, the independence of directors and nominees for director and the interests of management. Generally, the new rules

- focus the disclosure determination for related person transactions on a materiality analysis, rather than on bright line standards;
- expand the definitions of “transaction,” “related person” and “immediate family member” to clarify the broad scope of the transactions and relationships that are covered by the new rules; and
- require a description of applicable policies and procedures for review, approval or ratification of related person transactions.

Principles-based Disclosure Approach

In adopting the new related person disclosure rules, the SEC retained the disclosure principles underlying prior Item 404(a) but eliminated the bright line thresholds in the instructions to that Item. New Item 404(a) requires disclosure of transactions (including indebtedness currently disclosable under Item 404(c)) in the company's last fiscal year or currently proposed transactions, in which

- the company was or is to be a participant;
- the amount involved exceeds \$120,000 (an increase from the prior \$60,000 disclosure threshold);¹³⁶ and
- certain “related persons” had or will have direct or indirect material interests.

Consistent with current interpretations, the materiality of an interest in a transaction will be determined on the basis of the significance of the information to investors in light of all of the circumstances, including the significance of the interest to the related person.¹³⁷ Under the new rules, this general principle will guide materiality and, hence, disclosure decisions. This represents a departure from the prior approach, which combined the general statement of principle with a series of more specific presumptions and boundaries, and reflects the SEC's view that rigid application of the presumptions in such instructions has prevented disclosure of transactions that may have been material.¹³⁸ But, the

¹³⁶ Although the related person disclosure threshold has been increased to \$120,000 for purposes of Item 404(a), NYSE- and Nasdaq-listed issuers should note that the dollar thresholds applicable to independence determinations under the applicable listing standards remain at \$100,000 and \$60,000, respectively. This incongruity results in a situation where independence determinations under NYSE and Nasdaq listing standards may be precluded by transactions that are not required to be disclosed under Item 404(a). Nasdaq-listed issuers also should note that, as a result of the increased disclosure threshold under Item 404(a), the threshold for audit committee approval of related party transactions also has been increased.

¹³⁷ See Executive Compensation Release at 149-150.

¹³⁸ For example, the new rules eliminate the instruction to prior Item 404(a) which required, in the case of a related person transaction involving the purchase or sale of assets by or to the company outside the ordinary course of business, disclosure of the cost of the assets to the purchaser, and, if acquired within two years prior to the transaction, the cost of the assets to the seller and related information about the price of the assets. However, under the new rules disclosure of such information is required, if material.

change in approach is not quite as drastic as initially proposed by the SEC, as several instructions that were initially proposed to be deleted have been retained in the final rules as exceptions to the disclosure requirement.

Disclosure Requirements

In an attempt to streamline Item 404, the SEC incorporated the disclosure requirements of prior paragraphs (a), (b) and (c) into revised paragraph (a). Despite this structural change, the disclosure requirements under the new Item generally are consistent with those under prior Item 404.¹³⁹ Under new Item 404(a), companies are required to describe transactions with related persons, including

- the related person's name and relationship to the company;
- the person's interest in the transaction, including the related person's position or relationship with, or ownership interest in, any other entity that has an interest in or is a party to the transaction; and
- the approximate dollar value of the amount involved in the transaction and the related person's interest in the transaction.¹⁴⁰

Implications of Consolidating Items 404(a), 404(b) and 404(c)

- Companies will lose the benefit of an SEC staff telephone interpretation that has provided flexibility in certain circumstances to avoid disclosure of transactions valued in excess of the \$60,000 threshold under prior Item 404(a) if the transaction value did not exceed the 5% of gross revenues threshold under prior Item 404(b).
- The explicit requirement to disclose that a nominee or director is a lawyer or an investment banker in a firm that rendered services to the company is eliminated.
- Indebtedness of related persons to the company is subject to the \$120,000 disclosure threshold.

Exceptions to Disclosure Requirements

As is the case under prior Item 404, the instructions to new Item 404(a) set forth a number of categories of transactions that are excluded from the disclosure requirements of Item 404(a). These exceptions are:

- certain transactions involving indebtedness, including (i) amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel

¹³⁹ Item 404(a) does not, however, require disclosure regarding amounts owed to the company under Section 16(b) of the Exchange Act (which previously was disclosable under Instruction 4 to Item 404(c)). The SEC eliminated this requirement based on the differing purposes of Item 404 and Section 16(b). See Executive Compensation Release at 159-160.

