

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PARTS 228, 229, 239, 240, 245, 249 AND 274**

**RELEASE NOS. 33-8655; 34-53185; IC-27218; FILE NO. S7-03-06**

**RIN 3235-AI80**

**EXECUTIVE COMPENSATION AND RELATED PARTY DISCLOSURE**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission is proposing amendments to the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters and security ownership of officers and directors. These amendments would apply to disclosure in proxy and information statements, periodic reports, current reports and other filings under the Securities Exchange Act of 1934 and to registration statements under the Exchange Act and the Securities Act of 1933. We also propose to require that disclosure under the amended items generally be provided in plain English. The proposed amendments are intended to make proxy statements, reports and registration statements easier to understand. They are also intended to provide investors with a clearer and more complete picture of the compensation earned by a company's principal executive officer, principal financial officer and highest paid executive officers and members of its board of directors. In addition, they are intended to provide better information about key financial relationships among companies and their executive officers, directors, significant shareholders and their respective immediate family members.

**DATES:** Comments should be received on or before April 10, 2006.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-03-06 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number S7-03-06. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Anne Krauskopf, Carloyn Sherman, or Daniel Greenspan, at (202) 551-3500, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010 or, with respect to questions regarding investment companies, Kieran Brown in the Division of Investment Management, at (202) 551-6784.

**SUPPLEMENTARY INFORMATION:** We propose to amend: Items 201,<sup>1</sup> 306,<sup>2</sup> 401,<sup>3</sup> 402,<sup>4</sup> 403<sup>5</sup> and 404<sup>6</sup> of Regulations S-K<sup>7</sup> and S-B,<sup>8</sup> Item 601<sup>9</sup> of Regulation S-K, Item 1107<sup>10</sup> of Regulation AB,<sup>11</sup> and Rule 100<sup>12</sup> of Regulation BTR.<sup>13</sup> We also propose to add new Item 407 to Regulations S-K and S-B. In addition, we propose to amend Rules 13a-11,<sup>14</sup> 14a-6,<sup>15</sup> 14c-5,<sup>16</sup> 15d-11<sup>17</sup> and 16b-3<sup>18</sup> under the Securities Exchange Act of 1934.<sup>19</sup> We propose to add Rules 13a-20 and 15d-20 under the Exchange Act. We

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<sup>1</sup> 17 CFR 229.201 and 17 CFR 228.201.

<sup>2</sup> 17 CFR 229.306 and 17 CFR 228.306.

<sup>3</sup> 17 CFR 229.401 and 17 CFR 228.401.

<sup>4</sup> 17 CFR 229.402 and 17 CFR 228.402.

<sup>5</sup> 17 CFR 229.403 and 17 CFR 228.403.

<sup>6</sup> 17 CFR 229.404 and 17 CFR 228.404.

<sup>7</sup> 17 CFR 229.10 et seq.

<sup>8</sup> 17 CFR 228.10 et seq.

<sup>9</sup> 17 CFR 229.601.

<sup>10</sup> 17 CFR 229.1107.

<sup>11</sup> 17 CFR 229.1100 et seq.

<sup>12</sup> 17 CFR 245.100.

<sup>13</sup> 17 CFR 245.100 et seq.

<sup>14</sup> 17 CFR 240.13a-11.

<sup>15</sup> 17 CFR 240.14a-6.

<sup>16</sup> 17 CFR 240.14c-5.

<sup>17</sup> 17 CFR 240.15d-11.

<sup>18</sup> 17 CFR 240.16b-3.

<sup>19</sup> 15 U.S.C. 78a et seq.

further propose to amend Schedule 14A<sup>20</sup> under the Exchange Act, as well as Exchange Act Forms 8-K,<sup>21</sup> 10,<sup>22</sup> 10SB,<sup>23</sup> 10-Q,<sup>24</sup> 10-QSB,<sup>25</sup> 10-K,<sup>26</sup> 10-KSB<sup>27</sup> and 20-F.<sup>28</sup> Finally, we propose to amend Forms SB-2,<sup>29</sup> S-1,<sup>30</sup> S-3,<sup>31</sup> S-4<sup>32</sup> and S-11<sup>33</sup> under the Securities Act, Forms N-1A,<sup>34</sup> N-2,<sup>35</sup> and N-3<sup>36</sup> under the Securities Act and the Investment Company Act of 1940,<sup>37</sup> and Form N-CSR<sup>38</sup> under the Investment Company Act and the Exchange Act.

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<sup>20</sup> 17 CFR 240.14a-101.

<sup>21</sup> 17 CFR 249.308.

<sup>22</sup> 17 CFR 249.210.

<sup>23</sup> 17 CFR 249.210b.

<sup>24</sup> 17 CFR 249.308a.

<sup>25</sup> 17 CFR 249.308b.

<sup>26</sup> 17 CFR 249.310.

<sup>27</sup> 17 CFR 249.310b.

<sup>28</sup> 17 CFR 249.220f.

<sup>29</sup> 17 CFR 239.10.

<sup>30</sup> 17 CFR 239.11.

<sup>31</sup> 17 CFR 239.13.

<sup>32</sup> 17 CFR 239.25.

<sup>33</sup> 17 CFR 239.18.

<sup>34</sup> 17 CFR 239.15A and 274.11A.

<sup>35</sup> 17 CFR 239.14 and 274.11a-1.

<sup>36</sup> 17 CFR 239.17a and 274.11b.

<sup>37</sup> 15 U.S.C. 80a-1 et seq.

<sup>38</sup> 17 CFR 249.331 and 274.128.

## Table of Contents

- I. Background and Overview of the Proposals
- II. Executive and Director Compensation Disclosure
  - A. Compensation Discussion and Analysis
    - 1. Intent and Operation of the Proposed Compensation Discussion and Analysis
    - 2. Proposed Instructions to Compensation Discussion and Analysis
    - 3. “Filed” Status of Compensation Discussion and Analysis
    - 4. Proposed Elimination of the Performance Graph and the Compensation Committee Report
  - B. Compensation Tables
    - 1. Compensation to Named Executive Officers in the Last Three Completed Fiscal Years -- The Summary Compensation Table and Related Disclosure
      - a. Total Compensation Column
      - b. Salary and Bonus Columns
      - c. Plan-Based Awards
        - i. Stock Awards and Option Awards Columns
        - ii. Non-Stock Incentive Plan Compensation Column
      - d. All Other Compensation Column
        - i. Earnings on Deferred Compensation
        - ii. Increase in Pension Value
        - iii. Perquisites and Other Personal Benefits
        - iv. Additional All Other Compensation Column Items
      - e. Captions and Table Layout
    - 2. Supplemental Annual Compensation Tables
      - a. Grants of Performance-Based Awards Table
      - b. Grants of All Other Equity Awards Table
    - 3. Narrative Disclosure to Summary Compensation Table and Supplemental Tables
    - 4. Exercises and Holdings of Previously Awarded Equity
      - a. Outstanding Equity Awards at Fiscal Year-End
      - b. Option Exercises and Stock Vesting
    - 5. Post-Employment Compensation
      - a. Retirement Plan Potential Annual Payments and Benefits Table
      - b. Nonqualified Defined Contribution and Other Deferred Compensation Plans Table
      - c. Other Potential Post-Employment Payments
    - 6. Officers Covered
      - a. Named Executive Officers

- b. Identification of Most Highly Compensated Officers;  
Dollar Threshold for Disclosure
        - 7. Interplay of Items 402 and 404
        - 8. Other Proposed Changes
        - 9. Compensation of Directors
      - C. Treatment of Specific Types of Issuers
        - 1. Small Business Issuers
        - 2. Foreign Private Issuers
        - 3. Business Development Companies
      - D. Conforming Amendments
      - E. General Comment Requests on the Item 402 Proposals
  - III. Proposed Revisions to Form 8-K and the Periodic Report Exhibit Requirements
    - A. Proposed Revisions to Items 1.01 and 5.02 of Form 8-K
    - B. Proposed Extension of Limited Safe Harbor under Section 10(b) and Rule 10b-5 to Item 5.02(e) of Form 8-K and Exclusion of that Item from Form S-3 Eligibility Requirements
    - C. General Instruction D to Form 8-K
    - D. Foreign Private Issuers
  - IV. Beneficial Ownership Disclosure
  - V. Certain Relationships and Related Transactions Disclosure
    - A. Transactions with Related Persons
      - 1. Broad Principle for Disclosure
        - a. Indebtedness
        - b. Definitions
      - 2. Disclosure Requirements
      - 3. Exceptions
    - B. Procedures for Approval of Related Person Transactions
    - C. Promoters
    - D. Corporate Governance Disclosure
    - E. Treatment of Specific Types of Issuers
      - 1. Small Business Issuers
      - 2. Foreign Private Issuers
      - 3. Registered Investment Companies
    - F. Conforming Amendments
      - 1. Regulation Blackout Trading Restriction
      - 2. Rule 16b-3 Non-Employee Director Definition
      - 3. Other Conforming Amendments
  - VI. Plain English Disclosure
  - VII. Transition

- VIII. Paperwork Reduction Act
  - A. Background
  - B. Summary of Information Collections
  - C. Paperwork Reduction Act Burden Estimates
    - 1. Securities Act Registration Statements, Exchange Act Registration Statements and Exchange Act Annual Reports
    - 2. Exchange Act Current Reports
  - D. Request for Comment
- IX. Cost-Benefit Analysis
  - A. Background
  - B. Summary of Proposals
  - C. Benefits
  - D. Costs
  - E. Request for Comment
- X. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation
- XI. Initial Regulatory Flexibility Act Analysis
  - A. Reasons for the Proposed Action
  - B. Objectives
  - C. Legal Basis
  - D. Small Entities Subject to the Proposed Amendments
  - E. Reporting, Recordkeeping and Other Compliance Requirements
  - F. Duplicative, Overlapping or Conflicting Federal Rules
  - G. Significant Alternatives
  - H. Solicitation of Comment
- XII. Small Business Regulatory Enforcement Fairness Act
- XIII. Statutory Authority and Text of the Proposed Amendments

## **I. Background and Overview of the Proposals**

We are proposing revisions to our rules governing disclosure of executive compensation, director compensation, related party transactions, director independence and other corporate governance matters and current reporting regarding compensation arrangements. The proposed revisions to the compensation disclosure rules are intended to provide investors with a clearer and more complete picture of compensation to principal executive officers, principal financial officers, the other highest paid executive officers and directors.

Closely related to executive officer and director compensation is the participation by executive officers, directors, significant shareholders and other related persons in financial transactions and relationships with the company. We are also proposing to revise our disclosure rules regarding related party transactions and director independence and board committee functions.

Finally, some compensation arrangements must be disclosed under our recently revised rules relating to current reports on Form 8-K. We propose to reorganize and more appropriately focus our requirements on the type of compensation information that should be disclosed on a real-time basis.

Since the enactment of the Securities Act and the Exchange Act,<sup>39</sup> the

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<sup>39</sup> Initially, disclosure requirements regarding executive and director compensation were set forth in Schedule A to the Securities Act and Section 12(b) of the Exchange Act, which list the type of information to be included in Securities Act and Exchange Act registration statements. Item 14 of Schedule A called for disclosure of the “remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded \$25,000 during any such year.” Section 12(b) of the Exchange Act as enacted required disclosure of “(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuers and any person directly or indirectly



Commission has on a number of occasions explored the best methods for communicating clear, concise and meaningful information about executive and director compensation and relationships with the issuer.<sup>40</sup> The Commission also has had to reconsider executive and director compensation disclosure requirements in light of changing trends in executive compensation. Most recently, in 1992, the Commission adopted amendments to the disclosure rules that eschewed a mostly narrative disclosure approach adopted in 1983 in favor of formatted tables that captured all compensation, while categorizing the various elements of compensation and promoting comparability from year to year and from company to company.<sup>41</sup>

We believe this tabular approach remains a sound basis for disclosure. However, especially in light of the complexity of and variations in compensation programs, the very formatted nature of the current rules results in too many cases in disclosure that does not inform investors adequately as to all elements of compensation. In those cases investors may lack material information that we believe they should receive.

We are thus today proposing an approach that builds on the strengths of the current requirements rather than discarding them. However, today's proposals do

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controlling or controlled by, or under direct or indirect common control with the issuer;" and "(E) remuneration to others than directors and officers exceeding \$20,000 per annum."

<sup>40</sup> In 1938, the Commission promulgated its first executive and director compensation disclosure rules for proxy statements. Release No. 34-1823 (Aug. 11, 1938). At different times thereafter, the Commission has adopted rules mandating narrative, tabular, or combinations of narrative and tabular disclosure as the best method for presenting compensation disclosure in a manner that is clear and useful to investors. See e.g., Release No. 34-3347 (Dec. 18, 1942) [7 FR 10653] (introducing first tabular disclosure); Release No. 34-4775 (Dec. 11, 1952) [17 FR 11431] (introducing separate table for pensions and deferred remuneration); Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33-6003 (Dec. 4, 1978) [43 FR 58151] (expanding tabular disclosure to cover all forms of compensation); and Disclosure of Executive Compensation, Release No. 33-6486 (Sept. 23, 1983) [48 FR 44467] (the "1983 Release") (limiting tabular disclosure to cash remuneration).

represent a thorough rethinking of our current rules that would combine a broader-based tabular presentation with improved narrative disclosure supplementing the tables. This proposed approach would promote clarity and completeness of numerical information through an improved tabular presentation, continue to provide the ability to make comparisons using tables, and call for material qualitative information regarding the manner and context in which compensation is awarded and earned.

The proposals that we publish for comment today would require that all elements of compensation must be disclosed. We also seek to structure the revised requirements sufficiently broadly so that, if they are adopted, they will continue to operate effectively as new forms of compensation are developed in the future.

Under our proposals, compensation disclosure would begin with a narrative providing a general overview. Much like the overview that we have encouraged companies to provide with their Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A),<sup>42</sup> the proposed Compensation Discussion and Analysis would call for a discussion and analysis of the material factors underlying compensation policies and decisions reflected in the data presented in the tables. This overview would address in one place these factors with respect to both the separate elements of executive compensation and executive compensation as a whole.

Following the Compensation Discussion and Analysis, we propose to organize detailed disclosure of executive compensation into three broad categories:

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<sup>41</sup> Executive Compensation Disclosure, Release No. 33-6962 (Oct. 16, 1992) [57 FR 48125] (the "1992 Release"); See also Executive Compensation Disclosure; Securityholder Lists and Mailing Requests, Release No. 33-7032 (Nov. 22, 1993) [58 FR 63010], at Section II.

<sup>42</sup> Item 303 of Regulation S-K [17 CFR 229.303]. See also Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75055], at Section III.A.