¹⁴⁰ Consistent with prior Item 404, new Item 404(a) requires disclosure of any other material information regarding the transaction or related person.

and expense payments and for other transactions in the ordinary course of business;¹⁴¹ (ii) indebtedness transactions involving a significant shareholder (unless that person was otherwise a “related person,” e.g., an executive officer);¹⁴² and (iii) loans to related persons by banks, savings and loan associations, or broker-dealers, if the loans are not disclosed as nonaccrual, past due, restructured or potential problems;¹⁴³

- compensation to executive officers either reported under Item 402 or not required to be reported under Item 402 because the executive officer is not a named executive officer and the executive officer is not an immediate family member, and the compensation had been approved by the company’s compensation committee;¹⁴⁴
- interests of a related person based on his or her position and/or ownership of a person or entity that is party to the transaction with the company, where such position and/or ownership are below specified thresholds;¹⁴⁵ and
- transactions (i) in which the rates are determined by competitive bids or are fixed by applicable law; (ii) involving services as a bank depository, transfer agent, registrar, trustee under a trust indenture, or similar services; or (iii) in which the related person’s interest arises solely from the ownership of the company’s securities and all holders of that class of equity securities of the company receive the same benefit on a pro rata basis.¹⁴⁶

¹⁴¹ Instruction 4.a. to Item 404(a).

¹⁴² See Instruction 4.b. to Item 404(a).

¹⁴³ See Instruction 4.c. to Item 404(a). In the case of transactions involving loans excludable under this exception, companies must disclose, if true, that the loans were made in the ordinary course of business, were made on substantially the same terms (including interest rates and collateral) as those made to persons not related to the lender, and did not involve more than the normal risk of collectability or present unfavorable features. *Id.*

¹⁴⁴ See Instruction 5.a. to Item 404(a). Compensation to directors need not be disclosed pursuant to Item 404(a) if the compensation is reported in the Director Compensation Table. See Instruction 5.b. to Item 404(a).

¹⁴⁵ See Instruction 6 to Item 404(a).

¹⁴⁶ See Instructions 7.a., 7.b. and 7.c. to Item 404(a).

Changes to Definitions under the New Rules

- “Transaction” is to be interpreted broadly to include any financial transaction, arrangement or relationship or series of similar transactions, arrangements or relationships.
- The definition of “related person” is clarified to make express the SEC’s position that disclosure must be provided with respect to any person who was a “related person” *at any time* during the company’s last fiscal year, even if not a “related person” at year end. However, a person will only be considered a “related person” based on stock ownership if the person met the 5% ownership threshold at year-end.
- The definition of “immediate family member” is expanded to include stepchildren, stepparents and any other person (other than a tenant or employee) sharing the household of a related person.

As noted above, Item 404(a) does not require disclosure of compensation to directors or executive officers if such compensation is disclosed under Item 402. The SEC, however, eliminated the prior instruction that permitted companies to omit disclosure of compensation arising out of transactions otherwise disclosable as related person transactions under Item 404. As the SEC has acknowledged, this new disclosure regime may result in some “double reporting” of such transactions because the transaction itself must be reported under Item 404(a) and the related compensation must be reported under Item 402.¹⁴⁷

Procedures for Approval of Related Person Transactions

Echoing state law principles and NYSE and NASDAQ listing requirements relating to policies and procedures for approval of related party transactions, Item 404(b) requires disclosure of such policies and procedures.¹⁴⁸ Specifically, the new rules require a company to disclose the material features of its policies and procedures for the review, approval or ratification of transactions with related persons that are reportable under Item 404(a).¹⁴⁹ The SEC acknowledged that the material features would vary by company, but provided the following examples of features that may be material to such policies and procedures:

- the types of transactions covered and the respective standards to be applied to such transactions;
- the persons or groups, on the board of directors or otherwise, responsible for applying the policies and procedures; and
- whether the policies and procedures are in writing, and if not, how they are evidenced.¹⁵⁰

¹⁴⁷ See Executive Compensation Release at 121.

¹⁴⁸ See, e.g., Del. Code Ann. Tit. 8, §144 (2004); NYSE Listed Company Manual §307.00; NASD Manual, Marketplace Rules 4350(h) and 4360(i).

¹⁴⁹ Disclosure need not be provided under Item 404(b), however, with respect to any transaction that occurred prior to a person becoming a related person if the transaction did not continue after the person became a related person. See Instruction to Item 404(b).

¹⁵⁰ Item 404(b)(1).

In addition, the new Item requires a company to identify any transactions required to be reported under Item 404(a) that were not required to be reviewed, approved or ratified under the company's policies and procedures or for which such policies and procedures were not followed.

Changes to Form 8-K

When the SEC overhauled Form 8-K in 2004, new Item 1.01 was added to the form, requiring disclosure of the entry into material definitive agreements not made in the ordinary course of business, and material amendments to material definitive agreements. As adopted in 2004, the instructions to Item 1.01 provided that in evaluating whether an agreement is material and not made in the ordinary course of business, companies should use certain of the standards set forth in Item 601(b)(10) of Regulation S-K, which governs the filing of material contracts as exhibits to SEC filings. Among other things, Item 601(b)(10) of Regulation S-K requires a company to file, as material contract exhibits, certain management contracts and other compensatory plans, contracts (oral or written) and arrangements. Accordingly, entry into such contracts and compensatory plans and arrangements triggered the filing of a Form 8-K within four business days.

As the SEC observed in the proposing release, the 2004 changes to Form 8-K have resulted in much more frequent and accelerated disclosures of a wide range of executive compensation matters.¹⁵¹ However, the SEC's staff's experience with Item 1.01 of Form 8-K suggests that much of this disclosure does not appear to be unquestionably or presumptively material and arguably does not need to be disclosed on a real-time basis on Form 8-K.¹⁵² As part of the new rules on executive compensation disclosure, the SEC has made changes to Form 8-K that are intended to scale back somewhat the volume of Form 8-K filings related to management contracts and compensatory plans.

The changes to Form 8-K include the following:

- Item 1.01 (material definitive agreements) is amended to exclude compensation-related agreements and arrangements, which are now instead covered under an expanded Item 5.02.
- Revised Item 5.02 retains the requirement to file a Form 8-K to report the appointment or departure of directors and specified officers (*i.e.* principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions), but extends this requirement to all named executive officers.¹⁵³
- Revised Item 5.02 expands the disclosures required upon the occurrence of a triggering event to include a brief description, not just of employment agreements, but also any material plan, contract or arrangement to which an officer or director is party or in which he or she participates that is entered into or materially amended in connection with any such triggering event, or any grant or award to any such person (or modification thereto) under any such plan, contract or arrangement in connection with such triggering event.

¹⁵¹ Proposing Release at 104-106.

¹⁵² Executive Compensation Release at 132.

¹⁵³ A new instruction to Item 5.02 clarifies that for purposes of this Item, the named executive officers are the named executive officers identified in the Summary Compensation Table in the most recent filing by the company that was required to include such table. Instruction 4 to Item 5.02 of Form 8-K.

- Revised Item 5.02 also requires the filing of a Form 8-K to report the adoption of any material new compensatory plan, contract or arrangement, or new material grant or award thereunder, and any material amendment to any such plan, contract, arrangement or award, for the principal executive officer, principal financial officer, and any other named executive officer, whether or not in connection with the appointment or departure of such officers. Such grants and awards need not be disclosed, however, if they are materially consistent with the previously-disclosed terms of a plan, contract or arrangement, and such grants or awards are disclosed when Item 402 of Regulation S-K requires such disclosure.

Corporate Governance Disclosures

In the wake of the Sarbanes-Oxley Act of 2002, the SEC adopted many new disclosure requirements touching on various aspects of corporate governance. The SEC has continued this trend by adopting additional disclosure requirements in this area, most notably regarding the workings of the compensation committee. In addition, the SEC has consolidated a number of existing corporate governance disclosure requirements in one place under new Item 407.