- compensation with respect to the last fiscal year (and the two preceding fiscal years), as reflected in a revised Summary Compensation Table that presents compensation paid currently or deferred (including options, restricted stock and similar grants) and compensation consisting of current earnings or awards that are part of a plan, and as supplemented by two tables providing back-up information for certain data in the Summary Compensation Table;
- holdings of equity-related interests that relate to compensation or are potential sources of future gains, with a focus on compensation-related equity interests that were awarded in prior years (and disclosed as current compensation for those years) and are “at risk,” as well as recent realization on these interests, such as through vesting of restricted stock and similar instruments or the exercise of options and similar instruments; and
- retirement and other post-employment benefits, including retirement and defined contribution and other deferred compensation plans, other retirement benefits and other post-employment benefits, such as those payable in the event of a change in control.

We propose to require improved tabular disclosure for each of the above three categories that would be supplemented by appropriate narrative that provides material information necessary to an understanding of the information presented in the individual tables.<sup>43</sup> We

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<sup>43</sup> As discussed in more detail below, this narrative disclosure, together with the Compensation Discussion and Analysis noted above, would replace the currently required Compensation Committee Report and the Performance Graph. Unlike the current requirements under which both the report and the graph, although physically included in the proxy statement, need only be furnished to the Commission, the proposed narrative disclosure, along with the rest of the proposed executive officer and director compensation, would be company disclosure filed with the Commission.

are also proposing a new disclosure requirement of the total compensation and job description of up to an additional three most highly compensated employees who are not executive officers or directors but who earn more than the highest paid executive officers.

Finally, we propose a director compensation table that is similar to the proposed Summary Compensation Table.<sup>44</sup>

We also propose to modify some of the recently expanded Form 8-K requirements regarding compensation. Form 8-K requires disclosure on a current basis of the entry into, amendment of, and termination of, material definitive agreements entered into outside the ordinary course of business within four business days of the triggering event. Under our pre-existing definitions of material contracts, many agreements regarding executive compensation are deemed to be material agreements entered into outside the ordinary course, and when, for purposes of consistency, we adopted those definitions for use in the expanded Form 8-K requirements, we incorporated all of these executive compensation agreements into the current disclosure requirements. Therefore, many agreements regarding executive compensation, including some not related to named executive officers, are required to be disclosed within four business days of the applicable triggering event. Consistent with our intent in adopting the expanded Form 8-K to

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Current Item 402(a)(9) of Regulation S-K provides that the Compensation Committee Report and Performance Graph “shall not be deemed to be ‘soliciting material’ or to be ‘filed’ with the Commission or subject to Regulations 14A or 14C [17 CFR 240.14a-1 et seq. or 240.14c-1 et seq.], other than as provided in this item, or to the liabilities of section 18 of the Exchange Act [15 U.S.C. 78r], except to the extent that the registrant specifically requests that such information be treated as soliciting material or specifically incorporates it by reference into a filing under the Securities Act or the Exchange Act.”

<sup>44</sup> We made similar proposals, which we did not act on, regarding director compensation in 1995. Streamlining and Consolidation of Executive and Director Compensation Disclosure, Release No. 33-7184 (Aug. 6, 1995) [60 FR 35633] (the “1995 Release”), at Section I.B.

capture only events that are unquestionably or presumptively material to investors, we believe it is appropriate to modify the Form 8-K requirements.

We believe that executive and director compensation is closely related to financial transactions and relationships involving companies and their directors, executive officers and significant shareholders and respective immediate family members. Disclosure requirements regarding these matters historically have been interconnected, given that relationships among these parties and the company can include transactions that involve compensation or analogous features. Such disclosure also represents material information in evaluating the overall relationship with a company's executive officers and directors. Further, this disclosure provides material information regarding the independence of directors. The current related party transaction disclosure requirements were adopted piecemeal over the years and were combined into one disclosure requirement beginning in 1982.<sup>45</sup> In light of the many developments since then, including the increasing focus on corporate governance and director independence, we believe it is necessary to revise our requirements. Today's proposals include amendments to update, clarify and slightly expand the related party transaction disclosure requirements. The proposed amendments would fold into the disclosure requirements for related party transactions the currently separate disclosure requirement regarding indebtedness of management and directors.<sup>46</sup> Further, we propose a requirement that calls for a narrative explanation of the independence status of directors under a company's director independence policies, consistent with recent significant changes to

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<sup>45</sup> Disclosure of Certain Relationships and Transactions Involving Management, Release No. 33-6441 (Dec. 2, 1982) [47 FR 55661] (the "1982 Release").

<sup>46</sup> Related party transactions are currently disclosed under Items 404(a) of Regulations S-K and S-B. Indebtedness is currently disclosed under Item 404(c) of Regulation S-K.

the listing standards of the nation's principal securities trading markets.<sup>47</sup> We also propose to consolidate this and other corporate governance disclosure requirements regarding director independence and board committees into a single expanded disclosure item.<sup>48</sup>

In order to ensure that these amended requirements result in disclosure that is clear, concise and understandable for investors, we propose to add Rules 13a-20 and 15d-20 under the Exchange Act to require that most of the disclosure provided in response to the amended items be presented in plain English. This proposal would extend the plain English requirements currently applicable to portions of registration statements under the Securities Act to the disclosure required under the amended items in Exchange Act reports and proxy or information statements incorporated by reference into those reports.

Finally, we propose to amend our beneficial ownership disclosure requirements to require disclosure of shares pledged by named executive officers, directors and director nominees, as well as directors' qualifying shares.

## **II. Executive and Director Compensation Disclosure**

As discussed above, executive and director compensation disclosure has been required since 1933, and the Commission has had disclosure rules in this area since 1938. In 1992, the Commission proposed and adopted substantially revised rules that embody our current requirements.<sup>49</sup> In doing so, the Commission moved away from narrative disclosure and back to using tables that permit comparability from year to year and from

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<sup>47</sup> See, e.g., NASD and NYSE Rulemaking: Relating to Corporate Governance, Release No. 34-48745 (Nov. 4, 2003) [68 FR 64154] (the "NASD and NYSE Listing Standards Release"). This proposal would replace our existing disclosure requirement about director relationships that can affect independence.

<sup>48</sup> Proposed Item 407 of Regulation S-K and Regulation S-B.

<sup>49</sup> 1992 Release.

company to company. We believe that while the reasoning behind this approach remains fundamentally sound, significant changes are appropriate. Much of the concern with the current tables is also their strength: they are highly formatted and rigid.<sup>50</sup> Thus, information not specifically called for in the tables is sometimes not provided. For example, the highly formatted and specific approach has led some to suggest that items that do not fit squarely within a “box” specified by the rules need not be disclosed.<sup>51</sup> As another example, because the tables do not call for a single figure for total compensation, that information is generally not provided, although there is considerable commentary indicating that a single total figure is high on the list of information that some investors wish to have. To preserve the strengths of the current approach and build on them, we propose several steps:

- first, retaining the tabular approach to provide clarity and comparability while improving the tabular disclosure requirements;
- second, confirming that all elements of compensation must be included in the tables;
- third, providing a format for the Summary Compensation Table that requires disclosure of a single figure for total compensation; and

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<sup>50</sup> See, e.g., Council of Institutional Investors’ Discussion Paper on Executive Pay Disclosure, Executive Compensation Disclosure: How it Works Now, How It Can Be Improved, at 11 (available at [www.cii.org/site\\_files/pdfs/CII%20pay%20primer%20edited.pdf](http://www.cii.org/site_files/pdfs/CII%20pay%20primer%20edited.pdf)).

<sup>51</sup> For examples, see, e.g., The Corporate Counsel (Sept.–Oct. 2005) at 6-7; The Corporate Counsel (Sept.– Oct. 2004) at 7; but see 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 (October 20, 2004) (indicating that the explicit language of the current rules requires disclosure of such items), available at [www.sec.gov/news/speech/spch102004alb.htm](http://www.sec.gov/news/speech/spch102004alb.htm).

- finally, requiring narrative disclosure comprising both a general discussion and analysis of compensation and specific material information regarding tabular items where necessary to an understanding of the tabular disclosure.<sup>52</sup>

#### **A. Compensation Discussion and Analysis**

We propose requiring a new Compensation Discussion and Analysis section.<sup>53</sup>

This section would be an overview that would provide narrative disclosure that puts into context the compensation disclosure provided elsewhere.<sup>54</sup> This overview would explain material elements of the particular company’s compensation for named executive officers by answering the following questions:

- what are the objectives of the company’s compensation programs?
- what is the compensation program designed to reward and not reward?
- what is each element of compensation?
- why does the company choose to pay each element?

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<sup>52</sup> The discussion that follows focuses on changes to Item 402 of Regulation S-K, with Section II.C.1 explaining the different modifications proposed for Item 402 of Regulation S-B. References throughout the following discussion are to current or proposed Items of Regulation S-K, unless otherwise indicated.

<sup>53</sup> Proposed Item 402(b). In addition to the narrative Compensation Discussion and Analysis, we are proposing revisions to the rules so that, to the extent material, additional narrative disclosure would be provided following certain tables to supplement the disclosure in the table. See, e.g., Section II.B.3., discussing the narrative disclosure to the Summary Compensation Table and supplemental tables. We are also proposing disclosure of compensation committee procedures and processes as well as information regarding compensation committee interlocks and insider participation in compensation decisions as part of proposed Item 407 of Regulation S-K. See Section V.D., below.

<sup>54</sup> See Jeffrey N. Gordon, Executive Compensation: What’s the Problem, What’s the Remedy? The Case for Compensation Discussion and Analysis, 30 J. Corp. L. (forthcoming Spring 2006) (arguing that the SEC should require proxy disclosure that includes a “Compensation Discussion and Analysis” section that collects and summarizes all the compensation elements for senior executives, providing a “bottom line assessment” of the different compensation elements and an explanation as to why the board thinks such compensation is warranted). Also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=686464](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=686464).



- how does the company determine the amount (and, where applicable, the formula) for each element?
- how does each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

### **1. Intent and Operation of the Proposed Compensation Discussion and Analysis**

The purpose of the Compensation Discussion and Analysis disclosure would be to provide material information about the compensation objectives and policies for named executive officers without resorting to boilerplate disclosure. The Compensation Discussion and Analysis is intended to put into perspective for investors the numbers and narrative that follow it.

The proposed Compensation Discussion and Analysis requirement would be principles-based, in that it identifies the disclosure concept and provides several illustrative examples. The application of a particular example must be tailored to the company. However, the scope of the Compensation Discussion and Analysis is intended to be comprehensive, so that it would call for discussion of post-termination as well as in-service compensation arrangements.<sup>55</sup> Boilerplate disclosure would not comply with the proposed item. Examples of the issues that would potentially be appropriate for the company to address in given cases in the Compensation Discussion and Analysis include the following:

- policies for allocating between long-term and currently paid out compensation;

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<sup>55</sup> Forward looking information in the Compensation Discussion and Analysis would fall with the safe harbor for disclosure of such information. See Securities Act Section 27A [15 U.S.C. 77z-2] and Exchange Act Section 21E [15 U.S.C. 78u-5]).

- policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation;
- for long-term compensation, the basis for allocating compensation to each different form of award;
- for equity-based compensation, how the determination is made as to when the award is granted;
- what specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
- how specific elements of compensation are structured to reflect these items of the company's performance and the executive's individual performance;
- the factors considered in decisions to increase or decrease compensation materially;
- how compensation or amounts realizable from prior compensation (e.g., gains from prior option or stock awards) are considered in setting other elements of compensation (e.g., how gains from prior option or stock awards are considered in setting retirement benefits);
- the impact of accounting and tax treatments of a particular form of compensation;
- the company's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership), 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); and

- the role of executive officers in the compensation process.

The Compensation Discussion and Analysis should be sufficiently precise to identify material differences in compensation policies and decisions for individual named executive officers where appropriate. Where policies or decisions are materially similar, officers could be grouped together. Where, however, the policy for an executive officer is materially different, for example in the case of a principal executive officer, his or her compensation would be discussed separately.

## **2. Proposed Instructions to Compensation Discussion and Analysis**

We are proposing instructions to make clear that the Compensation Discussion and Analysis should focus on the material principles underlying the company's executive compensation policies and decisions, and the most important factors relevant to analysis of those policies and decisions, without using boilerplate language or repeating the more detailed information set forth in the tables and related narrative disclosures that follow. We also propose to include an instruction to make clear, as is currently the case, that companies are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse effect on the company, similar to the instruction with respect to the Compensation Committee Report today. In applying this instruction, we intend the standard for companies to use when determining whether disclosure would have an adverse effect on the company to be 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, periodic reports and other documents filed with us.<sup>56</sup> Similarly, to the extent a performance target has otherwise been disclosed publicly, disclosure under Item 402 would be required.

### **3. “Filed” Status of Compensation Discussion and Analysis**

The Compensation Discussion and Analysis will be considered a part of the proxy statement and any other filing in which it is included. Unlike the current Compensation Committee Report and Performance Graph, which would be eliminated under our proposals, as discussed below, the proposed Compensation Discussion and Analysis would be soliciting material and would be filed with the Commission. Therefore, it would be subject to Regulations 14A or 14C and to the liabilities of Section 18 of the Exchange Act.<sup>57</sup> In addition, to the extent that the Compensation Discussion and Analysis and any of the other disclosure regarding executive officer and director compensation or other matters is included or incorporated by reference into a periodic report, the disclosure would be covered by the certifications that principal executives officers and principal financial officers are required to make under the Sarbanes-Oxley Act of 2002.<sup>58</sup>

In adopting the current rules in 1992, the Commission took into account comments that the Compensation Committee Report should be furnished rather than filed

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<sup>56</sup> See Securities Act Rule 406 [17 CFR 230.406] and Exchange Act Rule 24b-2 [17 CFR 240.24b-2] (incorporating the criteria for non-disclosure set forth in Exemption 4 of the Freedom of Information Act [5 U.S.C. 552(b)(4)] and Exchange Act Rule 80(b)(4) [17 CFR 200.80(b)(4)]). Today’s proposed rules, like the current rules, would not require a company to seek confidential treatment under the procedures in Securities Act Rule 406 and Exchange Act Rule 24b-2.

<sup>57</sup> 15 U.S.C. 78r.

<sup>58</sup> Exchange Act Rules 13a-14 [17 CFR 240.13a-14] and 15d-14 [17 CFR 240.15d-14]. See also Certification of Disclosure in Companies’ Quarterly and Annual Reports, Release No. 34-46427 (Aug. 29, 2002) [67 FR 57275], at note 35 (the “Certification Release”) (stating that “the

to allow for a more open and robust discussion in the reports.<sup>59</sup> Little that we see in current Compensation Committee Reports suggests that this treatment has resulted in such discussions, or at least the more transparent disclosure that the comments suggested would result. Further, we believe that it is appropriate for companies to take responsibility for disclosure involving board matters as with other disclosure.

#### **4. Proposed Elimination of the Performance Graph and the Compensation Committee Report**

In light of the Compensation Discussion and Analysis proposal, we propose to eliminate the Performance Graph and the Compensation Committee Report that currently are required by our rules.<sup>60</sup> The graph and the report were intended to be intertwined and their purpose was to show the relationship, if any, between compensation and corporate performance, as reflected by stock price. Unfortunately, the Compensation Committee Report today often results in boilerplate disclosure that is of little benefit to investors.<sup>61</sup> Further, given the widespread availability of stock performance information about companies, industries and indexes through business-related Web sites or similar sources, we believe that the requirement for the Performance Graph is outdated, particularly since the disclosure in the Compensation Discussion and Analysis regarding the elements of corporate performance that a given company's policies might reach is intended to allow

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certification in the annual report on Form 10-K or 10-KSB would be considered to cover the Part III information in a registrant's proxy or information statement as and when filed").

<sup>59</sup> 1992 Release, at Section II.H.

<sup>60</sup> The Compensation Committee Report is currently required by Item 402(k) and the Performance Graph is currently required by Item 402(l).

<sup>61</sup> See Martin D. Mobley, Compensation Committee Reports Post-Sarbanes-Oxley: Unimproved Disclosure for Executive Compensation Policies and Practices, 2005 Colum. Bus. L. Rev. 111 (2005).

broader discussion than just that of the relationship of compensation to the performance of the company as reflected by stock price.

### **Request for Comment**

- Does the proposed Compensation Discussion and Analysis provide companies with the same flexibility as MD&A to provide a clear picture to investors?
- Are there any further changes that we can make to avoid boilerplate disclosure about executive compensation?
- Is there any significant impact by not having the report over the names of the compensation committee of the board of directors? If so, please explain in detail.
- Would any significant impact result from treating the Compensation Discussion and Analysis as filed and not furnished? A commenter that prefers furnishing over filing should describe any benefits that would be obtained by treating the material as furnished. In particular, such a commenter should describe those benefits in the context of the expected benefits of the Commission's decision in 1992 to treat the report of the Compensation Committee as furnished and should address whether and why those benefits were achieved or not achieved.
- Are there any other specific items we should list in the rule as possibly material information? Are there any items that are listed that should not be?
- Are there any items that we should explicitly mandate be disclosed by every issuer?
- Should performance targets continue to be excludable based on the potential adverse competitive effect on the company of their disclosure? Why or why not? If so, what should be the standard for exclusion? Are there any other items that

should be excludable based on potential adverse competitive effect on the company of their disclosure?

- Should we retain the Performance Graph?

## **B. Compensation Tables**

We believe that much about the tabular approach to eliciting compensation disclosure is sound.<sup>62</sup> We also believe, however, that the tables should be reorganized and streamlined to provide a clearer and more logical picture of total compensation and its elements for named executive officers. We propose reorganizing the compensation tables and their related narrative disclosure into three broad categories:

1. compensation with respect to the last fiscal year (and the two preceding fiscal years), as reflected in a revised Summary Compensation Table that presents compensation paid currently or deferred (including options, restricted stock and similar grants) and compensation consisting of current earnings or awards that are part of a plan, and as supplemented by two tables providing back-up information for certain data in the Summary Compensation Table;<sup>63</sup>
2. holdings of equity-based interests that relate to compensation or are potential sources of future compensation, focusing on compensation-related equity-based interests that were awarded in prior years<sup>64</sup> and are “at risk,” as well as

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<sup>62</sup> The tabular disclosure and related narrative disclosure under proposed Item 402 would apply, as does existing Item 402, to named executive officers. As discussed below in Section II.B.6.a., we are proposing certain changes to the definition of named executive officer.

<sup>63</sup> The two tables that would supplement the Summary Compensation Table would be the Grants of Performance-Based Awards Table, discussed below in Section II.B.2.a., and the Grants of All Other Equity Awards Table, discussed below in Section II.B.2.b. A proposed narrative disclosure requirement accompanying these three tables is discussed below in Section II.B.3.

<sup>64</sup> Under the proposals, these interests would be disclosed as current compensation for those prior years.

recent realization on these interests, such as through vesting of restricted stock or the exercise of options and similar instruments;<sup>65</sup> and

3. retirement and other post-employment compensation, including retirement and deferred compensation plans, other retirement benefits and other post-employment benefits, such as those payable in the event of a change in control.<sup>66</sup>

Reorganizing the tables along these themes should help investors understand how compensation components relate to each other. At the same time we would retain the ability for investors to use the tables to compare compensation from year to year and from company to company.

We note that in more clearly organizing the compensation tables to explain how the elements relate to each other, we may in some situations be requiring disclosure of both amounts earned (or potentially earned) and amounts subsequently paid out. This approach raises the risk of “double counting” some elements of compensation. However, we believe the risk inherent in such double disclosure is outweighed by the clearer and more complete picture it would provide to investors. We would encourage companies to use the narrative following the tables (and where appropriate the Compensation

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<sup>65</sup> Information regarding holdings of such equity-based interests that relate to compensation would be disclosed in the Outstanding Equity Awards at Fiscal Year-End Table, discussed below in Section II.B.4.a. Information regarding realization on holdings of equity-related interests would be required to be disclosed in the Option Exercises and Stock Vested Table discussed below in Section II.B.4.b.

<sup>66</sup> The proposed disclosure regarding retirement and post-employment compensation would be required in the Retirement Plan Potential Annual Payments and Benefits Table, discussed below in Section II.B.5.a., the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table, discussed below in Section II.B.5.b., and the narrative disclosure requirement for other potential post-employment payments discussed below in Section II.B.5.c.



Discussion and Analysis) to explain how disclosures relate to each other in their particular circumstances.

**1. Compensation to Named Executive Officers in the Last Three Completed Fiscal Years -- The Summary Compensation Table and Related Disclosure**

Under today's proposals, the Summary Compensation Table would continue to serve as the principal disclosure vehicle regarding executive compensation. This table, with the proposed revisions, would show the named executive officers' compensation for each of the last three years, whether or not actually paid out. Consistent with current requirements, the revised Summary Compensation Table would continue to require disclosure of compensation for each of the company's last three completed fiscal years.<sup>67</sup>

However, the proposals would require disclosure of a figure representing total compensation, as reflected in other columns of the Summary Compensation Table, and would simplify the presentation from that in the current table. As described in greater detail below, the proposals also provide for two supplementary tables disclosing additional information about grants of performance-based awards and all other equity awards, respectively. Narrative disclosure would follow the three tables, providing disclosure of material information necessary to an understanding of the information disclosed in the tables.

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<sup>67</sup> Current Instruction to Item 402(b), permitting exclusion of information for fiscal years prior to the last completed fiscal year if the registrant was not a reporting company pursuant to Exchange Act Sections 13(a) or 15(d) at any time during that year, unless the registrant previously was required to provide information for any such year in response to a Commission filing requirement, would be retained and redesignated as proposed Instruction 1 to Item 402(c).

**SUMMARY COMPENSATION TABLE**

Name and Principal Position	Year	Total (\$)	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
PEO <sup>68</sup>	_____ _____ _____							
PFO <sup>69</sup>	_____ _____ _____							
A	_____ _____ _____							
B	_____ _____ _____							
C	_____ _____ _____							

**Request for Comment**

- Should the Summary Compensation Table continue as it currently does to require disclosure of compensation for each of the company’s last three fiscal years, or is only the last completed fiscal year necessary in light of the availability of

<sup>68</sup> “PEO” refers to principal executive officer. See Section II.B.6.a. below for a description of the proposed named executive officers for whom compensation disclosure would be required.

<sup>69</sup> “PFO” refers to principal financial officer.

historical data on compensation through the Commission's EDGAR system and other sources?

- Should we require all of the proposed disclosures discussed below in addition to those in the Summary Compensation Table, or does the Summary Compensation Table itself provide an adequate picture of compensation? Is there some other combination of the Summary Compensation Table with other proposed disclosures that would fulfill our objectives?

**a. Total Compensation Column**

We propose to modify the Summary Compensation Table to provide a clearer picture of total compensation. We propose requiring that all compensation be disclosed in dollars and that a total of all compensation be provided.<sup>70</sup> The new column disclosing total compensation would appear as the first column providing compensation information -- column (c).<sup>71</sup> This column would aggregate the total dollar value of each form of compensation quantified in the columns that would follow it (columns (d) through (i)). The proposed "Total" column would respond to concerns that investors, analysts and other users of Item 402 disclosure cannot compute aggregate amounts of compensation using current disclosure in a manner that is accurate or is comparable across years or companies.

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<sup>70</sup> Proposed Instruction 2 to Item 402(c) (requiring all compensation values in the Summary Compensation Table to be reported in dollars). Currently, some stock-based compensation is disclosed in per share increments rather than in dollar amounts. The instruction would further require, where compensation was paid or received in a different currency, footnote disclosure identifying that currency and describing the rate and methodology used for conversion to dollars.

<sup>71</sup> Columns (a) and (b) would, as is currently the case, specify the executive officer and the year in question.

## **Request for Comment**

- Should we include a requirement to disclose a total compensation amount?
- Will a total compensation number provide investors with meaningful information about compensation? If not, why? Would disclosure of a total compensation number result in any unintended consequences? If so, how can they be mitigated?
- Should total compensation be calculated in a different manner from that proposed? For example, with respect to stock-based and option-based awards, should exercise or vesting date valuations be used instead?
- Is the proposed new instruction which would direct that all compensation values are to be reported in U.S. dollars necessary? Are there particular circumstances we should address regarding disclosure of compensation in foreign currencies?

### **b. Salary and Bonus Columns**

The next columns we are proposing are the salary and bonus columns (columns (d) and (e), respectively), which would be retained substantially in their current form. However, we propose certain changes that should give an investor a clearer picture of the total amount earned, the amount deferred for the year, and the total amount of deferred compensation that may be paid out at a later date.

Compensation that is earned, but for which payment will be deferred, would be included in the salary, bonus or other column, as appropriate.<sup>72</sup> A new instruction, applicable to the entire Summary Compensation Table, would provide that if receipt of any amount of compensation is currently payable (which must be included in the

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<sup>72</sup> This is the case today for salary and bonus. This aspect of current Instruction 1 to Item 402(b)(2)(iii)(A) and (B) will be expanded and redesignated as Proposed Instruction 4 to Item 402(c).

appropriate column) but has been deferred for any reason, the amount so deferred must be disclosed in a footnote to the applicable column.<sup>73</sup> As described below, the amount deferred would also generally be reflected as a contribution in the deferred compensation presentation.<sup>74</sup> The new footnote disclosure of amounts deferred would help to clarify the extent to which amounts disclosed in the proposed Nonqualified Defined Contribution and Other Deferred Compensation Plans Table described below represent compensation already reported, rather than additional compensation.

We are also proposing a change eliminating the delay that exists under current rules where salary and bonus for the most recent fiscal year are determined following compliance with Item 402 disclosure. Under our proposal, where salary and bonus cannot be calculated as of the most recent practicable date, a current report under Item 5.02 of Form 8-K would be triggered by a payment, decision or other occurrence as a result of which such amounts become calculable in whole or part.<sup>75</sup> The Form 8-K would include disclosure of the salary or bonus amount and a new total compensation figure including that salary or bonus amount.

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<sup>73</sup> Currently, the requirement is triggered only if the officer elects the deferral. We propose to revise this to cover all deferrals no matter who has initiated them.

<sup>74</sup> See Section II.B.5.b., describing the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table. Disclosure of these amounts as contributions would be required for nonqualified deferred compensation plans. This disclosure would not be required for qualified plans. Nonqualified deferred compensation plans and arrangements provide for the deferral of compensation that does not satisfy the minimum coverage, nondiscrimination and other rules that “qualify” broad-based plans for favorable tax treatment under the Internal Revenue Code.

<sup>75</sup> Proposed Instruction 3 to Item 5.02(e) of Form 8-K and proposed Instruction 1 to Item 402(c)(2)(iv) and (v). Currently, in the event that such amounts are not determinable at the most recent practicable date, they are generally reported in the annual report on Form 10-K or proxy statement for the following fiscal year. We believe providing the information more quickly is appropriate and are therefore proposing the use of a current report on Form 8-K. Proposed Instruction 1 to Item 402(c)(2)(iv) and (v) would require that the company disclose in a footnote that the salary or bonus is not calculable through the latest practicable date and the date that the salary or bonus is expected to be determined.

## **Request for Comment**

- Is the proposed presentation of deferred compensation in the Summary Compensation Table and related footnotes, along with the proposals outlined below, the best means for communicating the portion of compensation that is deferred?
- Are there ways that we could better clarify how the amounts that would be identified as deferred in a footnote to the Summary Compensation Table relate to the amounts that would be required in the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table?
- Is the proposed change to Form 8-K to eliminate the delay in disclosing salary or bonus when they cannot be calculated as of the most recent practicable date appropriate?

### **c. Plan-Based Awards**

The next three proposed columns -- Stock Awards, Option Awards and Non-Stock Incentive Plan Compensation -- cover plan-based awards.

#### **i. Stock Awards and Option Awards Columns**

The Stock Awards Column (proposed column (f)) would disclose stock-related awards that derive their value from the company's equity securities or permit settlement by issuance of the company's equity securities, such as restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar instruments that do not have option-like features.<sup>76</sup> Valuation would be based on

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<sup>76</sup> Generally speaking, a restricted stock award is an award of stock subject to vesting conditions, such as performance-based conditions or conditions based on continued employment for a specified period of time. This type of award is referred to as "nonvested equity shares" in FAS 123R. Phantom stock, phantom stock units, common stock equivalent units and other similar

the grant date fair value of the award determined pursuant to Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (FAS 123R) for financial reporting purposes. Stock awards subject to performance-based conditions would also be included in this column to ensure consistent reporting of stock awards and to ensure their inclusion in the proposed Summary Compensation Table.<sup>77</sup>

Awards of options, stock appreciation right grants, and similar stock-based compensation instruments that have option-like features (proposed column (g)) would be disclosed in a manner similar to the proposed treatment of stock and other stock-based awards.<sup>78</sup> Instead of the current disclosure of the number of securities underlying the awards, this column would require disclosure of the grant date fair value of the award as determined pursuant to FAS 123R for financial reporting purposes. In order to calculate a total dollar amount of compensation, the value rather than the number of securities underlying an award must be used. The FAS 123R valuation would be used whether the award itself is in the form of stock, options or similar instruments or the award is settled in cash but the amount of payment is tied to performance of the company's stock. We

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awards are typically awards where an executive obtains a right to receive payment in the future of an amount based on the value of a hypothetical, or notional, amount of shares of common equity (or in some cases stock based on that value). To the extent that the terms of phantom stock, phantom stock units, common stock equivalents or other similar awards include option-like features, the awards would be required to be included in the Option Awards column. Currently, restricted stock awards are valued in the Summary Compensation Table by multiplying the closing market price of the company's unrestricted stock on the date of grant by the number of shares awarded.