The new rules align the disclosure requirements regarding the composition and activities of compensation committees with those already in place for the audit and nominating committees. In addition to laying out information regarding the committee's charter and scope of authority, a company must now provide a narrative description of the procedures and processes the committee uses in establishing compensation policies and in setting executive and director compensation. Although this narrative description is not intended to duplicate disclosures required in the new CD&A section and elsewhere in the proxy statement, it is likely that there will be some overlap between this discussion and descriptions of compensation policies called for by the other new rules.

One of the more notable provisions in new Item 407 is the requirement that companies disclose the role, if any, played by compensation consultants in determining the amount or form of executive and director compensation. Any compensation consultants retained by the company must be identified, and the nature and scope of their assignment must be disclosed, including the material elements of the direction provided to the consultants by the company.¹⁵⁴ While this new requirement is intended to address concerns regarding the independence of compensation consultants, it is noteworthy that the SEC did not take steps to impose independence standards similar to those imposed on outside auditors. Moreover, the rule does not require a company to disclose whether its compensation consultant also performs other functions for the company. For these reasons, some have questioned whether the new rule adequately addresses the independence issue.¹⁵⁵

The new rules also consolidate and increase disclosure requirements with respect to director independence. Companies with stock listed on a national securities exchange must disclose the identities of those directors determined to be independent under the applicable listing standards.¹⁵⁶ In addition, listed companies must identify those members of the audit, compensation and nominating committees who are not independent under the applicable independence standards. These same disclosures must be made by companies that do not have any securities listed on a national securities exchange. However,

¹⁵⁴ Item 407(e)(3)(iii).

¹⁵⁵ See Gretchen Morgenson, *Outside Advice on Boss's Pay May Not Be So Independent*, N.Y. Times, Apr. 10, 2006.

¹⁵⁶ Item 407(a).

such companies may choose the listing standards of a national securities exchange for purposes of making independence determinations.¹⁵⁷

Item 407(a) also requires companies to disclose, by specific category or type, any transactions, relationships or arrangements with independent directors that are not disclosed under Item 404(a) but that the board of directors considered in determining the independence of its directors.¹⁵⁸ This represents a change from the proposed rules, which would have required disclosure of all such transactions (not just by category or type). The description of the categories or types of transactions must, however, be in sufficient detail to fully describe the nature of such transactions.¹⁵⁹

Finally, Item 407 consolidates a number of existing corporate governance disclosure requirements, although no substantive changes have been made to these disclosure items. These include the audit committee report requirements (formerly Item 306), disclosures regarding the composition of the audit committee and the identity of the audit committee financial expert(s) (formerly Items 401(h)-(i)), disclosures regarding interested relationships of members of the compensation committee, and disclosure of material changes to the shareholder director nomination process.¹⁶⁰

Disclosure Regarding Pledges of Stock Beneficially Owned by Officers and Directors

In tandem with the amendments to executive compensation disclosure rules, the SEC amended the rules governing disclosure of beneficial ownership of stock. Now, in addition to the amount of its stock owned by a company's named executive officers, directors and director nominees, a company must disclose, by means of a footnote to its table of beneficial stockholders, the number of shares pledged as security by such persons.¹⁶¹ The rationale for this new requirement is that shares beneficially owned by executives and directors that are used as collateral may be subject to material risks or contingencies that do not apply to other shares beneficially owned by these persons. Noting its belief that this possibility has the potential to influence management's performance and decisions, the SEC indicated that such relationships could be material and therefore should be disclosed. The SEC chose not to adopt a suggested requirement to also disclose hedging arrangements by these persons, since such arrangements are likely to trigger prompt disclosure under Section 16(a) of the Exchange Act, and because the CD&A will now include discussion of the company's policies regarding such transactions.¹⁶²

Stock Performance Graph

Based on comments it received on its rule proposal, the SEC decided to retain the stock performance graph, which, it concluded, remains a useful tool for investors. However, the graph will be

¹⁵⁷ Item 407(a)(1)(ii). If the company relies on an exemption provided by the applicable listing standards, that exemption must be disclosed and the basis for relying on such exemption must be described. Instruction 1 to Item 407(a).