<sup>77</sup> These performance-based stock awards can currently be reported at the company's election as incentive plan awards. See current Instruction 1 to Item 402(b)(2)(iv). Our proposal would eliminate this option. See the discussion of what are considered performance-based conditions in note 87, below.

<sup>78</sup> A stock appreciation right usually gives the executive the right to receive the value of the increase in the price of a specified number of shares over a specified period of time. These awards may be settled in cash or in shares.

propose to eliminate the current requirement in the Options/SAR Grants in Last Fiscal Year Table to report the potential realizable value of each option grant under 5% or 10% increases in value or the present value of each grant (computed under any option pricing model),<sup>79</sup> because these alternative disclosures would no longer be necessary if the grant date fair value of equity-based awards is included in the Summary Compensation Table.

A new instruction would require a footnote referencing the discussion of the relevant assumptions in the notes to the company's financial statements or to the discussion of relevant assumptions in the MD&A.<sup>80</sup> The same proposed instruction would also provide that the referenced sections will be deemed to be part of the disclosure provided pursuant to Item 402. The referenced sections containing this disclosure are required in the company's annual report to shareholders that must precede or accompany the company's proxy statement.<sup>81</sup> In the case of Internet disclosure of proxy materials, companies could provide hyperlinks from the proxy statement to the referenced sections contained in the annual report.<sup>82</sup>

Under FAS 123R, the compensation cost is initially measured based on the grant date fair value of an award.<sup>83</sup> The key measurement principle behind the accounting

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<sup>79</sup> Current Item 402(c)(2)(vi).

<sup>80</sup> Proposed Instruction 1 to Item 402(c)(2)(vi) and (vii).

<sup>81</sup> See Exchange Act Rule 14a-3 [17 CFR 240.14a-3].

<sup>82</sup> We recently proposed rules that would allow companies and other persons to use the Internet to satisfy proxy material delivery requirements. Internet Availability of Proxy Materials, Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].

<sup>83</sup> Under FAS 123R, the classification of an award as an equity or liability award is an important aspect of the accounting because the classification will affect the measurement of compensation cost. Awards with cash-based settlement, repurchase features, or other features that do not allow an employee to bear the risks and rewards normally associated with share ownership for a specified period of time would be classified as liability awards under FAS 123R. For an award classified as an equity award under FAS 123R, the compensation cost recognized is fixed for a particular award, and absent modification, is not revised with subsequent changes in market prices or other assumptions used for purposes of the valuation. In contrast, liability awards are initially



standard, measuring stock-based payments at grant date fair value, is also followed in our proposals. Under FAS 123R, the compensation cost calculated as the fair value is generally recognized for financial reporting purposes over the period in which the employee is required to provide service in exchange for the award (generally the vesting period). Under our proposals, the compensation cost calculated as the grant date fair value will be shown as compensation in the year in which the grant is made. We believe that this approach is more consistent with the purpose of executive compensation disclosure. We are in effect proposing an approach that subscribes to the measurement method of FAS 123R based on grant date fair value, but that also provides for immediate disclosure of compensation as preferable for compensation reporting purposes to the timing of recognition of the compensation cost for the company's financial statement reporting purposes.

To consolidate related elements of compensation, the Stock Awards and Option Awards columns would also require disclosure of the earnings on outstanding awards in the respective categories.<sup>84</sup> New instructions would require footnote identification and quantification of all earnings, whether the earnings were paid during the fiscal year, payable during the period but deferred, or payable by their terms at a later date but earned

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measured at fair value on the grant date, but for purposes of recognition in financial statement reporting are then re-measured at each reporting date through the settlement date under FAS 123R. These re-measurements would not be the basis for executive compensation disclosure unless the award has been modified, as described later in this proposal.

<sup>84</sup> These earnings are currently reportable in the Other Annual Compensation or All Other Compensation columns of the Summary Compensation Table. Current Item 402(b)(2)(iii)(C)(2) requires disclosure of earnings on restricted stock, options, and SARs paid during the fiscal year (or payable during that period but deferred at the election of the named executive officer), to the extent those earnings are above-market or preferential. The proposal would require disclosure of all such earnings, rather than merely any above-market or preferential portion. Current Item 402(b)(2)(iii)(C)(3) requires similar disclosure of all earnings on long-term incentive plan compensation. See also current Item 402(b)(2)(v)(B) and (C).

during the year.<sup>85</sup> Previously awarded options or freestanding stock appreciation awards that the company repriced or otherwise materially modified during the last fiscal year would be disclosed based on the total fair value of the award as so modified.<sup>86</sup>

If the award has no performance conditions, but instead vests with the passage of time and continued employment, then the number of shares underlying the award and other details regarding the award would be disclosed in a separate table covering grants of equity awards supplementing the Summary Compensation Table.<sup>87</sup> If the award has a performance condition, then the details on the estimated future payouts will be disclosed in a second separate supplemental table covering grants of performance-based awards.<sup>88</sup>

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<sup>85</sup> Proposed Instruction 3 to Item 402(c)(2)(vi) and (vii) and Proposed Instruction 2 to Item 402(c)(2)(viii).

<sup>86</sup> See current Instruction 3 to Item 402(b)(2)(iv) and proposed Instruction 2 to Item 402(c)(2)(vi) and (vii). Under FAS 123R, unlike under our proposal, only the incremental compensation cost is recognized for a modified award.

<sup>87</sup> See Section II.B.2.b., discussing the Grants of All Other Equity Awards Table required by proposed Item 402(e). As defined in Appendix E of FAS 123R, a performance condition is “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). Attaining a specified growth rate in return on assets, obtaining regulatory approval to market a specified product, selling shares in an initial public offering or other financing event, and a change in control are examples of performance conditions for purposes of this Statement. A performance target also may be defined by reference to the same performance measure of another entity or group of entities. For example, attaining a growth rate in earnings per share that exceeds the average growth rate in earnings per share of other entities in the same industry is a performance condition for purposes of this Statement. A performance target might pertain either to the performance of the enterprise as a whole or to some part of the enterprise, such as a division or an individual employee.” An award also would be considered to have a performance condition if it is subject to a market condition, which is “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).”

<sup>88</sup> See Section II.B.2.a., discussing the Grants of Performance-Based Awards Table.

## Request for Comment

- Is the proposed presentation of stock awards that do not have option-like features in the Summary Compensation Table the best means for presenting restricted stock and similar awards?
- Is FAS 123R the appropriate approach for valuing equity-based awards, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units, options, stock appreciation rights and other similar awards for purposes of Item 402 disclosure? If not, why not and what other valuation methods would be appropriate? Would any other valuation method provide the same comparability? If a different approach were used, would investors be confused by differences between the grant date fair value for financial reporting purposes and the value in the compensation tables?<sup>89</sup>
- Should the expected term assumption used in computing the grant date fair value for financial statement purposes under FAS 123R also be used in measuring the value of an individual named executive officer's compensation for the purposes of Item 402? Or, should an expected term assumption used to determine an individual named executive officer's compensation be used if it differs from the expected term assumption used for FAS 123R purposes?<sup>90</sup> Should companies use

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<sup>89</sup> See, e.g., Jonathan Weil and Betsy McKay, Coke Developed a New Way to Value Options, But Company Will Return to its Classic Formula, Wall St. J., Mar. 7, 2003, at C3 (highlighting potential issue of using one valuation methodology for financial statements and another for executive compensation disclosure).

<sup>90</sup> FAS 123R requires a company to aggregate individuals receiving awards into relatively homogenous groups with respect to exercise and post-vesting employment termination behaviors for the purpose of determining expected term, for example executives and non-executives. Our proposals today are not intended to change the method used to value employee share options for purposes of FAS 123R or to affect the judgments as to reasonable groupings for purposes of determining the expected term assumption required by FAS 123R. Under our proposals, where a company uses more than one group, the measurement of grant date fair value for purposes of Item

the full term rather than an expected term assumption for calculations for named executive officers? Would the complexity of such an approach for investors or the additional burden on companies outweigh any advantages, such as possible increased comparability among companies, of adjusting assumptions?

- Is the timing of reporting stock-based compensation in our proposals the best approach? Should stock-based compensation instead be reflected in Item 402 according to the same time schedule by which it is recognized for a company's financial statement reporting purposes?
- Should the valuation method and all of the assumptions regarding the valuation also be disclosed in the proxy statement when they are required to be disclosed, described and analyzed elsewhere in a document furnished to shareholders, including in the notes to the financial statements?
- We propose treating a modification of an award as a new award and requiring disclosure of the total grant date fair value at the time of modification. Would it be more appropriate to require only disclosure of incremental compensation as is the approach under FAS 123R?
- Should we eliminate as proposed the current instruction allowing performance-based stock awards to be reported at the company's election as incentive plan awards? If not, please explain whether the availability of this election is helpful to and not confusing to investors.

## **ii. Non-Stock Incentive Plan Compensation Column**

We propose that the Non-Stock Incentive Plan Compensation column (proposed

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402 would be derived using the expected term assumption for the group that includes the named executive officers (or the group that includes directors for purposes of proposed Item 402(1)).

column (h)) would report the dollar value of all other amounts earned during the fiscal year pursuant to incentive plans.<sup>91</sup> This column would be limited to awards where the relevant performance measure under the incentive plan is not based on the price of the company's equity securities or the award may not be settled by issuance of a company's equity securities; those awards would instead be disclosed in the Stock Awards and Option Awards columns discussed above.<sup>92</sup> Performance-based compensation under a long-term plan that is not tied to the performance of the company's stock (but instead is tied to other measures such as a return on assets, return on equity, performance of a division, or other such measures) would be disclosed in the Summary Compensation Table in the year when the relevant specified performance criteria under the plan are satisfied and the compensation earned, whether or not payment is actually made to the named executive officer in that year. The grant of an award (providing for future compensation if such performance measures are satisfied) under such a plan would be disclosed in the supplemental Grants of Performance-Based Awards Table in the year of grant, which would generally be some year prior to the year in which performance-based compensation under the plan is reported in the Summary Compensation Table.<sup>93</sup> Because

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<sup>91</sup> Proposed Item 402(c)(2)(viii). An incentive plan generally provides for compensation intended to serve as an incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the company or an affiliate, the company's stock price, or any other measure. See proposed Item 402(a)(6)(iii) for definitions of "incentive plan" and "non-stock incentive plan."

<sup>92</sup> Awards disclosed in this column are not covered by FAS 123R for financial reporting purposes because they do not involve share-based payment arrangements. Awards that involve share-based payment arrangements would be disclosed in the Stock Awards or Option Awards columns, as appropriate.

<sup>93</sup> See Section II.B.2.a., discussing the Grants of Performance-Based Awards Table. Under the proposals, once the disclosure has been provided in the Summary Compensation Table when the specified performance criteria have been satisfied and the compensation earned, and the grant of the award has been disclosed in the Grants of Performance-Based Awards Table, no further disclosure would be required under proposed Item 402 when payment is actually made to the named executive officer.

there is not one clearly required or accepted standard for measuring the value at grant date of these non-stock based performance-based awards that reflects the applicable performance contingencies, as there is for equity-based awards with FAS 123R, we do not propose to include such a value in the Summary Compensation Table, but instead would continue the current disclosure format of reflecting these items of compensation when earned.<sup>94</sup>

As with the Stock Awards and Option Awards columns, earnings on outstanding awards of other incentive plans would also be included in the Non-Stock Incentive Plan Compensation column.

**Request for Comment**

- Since there is not one clearly required or accepted standard for measuring the value at grant date of those cash awards that reflect performance contingencies, is our approach to include the amounts in the Summary Compensation Table when earned appropriate? Are there particular models or standards that would provide a basis for measuring the value of these types of awards at grant date that we should consider incorporating into our rules?
- Should earnings on outstanding awards be reported as proposed in the applicable award column or should they be reported in another way, such as in separate or different columns?

**d. All Other Compensation Column**

The final column in the Summary Compensation Table would disclose all other compensation not required to be included in any other column. This approach would

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<sup>94</sup> Current Items 402(b)(2)(iv)(C) and 402(e).

allow the capture of all current compensation in the Summary Compensation Table and also would allow a total compensation calculation. We confirm that disclosure of all compensation would clearly be required under the proposals.<sup>95</sup>

We propose to clarify the disclosure required in the All Other Compensation Column (proposed column (i)) in two principal respects:

- consistent with the requirement that the Summary Compensation Table disclose all compensation, we would state explicitly that compensation not properly reportable in the other columns reporting specified forms of compensation must be reported in this column; and
- to simplify the Summary Compensation Table and eliminate confusing distinctions between items currently reported as “Annual” and “Long Term” compensation, we would move into this column all items currently reportable as “Other Annual Compensation.”<sup>96</sup>

We also propose that each item of compensation included in the All Other Compensation column that exceeds \$10,000 be separately identified and quantified in a footnote. We believe that the \$10,000 threshold balances our desire to avoid disclosure of clearly de minimis matters against the interests of investors in the nature of items comprising compensation. Each item of compensation less than that amount would be included in the column (other than aggregate perquisites and other personal benefits less than \$10,000 as discussed below), but would not be required to be identified by type and

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<sup>95</sup> The only exception, as discussed below, would be perquisites and personal benefits if they aggregated less than \$10,000 for a named executive. The 1992 Release, at Section II.A.4, also noted “the revised item includes an express statement that it requires disclosure of all compensation to the named executive officers and directors for services rendered in all capacities to the registrant and its subsidiaries.” See also current Item 402(a)(2).

<sup>96</sup> Current Item 402(b)(2)(iii)(c).

amount.<sup>97</sup> Items that would be disclosed in the All Other Compensation column would include, but would not be limited to, the items discussed below.

### **Request for Comment**

- Should all compensation no matter how de minimis be required to be disclosed?

Will companies be able to track this information without undue burden? Is

\$10,000 the appropriate threshold for separate identification and quantification?

#### **i. Earnings on Deferred Compensation**

We propose requiring disclosure in the All Other Compensation column of all earnings on compensation that is deferred on a basis that is not tax-qualified, including non-tax qualified defined contribution retirement plans.<sup>98</sup> Currently, these earnings must be disclosed only to the extent of any portion that is “above-market or preferential.”<sup>99</sup>

This limitation has generated criticism that Item 402 permits companies to avoid disclosure of substantial compensation.<sup>100</sup>

Separate footnote identification and quantification of all such earnings would be required if the amount exceeds \$10,000.<sup>101</sup> A company would be permitted to identify by footnote the portion of any earnings that it considered to be paid at an above-market rate,

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<sup>97</sup> See Section II.B.1.d.iii. regarding separate standards for identification of perquisites and other personal benefits.

<sup>98</sup> Proposed Item 402(c)(2)(ix)(B).

<sup>99</sup> Current Items 402(b)(2)(iii)(C)(2) and 402(b)(2)(v)(B). An instruction specifies that interest is above-market only if the rate exceeds 120% of the applicable federal long-term rate. Furthermore, earnings disclosure is currently required in the Other Annual Compensation column or the All Other Compensation column, depending upon when paid or payable, complicating the preparation process and generating confusion among users of the Summary Compensation Table.

<sup>100</sup> See, e.g., Ellen E. Schultz, Buried Treasure: Well-Hidden Perk Means Big Money for Top Executives, Wall St. J., Oct. 11, 2002, at A1.

<sup>101</sup> Proposed Instruction 3 to Item 402(c)(2)(ix). Consistent with current requirements, if applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest



provided that the footnote explained the company’s criteria for determining the portion considered “above-market.”<sup>102</sup>

### **Request for Comment**

- Should we require, as proposed, disclosure of all earnings on compensation that is deferred on a basis that is not tax-qualified or should we require disclosure only of above-market or preferential earnings? If the latter, please explain why such an approach is more useful or informative for investors than our proposed approach.

### **ii. Increase in Pension Value**

We propose requiring in the All Other Compensation Column the aggregate of increase in actuarial value to the executive officer of defined benefit and actuarial plans (including supplemental plans) accrued during the year.<sup>103</sup>

An instruction would specify that this disclosure applies to each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental employee retirement plans, but excluding defined contribution plans.<sup>104</sup>

The retirement section, discussed below, would provide more information regarding these covered plans.<sup>105</sup> In contrast to defined contribution plans, for which the Summary

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at the highest rate. Proposed Instruction 5 to Item 402(c)(2)(ix), which is derived from current Instruction 3 to Item 402(b)(2)(iii)(C).

<sup>102</sup> Proposed Instruction 5 to Item 402(c)(2)(ix).

<sup>103</sup> Proposed Item 402(c)(2)(ix)(G).

<sup>104</sup> Proposed Instruction 6 to Item 402(c)(2)(ix). Defined benefit plans include, for example, cash balance plans in which the retiree’s benefit may be determined by the amount represented in an account rather than based on a formula referencing salary while still employed.

<sup>105</sup> See Section II.B.5.a., discussing the proposed Retirement Plan Potential Annual Payments and Benefits Table.

Compensation Table requires disclosure of company contributions,<sup>106</sup> Item 402 does not currently require disclosure of the annual increase in value of defined benefit plans, such as pension plans, in which the named executive officers participate.<sup>107</sup> The annual increase in actuarial value of these plans may be a significant element of compensation that is earned on an annual basis, thus we believe it is appropriate to include these values in the computation of total compensation.

Such disclosure is necessary to permit the Summary Compensation Table to reflect total compensation for the year. Such disclosure would also permit a full understanding of the company's compensation obligations to named executive officers, given that defined benefit plans guarantee what can be a lifetime stream of payments and allocate risk of investment performance to the company and its shareholders. In addition, commentators have noted that the absence of such a disclosure requirement creates an incentive to shift compensation to pensions, results in the understatement of non-performance-based compensation, and distorts pay comparisons between executives and between companies.

### **Request for Comment**

- Is disclosure of any additional information necessary to provide investors with meaningful information about the compensation earned annually through these plans?

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<sup>106</sup> Current Item 402(b)(2)(v)(D), which requires annual registrant contributions or other allocations to vested and unvested defined contribution plans to be disclosed in the All Other Compensation column.

<sup>107</sup> A typical defined contribution plan is a retirement plan in which the company and/or the executive makes contributions of a specified amount, and the amount that is paid out to the executive depends on the return on investments from the contributed amounts. A typical defined benefit plan is a retirement plan in which the company pays the executive specified amounts at retirement which are not tied to investment performance of the contributions that fund the plan.

- Is there any particular form of defined benefit or actuarial plan for which the proposed disclosure format is not suitable? If so, how could the proposed disclosure requirement be adapted for such plans?
- Should this disclosure instead be provided as a separate column in the Summary Compensation Table?
- Is the aggregate increase in accrued actuarial value the best measure for disclosing annual compensation earned under defined benefit and actuarial plans? If not, why? What other method should be used?
- Rather than requiring disclosure of the value based on the executive officer's benefit, should we require disclosure based on the company's cost for the plan? Under our proposals, disclosure of assumptions would be considered by companies in the narrative disclosure following the Summary Compensation Table and supplementary tables. Are there other preferable approaches? Should we otherwise require disclosure of any of the details of the calculation?
- Is it possible to provide meaningful disclosure about total compensation absent tabular disclosure of the compensation earned annually through these plans? If so, how? Would such an approach be preferable?

### **iii. Perquisites and Other Personal Benefits**

Perquisites and other personal benefits would be included in the All Other Compensation column. We propose changes to disclosure of perquisites and other personal benefits to improve disclosure and facilitate computing a total amount of compensation. We propose to require the disclosure of perquisites and other personal benefits unless the aggregate amount of such compensation is less than \$10,000. We

realize this may result in the total amount of compensation reportable in the Summary Compensation Table being slightly less than a complete total amount of compensation, but we believe \$10,000 is a reasonable balance between investors' need for disclosure of total compensation and the burden on a company to track every benefit, no matter how small. The current provision permits omission of perquisites and other personal benefits if the aggregate amount of such compensation is the lesser of either \$50,000 or 10% of the total of annual salary and bonus.<sup>108</sup> We believe this current rule permits the omission of too much information that investors may consider material.

We propose requiring footnote disclosure that identifies perquisites and other personal benefits. We propose modifying the current requirement that only perquisites and other personal benefits that are 25% of the total amount for each named executive officer are required to be identified and quantified. We propose modifying this requirement so that, unless the aggregate value of perquisites and personal benefits is less than \$10,000, any perquisite or other personal benefit is identified and, if it is valued at the greater of \$25,000 or ten percent of total perquisites and other personal benefits, its value would be disclosed.<sup>109</sup> Consistent with our objective to streamline the Summary Compensation Table, the revised threshold is intended to avoid requiring separate quantification of perquisites having de minimis value. As is the case today, tax "gross-ups" or other reimbursement of taxes owed with respect to any compensation, including but not limited to perquisites and other personal benefits, would be separately quantified and identified in the tax reimbursement category described below, even if the associated

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<sup>108</sup> Current Item 402(b)(2)(iii)(C)(1).

<sup>109</sup> Proposed Instruction 3 to Item 402(c)(2)(ix). Compare current Instruction 1 to Item 402(b)(2)(iii)(C).

perquisites or other personal benefits are eligible for exclusion or would not require identification or footnote quantification under the proposal. Where perquisites are subject to identification, they must be described in a manner that identifies the particular nature of the benefit received. For example, it is not sufficient to characterize generally as “travel and entertainment” different company-financed benefits, such as clothing, jewelry, artwork, theater tickets and housekeeping services.<sup>110</sup>

For decades questions have arisen as to what is a perquisite or other personal benefit required to be disclosed. We continue to believe that it is not appropriate for Item 402 to define perquisites or personal benefits, given that different forms of these items continue to develop, and thus a definition would become outdated. Further, we are concerned that sole reliance on a bright line definition in our rules might provide an incentive to characterize perquisites or personal benefits in ways that would attempt to circumvent the bright lines.<sup>111</sup>

In today’s proposals, perquisites and personal benefits are required to be disclosed for both named executive officers and directors. This discussion regarding perquisites and personal benefits therefore applies in the context of disclosure for both named

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<sup>110</sup> See In the Matter of Tyson Foods, Inc. and Donald Tyson, Litigation Release No. 34-51625 (Apr. 28, 2005) (failure to identify perquisites).

<sup>111</sup> In the 1970s and early 1980s, the Commission issued several interpretive releases regarding executive compensation disclosure issues, including disclosure of perquisites and personal benefits. See Disclosure of Management Remuneration, Release No. 33-5856 (Aug. 18, 1977) [42 FR 43058]; Disclosure of Management Remuneration, Release No. 33-5904 (Feb. 6, 1978) [43 FR 6060]; Disclosure of Management Remuneration, Release No. 33-6027 (Feb. 22, 1979) [44 FR 16368]; Disclosure of Management Remuneration, Release No. 33-6166 (Dec. 12, 1979) [44 FR 74803]; and Interpretation of Rules Relating to Disclosure of Management Remuneration, Release No. 33-6364 (Dec. 3, 1981) [46 FR 60421]. In Section I of the 1983 Release, as part of a substantial revision to Item 402 adopted at the time, the Commission rescinded those interpretive releases. Subsequently, neither the Commission nor its staff has published interpretations addressing what must be disclosed as a perquisite or personal benefit.

executive officers and directors.<sup>112</sup> The concepts of perquisites and personal benefits should not be interpreted artificially narrowly to avoid disclosure. Based on our long experience with disclosure in this area, we are providing interpretive guidance that among the factors to be considered in determining whether an item is a perquisite or other personal benefit are the following:

- an item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive’s duties.
- otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, without regard to 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.

The concept of a benefit that is “integrally and directly related” to job performance is a narrow one. As discussed below, it may extend, among other things, to office space at a company business location, a reserved parking space that is closer to business facilities but not otherwise preferential or additional clerical or secretarial services devoted to company matters. It does not extend to items that facilitate job performance, such as use of company-provided aircraft, yachts or other watercraft, commuter transportation services, additional clerical or secretarial services devoted to personal matters, or investment management services. The fact that the company has determined 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 is not responsive to the inquiry as to whether the expense provides a perquisite or other

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<sup>112</sup> For directors, the disclosure would be required in the Director Compensation Table discussed below in Section B.9.

personal benefit for disclosure purposes. Whether the company should pay for an expense relates principally to questions of state law regarding use of corporate assets; our disclosure requirements are triggered by different and broader concepts.

Applying the concepts that we outline above, examples of items requiring disclosure as perquisites or personal benefits under Item 402 include, but are not limited to: club memberships not used exclusively for business entertainment purposes, personal financial or tax advice, personal travel using vehicles owned or leased by the company, personal travel otherwise financed by the company, personal use of other property owned or leased by the company, housing and other living expenses (including but not limited to relocation assistance and payments for the executive or director to stay at his or her personal residence), security provided at a personal residence or during personal travel, commuting expenses (whether or not for the company's convenience or benefit), and discounts on the company's products or services not generally available to employees on a non-discriminatory basis.

In addition, as noted, business purpose or convenience does not affect the characterization of an item as a perquisite or personal benefit where it is not integrally and directly related to the performance by the executive of his or her job. Therefore, for example, a company's decision to provide an item of personal benefit for security purposes does not affect its characterization as a perquisite or personal benefit. A company policy that for security purposes an executive (or an executive and his or her family) must use company aircraft or other company means of travel for personal travel, or must use company or company-provided property for vacations, does not affect the conclusion that the item provided is a perquisite or personal benefit.

Examples of items that would not be perquisites or personal benefits would include, among other things, travel to and from business meetings, other business travel, business entertainment, security during business travel, and itemized expense accounts the use of which is limited to business purposes.

In seeking to interpret current rules, some legal advisers have put forward to the Commission staff examples of arrangements that they believe raise issues requiring more detailed bright line guidance regarding the definition of perquisites. These examples include larger offices or a level of secretarial service not available to employees generally. We believe that the factors enumerated above provide sufficient guidance in these areas. For example, an office at the job location, even if larger than that of other employees, is integrally and directly related to performance of the executive's job, as is secretarial service used for business purposes, even if at a higher level than other employees. On the other hand, provision of additional secretarial services, such as a second secretary, that is not directly related to performance of an executive's job would be a perquisite or personal benefit.

Beyond these examples, we assume companies and their advisors, who are more familiar with the detailed facts of a particular situation and who are responsible for providing materially accurate and complete disclosure satisfying our requirements, can assess whether particular arrangements require disclosure as perquisites or personal benefits. In light of the importance of the subject to many investors, all participants should approach the subject of perquisites and personal benefits thoughtfully.<sup>113</sup>

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<sup>113</sup> The Commission has recently taken action in circumstances where perquisites were not properly disclosed. See In the Matter of Tyson Foods, Inc. and Donald Tyson, note 110 above. See also Alex Berenson, From Coffee to Jets, Perks for Executives Come Out in Court, N.Y. Times, Feb.



Finally, we observe that the proposal calls for aggregate incremental cost to the company and its subsidiaries as the proper measure of value of perquisites and other personal benefits.<sup>114</sup> The amount attributed to such benefits for federal income tax purposes is not the incremental cost for purposes of our disclosure rules unless, independently of the tax characterization, it constitutes such incremental cost. Therefore, for example, the cost of aircraft travel attributed to an executive for federal income tax purposes is not generally the incremental cost of such a perquisite or personal benefit for purposes of our disclosure rules.<sup>115</sup>

### **Request for Comment**

- Is \$10,000 the proper minimum below which disclosure of the total amount of perquisites and personal benefits should not be required? Should there be no minimum? Should the minimum be a higher amount, such as \$25,000 or \$50,000? Should the current minimum of the lesser of \$50,000 or 10% of total salary and bonus be retained? Would some other ratio be more appropriate?
- Should all perquisites be required to be separately identified when the \$10,000 aggregate threshold is exceeded, as proposed?
- Is the greater of \$25,000 or 10% of the total amount of perquisites and personal benefits the proper minimum below which perquisites and personal benefits should not be required to be separately identified and their value reported?

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22, 2004, at 11 (citing criminal and civil litigation in which perquisites were identified and commentators discussing the benefits of improved perquisite disclosure).

<sup>114</sup> Proposed Instruction 4 to Item 402(c)(2)(ix).

<sup>115</sup> See IRS Regulation §1.61-21(g) [26 CFR 1.61-21(g)] regarding Internal Revenue Service guidelines for imputing taxable personal income to an employee who travels for personal reasons on corporate aircraft. These complex regulations are known as the Standard Industry Fare Level or SIFL rules.