¹⁵⁸ Item 407(a)(3).

¹⁵⁹ Instruction 3 to Item 407(a).

¹⁶⁰ In addition, disclosures relating to the audit and nominating committees formerly contained in Item 7 of Schedule 14A have been consolidated in Item 407. The primary substantive change to these requirements is that a company may now choose to post the audit committee's charter on its website rather than delivering a copy to shareholders. Instruction 2 to Item 407.

¹⁶¹ See Item 403(b).

¹⁶² Executive Compensation Release at 146.

separated from the executive compensation disclosure and moved to Item 201 of Regulation S-K.¹⁶³ As such, it will only be required to be included in annual reports accompanying or preceding proxy statements for annual meetings at which directors will be elected. The stock performance graph will continue to be deemed furnished.¹⁶⁴

Conclusion

Like the SEC's other non-normative rules regulating disclosures, the new executive compensation disclosure rules do not have as their stated objective the curbing of "excessive" compensation or the alteration of other compensation practices. Rather, they are aimed at improving the quality and quantity of information regarding executive compensation so that shareholders and investors are better equipped to make decisions and take actions regarding their companies and boards of directors. Underlying this effort, of course, is the premise that management compensation is a subject that is relevant to shareholders, whether this is because compensation represents an expenditure of company assets, or because the structure of compensation arrangements can influence how management runs the company, or even perhaps because the compensation awarded to management might reflect the relative strength or weakness of board oversight. By significantly increasing the volume of executive compensation data required to be disclosed, the SEC has implicitly acknowledged that certain compensation levels or practices may not be receiving sufficient scrutiny by shareholders. And, while the disclosure rules are "value-free" on their face, Chairman Cox has noted publicly that the requirement to disclose significantly more detail about compensation may, in fact, have the effect of curbing some abuses.¹⁶⁵

Some of the new executive compensation rules, like some elements of the Sarbanes-Oxley Act of 2002 before them, seem to have been formulated to address either a specific instance or category of compensation abuse, or, in many cases, to respond to specific suggestions made by institutional shareholder advocates. Although some aspects of the new rules are general and can be characterized as principles-based, most are very specific and call for a large amount of very detailed data points. One cannot help but ask, however, whether there will ever be enough data to sate the appetites of the more persistent shareholder advocates.

From a practical standpoint, public companies will need to adapt their processes and operations to the new rules. Because the rules call for a significant amount of additional disclosure, companies are well advised promptly to begin reviewing their information systems and other elements of disclosure controls and procedures so that they are positioned to collect, analyze and compile the data necessary to prepare the new disclosures. In many cases, it is likely that existing information systems and record-keeping processes will be found to be lacking. Much of the new disclosure will require careful coordination among people responsible for disclosure, legal, benefits, financial reporting and/or accounting matters. Further, because the new rules require quantification of a number of items not previously required to be quantified in the same manner, such as the grant date fair value of equity awards and the present value of accumulated pension benefits, companies may wish to do "dry run" calculations of such amounts prior to the end of 2006, with a view to possibly making changes to underlying contractual arrangements.

¹⁶³ Item 201(e).

¹⁶⁴ Instruction 8 to Item 201(e).

¹⁶⁵ Stephen Labaton, *Spotlight on Pay Could Be a Wild Card*, N.Y. Times (Apr. 9, 2006), Sect. 3, p. 1 (Chairman Cox is quoted as follows: "I have a feeling that when people are forced to undress in public, they'll pay more attention to their figures.").

Apart from the sheer challenge of information gathering, the new rules may spur other changes in corporate practices. For example, in light of the new requirement to quantify amounts payable to named executive officers under severance, change in control and similar arrangements, companies may find it advantageous to harmonize such arrangements so that all named executive officers have a standard form of such agreement, thereby easing the disclosure burden. Another area where change may occur is the practice of excluding management from meetings of the compensation committee. While undoubtedly there will continue to be a need for sessions without the presence of management, in order to achieve efficiency and accuracy companies may well find it necessary to have certain members of management (e.g., the general counsel) present during compensation committee meetings.