Should there be a lower minimum, such as \$10,000, or no minimum? Should the current minimum of 25% of the total amount be retained?

- Should perquisites and personal benefits below the proposed threshold be separately identified by category, even if not separately quantified? Alternatively, is separate identification and quantification of all perquisites and personal benefits so significant to investors that no threshold should apply for either purpose?
- We propose to retain the current standard for valuing perquisites and other personal benefits, based on the aggregate incremental cost to the company and its subsidiaries which has applied since 1983.<sup>116</sup> We believe that this approach is consistent with the approach we are taking otherwise in valuing compensation, including in respect of share-based compensation. Nevertheless, we realize that there may be an issue whether the retail value of what is received by the executive officer or director, rather than the aggregate incremental cost to the company, better measures the compensation provided by perquisites and other personal benefits. Therefore we request comment as to whether we should require perquisites and other personal benefits to be valued based on the retail price of the item or, if none, the retail price of a commercially available equivalent. In determining the commercially available equivalents, for example, for travel on the company's aircraft, the retail price of a commercially available equivalent would be the retail price to charter the same model aircraft. First-class airfare would not be considered equivalent to travel on a private aircraft.

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<sup>116</sup> See the 1983 Release, at Section III.C.

- Would the proposed valuation standard facilitate Item 402 compliance while providing meaningful compensation disclosure? Is there any other valuation methodology that is preferable for valuing perquisites and other personal benefits? If so, why?
- Under the proposals a “gross-up” or other reimbursement of taxes owed with respect to perquisites and other personal benefits would be required to be included in the table and separately quantified and identified in the tax reimbursement category if it meets the relevant threshold, even if the associated perquisites or other personal benefits would not be required to be included in the table or separately quantified. Is separate identification of items such as tax gross-ups material to investors even if it is clear the amount must be included in the All Other Compensation column?
- Should Item 402 include a definition of perquisites or other personal benefits? If so, how should perquisites or other personal benefits be defined? How can we assure that new perquisites will not be developed in a manner intended to avoid the definition and therefore disclosure? If such a definition is principles-based, what principles in addition to those described in this release should be considered?
- We are providing interpretive guidance above regarding perquisites and personal benefits. Are there any areas regarding perquisites and personal benefits where we should consider providing additional or different interpretive guidance? Should any of our interpretive guidance be codified?

#### iv. Additional All Other Compensation Column Items

The proposals also would specify that items disclosed in the All Other Compensation column would include, but not be limited to, the following items:<sup>117</sup>

- amounts paid or accrued pursuant to a plan or arrangement in connection with any termination (or constructive termination) of employment or a change in control;<sup>118</sup>
- annual company contributions or other allocations to vested and unvested defined contribution plans;<sup>119</sup>
- the dollar value of any insurance premiums paid by the company with respect to life insurance for the benefit of a named executive officer;<sup>120</sup>
- “gross-ups” or other amounts reimbursed during the fiscal year for the payment of taxes;<sup>121</sup> and
- for any security of the company or its subsidiaries purchased from the company or its subsidiaries (through deferral of fees or otherwise) at a discount from the

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<sup>117</sup> These items are all currently required to be disclosed either under All Other Compensation or under Other Annual Compensation.

<sup>118</sup> Unlike the current Item 402(b)(2)(v)(A) requirement, proposed Item 402(c)(2)(ix)(E) does not refer to amounts payable under post-employment benefits, because the focus for this item is current year compensation rather than aggregate amounts potentially payable in the future. These items are also the subject of disclosure as post-termination compensation, as described in Section II.B.5., below. For any compensation as a result of a business combination, other than pursuant to a plan or arrangement in connection with any termination of employment or change-in-control, such as a retention bonus, acceleration of option or stock vesting periods, or performance-based compensation intended to serve as an incentive for named executive officers to acquire other companies or enter into a merger agreement, disclosure would be required in the appropriate Summary Compensation Table column and in the other tables or narrative disclosure where the particular element of compensation is required to be disclosed.

<sup>119</sup> Proposed Item 402(c)(2)(ix)(F).

<sup>120</sup> Proposed Item 402(c)(2)(ix)(H). Because the proposal calls for disclosure of the dollar value of any life insurance premiums, rather than only premiums with respect to term life insurance, as currently required, the requirement of current Items 402(b)(2)(v)(E)(1) and (2) to disclose the value of any remaining premiums with respect to circumstances where the named executive officer has an interest in the policy’s cash surrender value would be deleted.

<sup>121</sup> Proposed Item 402(c)(2)(ix)(C).

market price of such security at the date of purchase, unless that discount is available generally either to all security holders or to all salaried employees of the company, the compensation cost computed in accordance with FAS 123R.<sup>122</sup>

### **Request for Comment**

- Are there other items that should be specifically enumerated for inclusion in the All Other Compensation Column? If so, what are they and how should they be valued and reported?
- Will the combination of the current Other Annual Compensation Column and the All Other Compensation Column result in too many compensation items being aggregated and separately identified within one column of the table? Is there another reason to continue to show the two groups of items separately?
- Should we retain the treatment of securities purchased at a discount in current Item 402(b)(2)(iii)(C)(5), which requires inclusion in the Other Annual Compensation column of the dollar value of the difference between the price paid by a named executive officer for any security of the company or its subsidiaries purchased from the company or its subsidiaries (through deferral of salary or bonus, or otherwise), and the fair market value of such a security at the date of purchase? If so, why?
- Because so many different types of compensation would be reportable in the “All Other Compensation” column, would this disclosure be clearer if it were presented as a supplemental table in the following or similar format:

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<sup>122</sup> Proposed Item 402(c)(2)(ix)(D).

Name	Perquisites and Other Personal Benefits	Earnings on Deferred Compensation	Tax Reimbursements	Discounted Securities Purchases	Payments/Accruals on Termination Plans	Registrant Contributions to Defined Contribution plans	Increase in Pension Actuarial Value	Insurance Premiums	Other
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

**e. Captions and Table Layout**

Currently a portion of the table is labeled as “annual compensation” and another portion as “long term compensation.” These captions create distinctions that may be confusing to both users and preparers of the Summary Compensation Table. Today’s proposal would not separately identify some columns as “annual” and other columns as “long term” compensation. In eliminating this distinction, we also propose to revise the definition of “long term incentive plan” to eliminate any distinction between a “long term” plan and one that may provide for periods shorter than one year, because, like the captions, the current approach creates distinctions that may be confusing to users and preparers. The proposals would thus define an “incentive plan” as any plan providing compensation intended to serve as incentive for performance to occur over a specified period.<sup>123</sup> Consistent with this change, as described above, we propose to merge the current Other Annual Compensation column into the proposed All Other Compensation column, and include current information regarding incentive plan compensation in the appropriate column for the relevant form of award.

<sup>123</sup> Proposed Item 402(a)(6)(iii).

## **Request for Comment**

- Will these changes improve the table? Are there any other changes to the captions and table layout that would improve the table?

### **2. Supplemental Annual Compensation Tables**

Following the Summary Compensation Table, we propose requiring two supplemental tables. These two tables are intended to help explain information in the Summary Compensation Table and would be derived from two tables currently required.

#### **a. Grants of Performance-Based Awards Table**

The first table that would supplement the Summary Compensation Table would include information regarding non-stock grants of incentive plan awards, stock-based incentive plan awards and awards of options, restricted stock and similar instruments under plans that are performance-based (and thus provide the opportunity for future compensation if conditions are satisfied).<sup>124</sup> This would ensure consistent reporting treatment of these performance-based awards, disclosing information equivalent to that currently required for grants of other long-term incentive plan awards. For purposes of this table, awards would be considered performance-based if they are subject to either a performance condition, or a market condition, as those terms are defined in FAS 123R.<sup>125</sup>

Disclosure in this table of grants of incentive plan awards would complement Summary Compensation Table disclosure of grant date fair value of stock awards and option awards, and the disclosure of annual amounts earned under non-stock based

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<sup>124</sup> This table would contain the information in the current Long-Term Incentive Plan Awards Table, augmented with information regarding performance-based stock, option and similar awards. See current Item 402(e). This table would also include awards with performance, market and other conditions affecting the terms of the award (exercise price, for example) rather than vesting.

<sup>125</sup> See note 87.

incentive compensation. This supplemental table would show the terms of grants made during the current year, including estimated future payouts, with separate disclosure for each grant.<sup>126</sup>

**GRANTS OF PERFORMANCE-BASED AWARDS**

Name	Performance-Based Stock and Stock-based Incentive Plans: number of shares, units or other rights (#)	Performance-Based Options: number of securities underlying Options (#)	Non-Stock Incentive Plan Awards: number of units or other rights (#)	Dollar amount of consideration paid for award, if any (\$)	Grant Date for Stock or Option Awards	Performance or other period until vesting or payout and Option Expiration Date	Estimated future payouts		
							Threshold (\$ or #)	Target (\$ or #)	Maximum (\$ or #)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

**Request for Comment**

- Will the proposed Grants of Performance-Based Awards Table effectively supplement the equity awards and non-stock incentive plan compensation information to be disclosed in the Summary Compensation Table? In particular,

<sup>126</sup> Proposed Instruction 1 to Item 402(d).



- should tabular disclosure be required of any additional information relating to performance-based equity awards and non-stock incentive plan awards?
- Is the information required by columns (b), (c) and (d) of this proposed table redundant with the information required in the Grants of Performance-Based Awards Table describing estimated future payouts to be required in columns (h), (i) and (j) of the Table, such that any of these columns should be eliminated? Is any other tabular information needed to describe estimated future payouts in addition to the information that would be required in proposed columns (h), (i) and (j)?
  - Are the references to the definitions of “performance condition” and “market condition” in FAS 123R appropriate in defining performance-based awards?

**b. Grants of All Other Equity Awards Table**

The second table supplementing the Summary Compensation Table would show the equity-based compensation awards granted in the last fiscal year that are not performance-based, such as stock, options or similar instruments where the payout or future value is tied to the company’s stock price, and not to other performance criteria.<sup>127</sup>

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<sup>127</sup> Proposed Item 402(e). Proposed Instruction 2 to Item 402(e) would require that if more than one award is made to a named executive officer during the last completed fiscal year, a separate line should be used to disclose each award.

GRANTS OF ALL OTHER EQUITY AWARDS

Name	Number of Securities Underlying Options Granted (#)	Exercise or Base Price (\$/Sh)	Expiration Date	Number of Shares of Stock or Units Granted (#)	Vesting Date	Grant Date
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

Instructions would require options and stock appreciation rights granted in connection with a repricing transaction to be included in the table, and footnote descriptions of any material terms of a grant.<sup>128</sup> Because the Summary Compensation Table would disclose grant date fair value of the options, stock appreciation rights or similar instruments, the columns in the current Option/SAR Grants in Last Fiscal Year table requiring disclosure of that value or, alternatively, potential realizable value at assumed five percent and ten percent annual rates of return, would be eliminated.<sup>129</sup>

This table would also supplement the Summary Compensation Table disclosure of the

<sup>128</sup> Proposed Instructions 3 and 4 to Item 402(e).

<sup>129</sup> See current Item 402(c)(2)(vi). We also propose removing the column, required by current Item 402(c)(2)(iii), requiring disclosure of the percent that the grant represents of total options and stock appreciation rights granted to all employees during the fiscal year. At this time, we do not believe that this relatively narrow disclosure is independently material to an understanding of a named executive officer's compensation.

aggregate grant date fair value of stock, units and similar instruments with disclosure relating to the number of underlying securities and other material terms of the grants.

#### **Request for Comment**

- Will the Grants of All Other Equity Awards Table, as proposed, effectively supplement the option and stock grants information to be disclosed in the Summary Compensation Table? In particular, should tabular disclosure be required of any additional information relating to these grants?
- Is this table or any aspect of it too repetitive?
- Will it be clear to investors how the two supplemental tables relate to the Summary Compensation Table? If not, how could we make that more clear?
- Are all plan-based awards covered by the two supplemental tables? What additional provisions would we need to add to cover all such awards?
- Instead, would it be preferable to have two separate versions of the Summary Compensation Table, with one showing all awards made during the year and the other having exactly the same columns showing all the amounts earned by services during the year? Would this approach increase the risk of double counting? Would it be duplicative as to cash salary and bonus and other currently earned and paid amounts and benefits?

### **3. Narrative Disclosure to Summary Compensation Table and Supplemental Tables**

We propose requiring narrative disclosure in order to give context to the tabular disclosure following the Summary Compensation Table, the Grants of Performance-Based Awards Table and the Grants of All Other Equity Awards Table. A company would be required to provide a narrative description of any additional material factors

necessary to an understanding of the information disclosed in the tables.<sup>130</sup> Unlike the Compensation Discussion and Analysis, which would focus on broader topics regarding the objectives and implementation of executive compensation policies, this narrative disclosure would focus on and provide context to the quantitative disclosure in the tables. The material factors will vary depending on the facts, but may include, in given cases, among other things, descriptions of the material terms in the named executive officers' employment agreements, which may be a potential source of material information necessary to an understanding of the tabular disclosure. The proposed narrative disclosure would cover written or unwritten agreements or arrangements. Requiring this disclosure in proximity to the Summary Compensation Table is intended to make the tabular disclosure more meaningful.<sup>131</sup> Mere filing of employment agreements (or summaries of oral agreements) may not be adequate to disclose material factors depending on the circumstances.

The factors that could be material include each repricing or other material modification of any outstanding option or other stock-based award during the last fiscal year. This disclosure would address not only option repricings, but also other significant changes to the terms of stock-based or other awards. We propose to eliminate the current ten-year option repricing table.<sup>132</sup> In its place, the narrative disclosure following the

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<sup>130</sup> Proposed Item 402(f)(1). Disclosure of employment agreement information is currently required by Item 402(h)(1). The standard of materiality that would apply in proposed Item 402(f)(1) is that of Basic v. Levinson, 485 U.S. 224 (1988) and TSC Industries v. Northway, 426 U.S. 438 (1976).

<sup>131</sup> Provisions regarding post-termination compensation would need to be addressed in the narrative section only to the extent disclosure of such compensation is required in the Summary Compensation Table; otherwise these provisions would be disclosable as post-termination compensation in the manner described in Section II.B.5., below.

<sup>132</sup> Current Item 402(i). We believe that the disclosure requirement would provide investors with material information regarding repricings and modifications and eliminate the arguably dated information contained in the ten-year option repricing table.

Summary Compensation Table would describe, to the extent material and necessary to an understanding of the tabular disclosure, repricing, extension of exercise periods, change of vesting or forfeiture conditions, change or elimination of applicable performance criteria, change of the bases upon which returns are determined, or any other material modification. The tabular disclosure would reflect the award's total fair value after any such modification as a new award.<sup>133</sup>

Narrative text accompanying the tables would also describe, to the extent material and necessary to an understanding of the tabular disclosure, award terms relating to data provided in the Grants of Performance-Based Awards Table, which could include, for example, a general description of the formula or criteria to be applied in determining the amounts payable, the vesting schedule, a description of the performance-based conditions and any other material conditions applicable to the award, whether dividends or other amounts would be paid, the applicable rate and whether that rate is preferential. Consistent with current disclosure requirements, however, companies would not be required to disclose any factor, criteria, or performance-related or other condition to payout or vesting of a particular award that involves confidential commercial or business

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<sup>133</sup> While this approach is different from that required for accounting and financial statement reporting purposes under FAS 123R, it does proceed from the grant date fair value concept embodied in that standard, and we believe it provides more meaningful information for executive compensation disclosure than the financial statement reporting approach and is consistent with our current requirement to treat repricings as a new award. This treatment would continue the current approach of essentially treating a repricing as a new award in Instruction 3 to Item 402(b)(2)(iv). However, this approach would not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or stock appreciation right exercise or base price, an antidilution provision, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or stock appreciation rights. See Proposed Instruction 2 to Item 402(f)(1).

information, disclosure of which would adversely affect the company's competitive position.<sup>134</sup>

Another factor that may be necessary to an understanding of the information disclosed in the tables is any material waiver or modification of any specified performance target, goal or condition to payout under any reported incentive plan payout because each action can materially affect previously disclosed information about the plans. Companies would be required to disclose as part of this narrative discussion whether the waiver or modification applied to one or more specified named executive officers or applied to all compensation subject to the condition.<sup>135</sup>

Material factors necessary to an understanding of the tabular disclosure could also include information regarding defined benefit and deferred compensation plans. For example, such information could include material assumptions underlying the determination of the amount of increase in actuarial value of defined benefit or actuarial plans or the provisions in a plan or otherwise for determining earnings on deferred compensation plans, including defined contribution plans, that are not tax-qualified.

We also propose an additional item that would require disclosure for up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any of the named executive officers.<sup>136</sup> The item would require disclosure of the amount of each of such employee's total compensation for the most recent fiscal year and a

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<sup>134</sup> Proposed Item 402(f)(1)(iii), which combines some information required by current Instruction 2 to Item 402(b)(2)(iv) with information required by current Instruction 1 to Item 402(e). For a discussion of the standard companies should use when determining whether disclosure would have an adverse impact on the company's competitive position, see Section II.A.2., above.

<sup>135</sup> Proposed Item 402(f)(1)(iv).

<sup>136</sup> Proposed Item 402(f)(2).

description of his or her job position. The individuals would not need to be named. We are proposing this requirement so that shareholders will have information about the use of corporate assets to compensate extremely highly paid employees in a company. More detailed information about these employees and their compensation does not appear appropriate in light of the fact that they do not have a policy making function at the company.<sup>137</sup>

### **Request for Comment**

- Will the proposed narrative disclosure to the Summary Compensation Table enhance an understanding of the table?
- Are there any additional material factors that should be listed as possibly requiring disclosure in the narrative to the Summary Compensation Table?
- Is the difference between the proposed required narrative disclosure and the Compensation Discussion and Analysis requirement sufficiently clear? How can it be made more clear?
- Should we require an additional column in the Summary Compensation Table where companies must indicate by checkmark whether a particular named executive officer has an employment agreement, so that investors will know to look for disclosure about the agreement in the narrative accompanying the table or to look for the agreement as an exhibit to a filing with us?
- Is the proposed treatment of repricings the most appropriate approach for executive compensation disclosure purposes? Should the treatment be consistent with the reporting approach of FAS 123R? Would tabular presentation rather

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<sup>137</sup> See note 162 below for a discussion of the term “executive officer.”

- than discussion of material terms in the narrative be preferable? In addition to the disclosure proposed in the Summary Compensation Table and the related narrative, should we also require quantification of the fair value of the award both immediately before and immediately after the repricing or other modification?
- Would the proposed disclosure of up to three employees who are not executive officers but earn more in total compensation than any of the named executive officers be appropriate in the narrative discussion? Should more disclosure be required regarding these employees and their compensation? Is this information material to investors? Will disclosure of this information, particularly in the case of smaller companies, cause competitive harm? Is disclosure of this information consistent with the overall goals of this proposal?

#### **4. Exercises and Holdings of Previously Awarded Equity**

The next section of proposed executive compensation disclosure would provide investors with an understanding of the compensation in the form of equity that has previously been awarded and remains outstanding, that is unexercised or unvested. This section also would disclose amounts realized on this type of compensation during the most recent fiscal year when, for example, a named executive officer exercises an option or his or her stock award vests. We propose two tables. One table shows the amounts of prior awards outstanding and the other shows the exercise or vesting of equity awards during the fiscal year.<sup>138</sup>

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<sup>138</sup> Some of this information is currently required in one table, the Aggregated Option/SAR Exercises in Last Fiscal Year and Fiscal Year-End Option/SAR Values Table required by current Item 402(d).



**a. Outstanding Equity Awards at Fiscal Year-End**

Outstanding awards that have been granted but the ultimate outcomes of which have not yet been realized in effect represent potential amounts that the named executive officer might or might not realize, depending on the outcome for the measure or measures (for example, stock price or performance benchmarks) to which the award relates. We are proposing a table that would disclose information regarding outstanding awards under, for example, stock option (or stock appreciation rights) plans, restricted stock plans, incentive plans and similar plans and disclose the market-based values of the options, rights, shares or units in question as of the company's most recent fiscal year end.<sup>139</sup>

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<sup>139</sup> Proposed Item 402(g). Under current rules such disclosure is provided only for holdings of outstanding stock options and stock appreciation rights. Consistent with current interpretations, this table, like the Summary Compensation Table, would reflect that the transfer of an option or similar award by an executive does not negate the award's status as compensation that should be reported. Registration of Securities on Form S-8, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103], at Section III.D.

OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END

Name	Number of securities underlying unexercised Options (#) Exercisable/ Unexercisable	In-the-money amount of unexercised Options (\$) Exercisable/ Unexercisable	Number of shares or units of Stock held that have not vested (#)	Market value of shares or units of Stock held that have not vested (\$)	Incentive Plans: Number of nonvested shares, units or other rights held (#)	Incentive Plans: Market or payout value of nonvested shares, units or other rights held (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

With respect to options, stock appreciation rights and similar instruments, an instruction, which would be the same as the current standard, would indicate that these instruments are “in-the-money” if the market price of the underlying securities exceeds the exercise or base price. The in-the-money amount of options, stock appreciation rights and similar instruments would be calculated by determining the difference, at fiscal year-end, between the market price of the underlying securities and the exercise or base price.<sup>140</sup> The market value of stock (including restricted stock, restricted stock units or other similar instruments) and incentive plan award holdings would be calculated by

<sup>140</sup> Proposed Instruction 1 to Item 402(g)(2), which is based on current Instruction 1 to Item 402(d)(2).

multiplying the closing market price of the company's stock at the end of the last completed fiscal year by the respective numbers of stock or incentive plan award holdings that were not then vested.<sup>141</sup>

A new instruction would require footnote disclosure of the expiration dates of options, stock appreciation rights and similar instruments held at fiscal year-end, separately identifying those that are exercisable and unexercisable, and the vesting dates of shares of stock (including restricted stock, restricted stock units or other similar instruments) and incentive plan awards held at fiscal year-end. If the expiration date of an option had occurred after fiscal year-end but before the date on which the disclosure is made, the footnote would need to state whether the option had been exercised or had expired.<sup>142</sup>

#### **Request for Comment**

- Will the proposed Outstanding Equity Awards at Fiscal Year-End Table provide material information for investors regarding the named executive officers' outstanding awards?
- Should the table include the value of out-of-the-money options and stock appreciation rights? Why or why not? If such instruments were included, how would the value be calculated and presented?
- Should we require, as proposed, that options or similar awards that have been transferred by an executive must still be included in the table? Should continued disclosure depend on the nature of the transfer or the identity of the transferee?

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<sup>141</sup> Proposed Instruction 3 to Item 402(g)(2). This standard is based on the current Summary Compensation Table footnote disclosure regarding restricted stock, expanded to cover restricted stock units and incentive plans. Current Instruction 2 to Item 402(b)(2)(iv).

<sup>142</sup> Proposed Instruction 2 to Item 402(g)(2).

**b. Option Exercises and Stock Vesting**

We are proposing a table that would show the amounts received upon exercise of options or similar instruments or the vesting of stock or similar instruments during the most recent fiscal year. This table would allow investors to have a picture of the amounts that a named executive officer realizes on equity compensation through its final stage.<sup>143</sup>

**OPTION EXERCISES AND STOCK VESTED**

Name of Executive Officer	Number of Shares Acquired on Exercise Or Vesting (#)	Value Realized Upon Exercise Or Vesting (\$)	Grant Date Fair Value Previously Reported in Summary Compensation Table (\$)
(a)	(b)	(c)	(d)
PEO - Options			
Stock			
PFO - Options			
Stock			
A - Options			
Stock			
B - Options			
Stock			
C - Options			
Stock			

<sup>143</sup> This table is similar to a portion of the current Aggregate Options/SAR Exercises in Last Fiscal Year and FY-End Options/SAR Values Table, except unlike that table it would also include the vesting of restricted stock and similar instruments. Commentators have noted a need for comparable disclosure of restricted stock vesting. See, e.g., Phyllis Plitch, Restricted Stock Grants Cloud Executive Pay Tally, Wall St. J. Online Edition, Jan. 26, 2005. The number and value of unexercised options and stock appreciation rights, included in the current option exercises table, would be shown in the proposed Outstanding Equity Awards at Fiscal Year-End Table described immediately above. See current Item 402(d).

The grant date fair value of these instruments would have been disclosed in the Summary Compensation Table for the year in which they were awarded. Therefore, to eliminate the impact of double disclosure, this table would show that amount from applicable previous years from the Summary Compensation Table.

**Request for Comment**

- In light of the proposed disclosure in the Summary Compensation Table of the grant date fair value of the awards, is separate reporting of the amounts realized upon exercise or vesting appropriate? Would it provide material information? Would separate reporting of the market value at exercise or vesting confuse users of financial statements and perhaps cause them to call into question the original grant date fair value estimate?
- Would the proposed separate column for grant date fair value previously reported for the same award eliminate potential confusion about the amount of compensation provided by options, stock appreciation rights, stock and similar instruments? Are there other ways we could make this clear, such as an explanatory footnote to the table?
- Will investors understand that the value of equity compensation had already been disclosed in the form of the grant-date fair value of equity-based awards? Are other sources of this information, such as reports filed by officers and directors pursuant to Section 16(a) of the Exchange Act,<sup>144</sup> adequate to inform investors of the information contained in this table?

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<sup>144</sup> 15 U.S.C. 78p(a).

- Would it be preferable to combine proposed Outstanding Equity Awards at Fiscal Year-End Table and the proposed Option Exercises and Stock Vested Table into one table?

## **5. Post-Employment Compensation**

We are proposing significant revisions to the disclosure regarding post-employment compensation to provide a clearer picture of this potential future compensation. Executive retirement packages and other post-termination compensation may represent a significant commitment of corporate resources and a significant portion of overall compensation. First, we are proposing to replace the current pension plan table, alternative plan disclosure and some of the other narrative descriptions with a table regarding defined benefit pension plans and enhanced narrative disclosure. Second, we are proposing a table and narrative disclosure that will disclose information regarding non-qualified defined contribution plans and other deferred compensation. Finally, we are proposing revised requirements regarding disclosure of compensation arrangements triggered upon termination and on changes in control.

### **a. Retirement Plan Potential Annual Payments and Benefits Table**

We are proposing significant revisions to the rules disclosing retirement benefits to require disclosure of the estimate of retirement benefits to be payable at normal retirement age and, if available, early retirement.<sup>145</sup> Current disclosure frequently does

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<sup>145</sup> Currently, for defined benefit or actuarial plans, disclosure consists of a general table showing estimated annual benefits under the plan payable upon retirement (including amounts attributable to supplementary or excess pension award plans) for specified compensation levels and years of service. The table does not provide disclosure for any specific named executive officer. See current Item 402(f)(1). This requirement is for plans under which benefits are determined primarily by final compensation (or average final compensation) and years of service, and includes narrative disclosure. If named executive officers are subject to other plans under which benefits are not determined primarily by final compensation (or average final compensation), narrative

not provide investors useful information regarding specific potential pension benefits. Current disclosure may make it difficult for the reader to understand which amounts relate to any particular named executive officer, and may thus obscure the value of a significant component of compensation.

As a result, we propose a new table disclosing estimated annual retirement payments under defined benefit plans for each named executive officer, followed by narrative disclosure.<sup>146</sup> A separate line of tabular disclosure would be required for each plan in which a named executive officer participates that provides for the payment of specified retirement benefits, or benefits that will be paid primarily following retirement.<sup>147</sup>

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disclosure is required of the benefit formula and estimated annual benefits payable to the officers upon retirement at normal retirement age. See current Item 402(f)(2).

<sup>146</sup> Proposed Item 402(i).

<sup>147</sup> These would include, but not be limited to, tax-qualified defined benefit plans, supplemental employee retirement plans and cash balance plans, but would exclude defined contribution plans, for which we propose disclosure as described below.

RETIREMENT PLAN POTENTIAL ANNUAL PAYMENTS AND BENEFITS

Name	Plan name	Number of years credited service (#)	Normal retirement age (#)	Estimated normal retirement annual benefit (\$)	Early retirement age (#)	Estimated early retirement annual benefit (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

An instruction would provide that quantification of benefits should reflect the form of benefit currently elected by the named executive officer, such as joint and survivor annuity or single life annuity, specifying that form in a footnote. Where the named executive officer is not yet eligible to retire, the dollar amount of annual benefits to which he or she would be entitled upon becoming eligible would be computed assuming that the named executive officer continued to earn the same amount of compensation as reported for the company’s last fiscal year. If a named executive officer left during the year, the dollar amounts of annual benefits to which he or she would be entitled would be required to be disclosed.