The SEC has correctly espoused neutrality as to levels and methods of executive compensation. It would be hard to imagine, however, that the agency's activities in this area would be quite the same absent strident concerns regarding this subject from many quarters in the governance arena, concerns that are already informed by current and detailed SEC-mandated disclosures regarding executive pay. And, this begs some awkward questions. Will the new disclosures be enough to allay those concerns, even if there are no particularly profound changes in compensation practices? If not, and there are many who have their doubts, how will the benefits of the new rules, which will increase markedly the length and complexity of annual meeting proxy statements, be measured?

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This information is not legal advice. Readers should seek specific legal advice before acting on subjects mentioned herein.

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SUMMARY COMPENSATION TABLE

Name and Principal Position	Year	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Nonqualified Deferred Compensation Earnings (\$)	All Other Compensation (\$)	Total (\$)
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
PEO	_____								

PFO	_____								

A	_____								

B	_____								

C	_____								

Explanatory Notes:

- (1) The dollar value of base salary (cash and non-cash) earned during the fiscal year.
- (2) The dollar value of bonus (cash and non-cash) earned during the fiscal year.
- (3) The aggregate grant date fair value of stock awards computed in accordance with FAS 123(R).
- (4) The aggregate grant date fair value of option awards (with or without tandem SARs) computed in accordance with FAS 123(R).
- (5) The dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-equity incentive plans and all earnings on any outstanding awards.
- (6) The sum of (i) the aggregate change in the actuarial present value of accumulated benefits under all defined benefit and actuarial pension plans from the plan measurement date used for financial statement reporting purposes with respect to the prior completed fiscal year to the plan measurement date used for financial statement reporting purposes with respect to the covered fiscal year, and (ii) above-market or preferential earnings on non-tax-qualified deferred compensation.
- (7) All other compensation for the year that could not properly be reported in any other column.
- (8) The dollar value of total compensation for the year, equal to the sum of columns (1) through (7).

GRANTS OF PLAN-BASED AWARDS

Name	Grant Date	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Future Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or Units (#)	All Other Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards (\$/Sh)
		Thresh-old (\$)	Target (\$)	Maximum (\$)	Thresh-old (#)	Target (#)	Maximum (#)			
	(1)	(2a)	(2b)	(2c)	(3a)	(3b)	(3c)	(4)	(5)	(6)
PEO										
PFO										
A										
B										
C										

Explanatory Notes:

- (1) The grant date for equity-based awards. If such grant date is different than the date on which the compensation committee takes action or is deemed to take action to grant such awards, a separate, adjoining column must be added between columns (1) and (2a) showing such date.
- (2) The dollar value of the estimated future payout upon satisfaction of the conditions in question under non-equity incentive plan awards granted in the fiscal year, or the applicable range of estimated payouts denominated in dollars (threshold, target and maximum amount) (columns (2a) through (2c)).
- (3) The number of shares of stock, or the number of shares underlying options to be paid out or vested upon satisfaction of the conditions in question under equity incentive plan awards granted in the fiscal year, or the applicable range of estimated payouts denominated in the number of shares of stock, or the number of shares of underlying options under the award (threshold, target and maximum amount) (columns (3a) through (3c)).
- (4) The number of shares of stock granted in the fiscal year that are not required to be disclosed in columns (3a) through (3c).
- (5) The number of securities underlying options granted in the fiscal year that are not required to be disclosed in columns (3a) through (3c).
- (6) The per-share exercise or base price of the options granted in the fiscal year. If such exercise or base price is less than the closing market price of the underlying security on the date of the grant, a separate, adjoining column showing the closing market price on the date of the grant must be added after column (6).

OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END

Name	Option Awards					Stock Awards			
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price (\$)	Option Expiration Date	Number of Shares or Units of Stock That Have Not Vested (#)	Market Value of Shares or Units of Stock That Have Not Vested (\$)	Equity Incentive Plan Awards: Number of Unearned Shares, Units or Other Rights That Have Not Vested (#)	Equity Incentive Plan Awards: Market or Payout Value of Unearned Shares, Units or Other Rights That Have Not Vested (\$)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
PEO									
PFO									
A									
B									
C									

Explanatory Notes:

- (1) On an award-by-award basis, the number of securities underlying unexercised options that are exercisable and that are not reported in column (3).
- (2) On an award-by-award basis, the number of securities underlying unexercised options that are unexercisable and that are not reported in column (3).
- (3) On an award-by-award basis, the total number of shares underlying unexercised options awarded under any equity incentive plan that have not been earned.
- (4) For each instrument reported in columns (1), (2) and (3), as applicable, the exercise or base price.
- (5) For each instrument reported in columns (1), (2) and (3), as applicable, the expiration date.
- (6) The total number of shares of stock that have not vested and that are not reported in column (8).
- (7) The aggregate market value of shares of stock that have not vested and that are not reported in column (9).
- (8) The total number of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned, and, if applicable the number of shares underlying any such unit or right.
- (9) The aggregate market or payout value of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned.

OPTION EXERCISES AND STOCK VESTED

Name	Option Awards		Stock Awards	
	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise (\$)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting (\$)
	(1)	(2)	(3)	(4)
PEO				
PFO				
A				
B				
C				

Explanatory Notes:

- (1) The number of securities for which the options were exercised.
- (2) The aggregate dollar value realized upon exercise of options, or upon the transfer of an award for value.
- (3) The number of shares of stock that have vested.
- (4) The aggregate dollar value realized upon vesting of stock, or upon the transfer of an award for value.

PENSION BENEFITS

Name	Plan Name	Number of Years of Credited Service (#)	Present Value of Accumulated Benefit (\$)	Payments During Last Fiscal Year (\$)
	(1)	(2)	(3)	(4)
PEO				
PFO				
A				
B				
C				

Explanatory Notes:

- (1) The name of the plan.
- (2) The number of years of service credited to the named executive officer under the plan, computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the last completed fiscal year.
- (3) The actuarial present value of the named executive officer's accumulated benefit under the plan, computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the last completed fiscal year.
- (4) The dollar amount of any payments and benefits paid to the named executive officer during the registrant's last completed fiscal year.

NONQUALIFIED DEFERRED COMPENSATION

Name	Executive contributions in last FY (\$) (1)	Registrant contributions in last FY (\$) (2)	Aggregate earnings in last FY (\$) (3)	Aggregate withdrawals/distributions (\$) (4)	Aggregate balance at last FYE (\$) (5)
PEO					
PFO					
A					
B					
C					

Explanatory Notes:

- (1) The dollar amount of aggregate executive contributions during the registrant's last fiscal year.
- (2) The dollar amount of aggregate registrant contributions during the registrant's last fiscal year.
- (3) The dollar amount of aggregate interest or other earnings accrued during the registrant's last fiscal year.
- (4) The aggregate dollar amount of all withdrawals by and distributions to the executive during the registrant's last fiscal year.
- (5) The dollar amount of total balance of the executive's account as of the end of the registrant's last fiscal year.

DIRECTOR COMPENSATION

Name	Fees Earned or Paid in Cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Nonqualified Deferred Compensation Earnings	All Other Compensation (\$)	Total (\$)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
A							
B							
C							
D							
E							

Explanatory Notes:

- (1) The aggregate dollar amount of all fees earned or paid in cash for services as a director, including annual retainer fees, committee and/or chairmanship fees, and meeting fees.
- (2) For awards of stock, the aggregate grant date fair value computed in accordance with FAS 123(R).
- (3) For awards of stock options, with or without tandem SARs, the aggregate grant date fair value computed in accordance with FAS 123(R).
- (4) The dollar value of all earnings for services performed during the fiscal year pursuant to non-equity incentive plans, and all earnings on any outstanding awards.
- (5) The sum of (i) the aggregate change in the actuarial present value of the director's accumulated benefit under all defined benefit and actuarial pension plans from the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the prior completed fiscal year to the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the covered fiscal year and (ii) above-market or preferential earnings on non-tax-qualified deferred compensation.
- (6) All other compensation for the covered fiscal year that could not properly be reported in any other column.
- (7) The dollar value of total compensation for the covered fiscal year, equal to the sum of all amounts reported in columns (1) through (6).