“Normal retirement age” would mean the normal retirement age defined in the plan, or if not so defined, the earliest time at which a participant may retire under the plan without any benefit reduction due to age. “Early retirement age” would be defined similarly as early retirement age as defined in the plan, or otherwise available to the



executive.<sup>148</sup> If the credited years of service for the executive under any plan differ from the actual years of service with the company, a footnote quantifying the difference and any resulting benefit increase would be required.<sup>149</sup>

The table would be followed by a narrative description of material factors necessary to an understanding of each plan disclosed in the table. Examples of such factors in the proposed rule may include, in given cases, among other things:

- the material terms and conditions of benefits available under the plan, including the plan's retirement benefit formula and eligibility standards, and early retirement arrangements;
- if the executive or company may elect a lump sum distribution, the amount of such distribution that would be available on election as of the end of the company's last fiscal year, disclosing the valuation method and material assumptions applied in quantifying such amount;
- the specific elements of compensation, such as salary and various forms of bonus, included in applying the benefit formula, identifying each such element;
- regarding participation in multiple plans, the reasons for each plan; and
- company policies with regard to such matters as granting extra years of credited service.

#### **Request for Comment**

- Should any other information (including information that may be disclosed in the narrative) be included in the proposed table? Should any of the information we propose to require to be disclosed be excluded?

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<sup>148</sup> Proposed Instruction 3 to Item 402(i).

- Should this item require quantification of the aggregate actuarial value of a plan benefit as of the end of the company’s last fiscal year without regard to whether the plan permits a lump sum distribution? If so, why? Alternatively, would this information provide meaningful disclosure only if the named executive officer currently is eligible to retire under the plan with a lump sum distribution?
- Is there any particular form of plan for which the proposed disclosure format is not suitable? If so, how could the proposed disclosure requirement be adapted for such plans?

**b. Nonqualified Defined Contribution and Other Deferred Compensation Plans Table**

In order to provide a more complete picture of potential post-employment compensation, we are proposing a new table to disclose contributions, earnings and balances under nonqualified defined contribution and other deferred compensation plans. These plans may be a significant element of retirement and post-termination compensation.<sup>150</sup> Our current rules elicit disclosure of the compensation when earned and only the above-market earnings on nonqualified deferred compensation.<sup>151</sup> The full value of those earnings and the accounts on which they are payable are not currently

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<sup>149</sup> Proposed Instruction 2 to Item 402(i).

<sup>150</sup> Nonqualified defined contribution and other deferred compensation plans are plans providing for deferral of compensation that do not satisfy the minimum coverage, nondiscrimination and other rules that “qualify” broad-based plans for favorable tax treatment under the Internal Revenue Code. A typical 401(k) plan, by contrast, is a qualified deferred compensation plan. Nonqualified defined contribution and other deferred compensation plans are generally unfunded, and their taxation is governed by Section 409A of the Internal Revenue Code [26 U.S.C. 409A].

<sup>151</sup> See Section II.B.1.d.i. above.

subject to disclosure, nor are shareholders and investors informed regarding the rate at which these amounts – and the corresponding cost to the company – are growing.<sup>152</sup>

Therefore, as noted above, we are proposing to require disclosure in the Summary Compensation Table of all earnings on compensation that is deferred on a basis that is not tax-qualified and are also proposing new tabular and narrative disclosure of nonqualified deferred compensation.<sup>153</sup>

**NONQUALIFIED DEFINED CONTRIBUTION  
AND OTHER DEFERRED COMPENSATION PLANS**

Name	Executive contributions in last FY (\$)	Registrant contributions in last FY (\$)	Aggregate earnings in last FY (\$)	Aggregate withdrawals/distributions (\$)	Aggregate balance at last FYE (\$)
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

An instruction would require footnote quantification of the extent to which amounts in the contributions and earnings columns are reported as compensation in the year in question and other amounts reported in the table in the aggregate balance column

<sup>152</sup> See Lucian A. Bebchuk and Jesse M. Fried, Stealth Compensation via Retirement Benefits, 1 Berkeley Bus. L.J. 291, 314-316 (2004); See also The Corporate Counsel (Sept.–Oct. 2005) at 6-7 and Gretchen Morgenson, Executive Pay, Hiding Behind Small Print, N.Y. Times, Feb. 8, 2004, §3, at 1.

<sup>153</sup> Proposed Item 402(j).

were reported previously in the Summary Compensation Table for prior years.<sup>154</sup> This would complement the proposed instruction to the Summary Compensation Table that would require footnote disclosure of amounts for which receipt has been deferred.<sup>155</sup> Together, these footnotes would operate to provide information so that investors can avoid “double counting” of deferred amounts by clarifying the extent to which amounts payable as deferred compensation represent compensation previously reported, rather than additional currently earned compensation.

The table would be followed by a narrative description of material factors necessary to an understanding of the disclosure in the table.<sup>156</sup> Examples of such factors in the proposed rule may include, in given cases, among other things:

- 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.

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<sup>154</sup> Proposed Instruction to Item 402(j)(2).

<sup>155</sup> Proposed Instruction 4 to Item 402(c), described in Section II.B.1.b., above, regarding the Summary Compensation Table.

<sup>156</sup> Proposed Item 402(j)(3).

### **Request for Comment**

- Should tabular or narrative disclosure require presentation of any additional information necessary for investors to clearly understand nonqualified deferred compensation? For example:
  - Should the dollar amount of aggregate interest or other earnings accrued from inception of the named executive officer's participation in the plan through the end of the company's last fiscal year be disclosed in the proposed table?
  - Is a narrative description of the tax implications for both the participant and the company necessary to a material understanding of these plans?
- In addition to the footnote required by the proposed instruction, are any other provisions necessary or appropriate to avoid "double counting" of previously reported compensation that will have been deferred?
- Should only above market or preferential earnings be included in the table? If so, why would such disclosure be more useful or informative to investors?
- Is any of the proposed new disclosure unnecessary? If so, please explain.

#### **c. Other Potential Post-Employment Payments**

We are proposing significant revisions to our requirements to describe termination or change in control provisions. The Commission has long recognized that "termination provisions are distinct from other plans in both intent and scope and, moreover, are of particular interest to shareholders."<sup>157</sup> Currently, disclosure does not in many cases capture material information regarding these plans and potential payments under them.

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<sup>157</sup> 1983 Release, at Section III.E.

We therefore propose disclosure of specific aspects of any written or unwritten arrangement that provides for payments at, following, or in connection with the resignation, severance, retirement or other termination (including constructive termination) of a named executive officer, a change in his or her responsibilities, or a change in control of the company. Our proposals would call for narrative disclosure of the following information regarding termination and change in control provisions:<sup>158</sup>

- the specific circumstances that would trigger payment(s) under the termination or change-in-control arrangements or the provision of other benefits (references to benefits include perquisites);
- the estimated payments and benefits that would be provided in each termination circumstance, and whether they would or could be lump-sum or annual, disclosing the duration and by whom they would be provided;<sup>159</sup>
- 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, non-disparagement or confidentiality covenants; and
- any other material features necessary for an understanding of the provisions.

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<sup>158</sup> Proposed Item 402(k), which would replace current Item 402(h)(2).

<sup>159</sup> We propose to eliminate the current \$100,000 disclosure threshold. With respect to post-termination perquisites, however, the same disclosure and itemization thresholds proposed for the Summary Compensation Table would apply. See Section II.B.1.d.iii, above.

The item contemplates disclosure of the duration of non-compete and similar agreements, and provisions regarding waiver of breach of these agreements, and disclosure of tax gross-up payments.

As proposed, a company would be required to provide quantitative disclosure under these requirements even where uncertainties exist as to amounts payable under these plans and arrangements. In the event that uncertainties exist as to the provision of payments or benefits or the amounts involved, the company would be required to make reasonable estimates and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would be considered forward-looking information as appropriate that falls within the safe harbor for disclosure of such information.<sup>160</sup>

#### **Request for Comment**

- Should we, as proposed, eliminate the current \$100,000 threshold for disclosure for compensatory plans or arrangements providing payments upon termination or change-in-control?
- Should the proposed item specifically require narrative disclosure of any additional information? If so, what information and why?
- Would a tabular format result in more effective disclosure of any of this information? If so, how should such a table be constructed so that it is easily understood, given the wide variability of the factors determining payments? For example, should such a table have separate columns for cash payments, stock payments, and perquisites; separate lines for each potential termination event; and

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<sup>160</sup> See Securities Act Section 27A and Exchange Act Section 21E.

narrative disclosure of other material terms, such as duration, renewal and applicable covenants?

- Should we require companies to provide quantitative disclosure as proposed? If not, how can there be assurance that investors can understand the significant amounts of compensation that may be involved?

## **6. Officers Covered**

### **a. Named Executive Officers**

We propose to have the principal executive officer, the principal financial officer<sup>161</sup> and the three most highly compensated executive officers other than the principal executive officer and principal financial officer comprise the named executive officers.<sup>162</sup> In addition, as is currently the case, up to two additional individuals 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 would be included.

We believe that compensation of the principal financial officer is important to shareholders because, along with the principal executive officer, the principal financial officer provides the certifications required with the company's periodic reports and has

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<sup>161</sup> We propose to adopt the nomenclature used most recently in Item 5.02 of Form 8-K, which refers to "principal executive officer" and "principal financial officer."

<sup>162</sup> Proposed Item 402(a)(3). Currently, the named executive officers for whom disclosure is required include the company's chief executive officer and the four most highly compensated executive officers excluding the chief executive officer. As defined in Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 3b-7 [17 CFR 240.3b-7], "the term 'executive officer,' when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant." Therefore, as is currently the case today, a named executive officer may be an executive officer of a subsidiary.



important responsibility for the fair presentation of the company's financial statements and other financial information.<sup>163</sup> Like the principal executive officer, disclosure about the principal financial officer would be required even if he or she was no longer serving in that capacity at the end of the last completed fiscal year.<sup>164</sup> As is currently the case for the chief executive officer, all persons who served as the company's principal executive officer or principal financial officer during the last completed fiscal year would be named executive officers.

We do not propose to require compensation disclosure for all of the officers listed in Item 5.02 of Form 8-K.<sup>165</sup> Item 5.02 of Form 8-K was adopted to provide current disclosure in the event of an appointment, resignation, retirement or termination of the specified officers, based on the principle that changes in employment status of these particular officers are unquestionably or presumptively material. At the time when a decision is made regarding the employment status of a particular officer, it will not always be clear who will be the named executive officers for the current year. Given these factors, it is reasonable for the two groups not to be identical.

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<sup>163</sup> Exchange Act Rules 13a-14 and 15d-14.

<sup>164</sup> Proposed paragraphs (a)(3)(i) and (a)(3)(ii) of Item 402 would provide that all individuals who served as a principal executive officer and principal financial officer or in similar capacities during the last completed fiscal year must be considered named executive officers. Proposed Instruction 4 to Item 402(a)(3) would specify that if the principal executive officer or principal financial officer served in that capacity for only part of a fiscal year, information must be provided as to all of the individual's compensation for the full fiscal year. Proposed Instruction 4 to Item 402(a)(3) would also specify that if a named executive officer (other than the principal executive officer or principal financial officer) served as an executive officer of the company (whether or not in the same position) during any part of the fiscal year, then information is required as to all compensation of that individual for the full fiscal year.

<sup>165</sup> These are the registrant's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions.

### **Request for Comment**

- Should the principal financial officer be specifically included as a named executive officer?
- Would the proposed named executive officers be those executive officers whose compensation is material to investors? Is only the compensation of the principal executive officer material? The principal executive officer and the principal financial officer?
- Should Item 402 specifically require disclosure of the compensation of any other officers listed in Form 8-K Item 5.02? If so, which officers and why? If we were to require Item 402 disclosure regarding compensation of additional Item 5.02 officers, should we also require Item 402 disclosure for two or three additional officers who receive the highest compensation?
- Are there any other specific executive officers, such as the general counsel or principal accounting officer, who should be specifically identified as named executive officers? If so, which officers and why?
- Should we retain, as proposed, the current requirement that up to two additional individuals 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 year be included in the disclosure?
- Is the continuation of the current requirement for five named executive officers appropriate? Should that number be higher or lower?

#### **b. Identification of Most Highly Compensated Officers; Dollar Threshold for Disclosure**

We propose to identify the most highly compensated executive officers on the

basis of total compensation for the most recent fiscal year.<sup>166</sup> We also propose to revise the dollar threshold for disclosure of named executive officers other than the principal executive officer and the principal financial officer to \$100,000 of total compensation for the last fiscal year.<sup>167</sup> Both the determination of the most highly compensated officers and the \$100,000 disclosure threshold are currently based only on total annual salary and bonus for the last fiscal year.<sup>168</sup> Given the proliferation of various forms of compensation other than salary and bonus, we believe that total compensation more accurately identifies those officers who are, in fact, the most highly compensated. Moreover, basing identification of named executive officers solely on the compensation reportable in the salary and bonus categories may provide an incentive to re-characterize compensation.

Under the current rules, companies are permitted to exclude an executive officer (other than the chief executive officer) due to either an unusually large amount of cash compensation that is not part of a recurring arrangement and is unlikely to continue, or cash compensation relating to overseas assignments attributed predominantly to such assignments.<sup>169</sup> Because payments attributed to overseas assignments have the potential to skew the application of Item 402 disclosure away from executives whose compensation otherwise properly would be disclosed, we propose to retain this basis for exclusion. However, we believe that other compensation that is “not recurring and unlikely to continue” should be considered compensation for disclosure purposes. There has been inconsistent interpretation of the “not recurring and unlikely to continue”

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<sup>166</sup> Proposed Instruction 1 to Item 402(a)(3).

<sup>167</sup> Id.

<sup>168</sup> Current Instruction 1 to Item 402(a)(3).

<sup>169</sup> Current Instruction 3 to Item 402(a)(3).

standard, and it is susceptible to manipulation. We therefore propose to eliminate this basis for exclusion.<sup>170</sup>

### **Request for Comment**

- Are there any particular circumstances or categories of companies for which a measure other than total compensation should be applied to identify the most highly compensated executive officers? If so, what measure should be applied and why? Is \$100,000 the correct disclosure threshold?
- Should payments attributable to overseas assignments be included in determining the most highly compensated officers, given that the purpose of such payments typically is to compensate for disadvantageous currency exchange rates or high costs of living?
- Are there any particular circumstances, such as commissions for executives responsible for sales, for which the “not recurring and unlikely to continue” standard should be retained?

### **7. Interplay of Items 402 and 404**

We propose that Item 402 require disclosure of all transactions between the company and a third party where the primary purpose of the transaction is to furnish compensation to a named executive officer. Currently, while Item 402 states that such compensation is reportable under Item 402, even if also called for by another requirement, Item 402 also provides that information may be excluded if a transaction has been reported in response to Item 404.<sup>171</sup> This provision may cause Item 402 disclosure to omit compensation that a transaction disclosed under Item 404 provides to executives.

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<sup>170</sup> Proposed Instruction 3 to Item 402(a)(3).

We propose to eliminate that exclusion from Item 402.<sup>172</sup> We also propose instructions to Item 404 that would clarify what compensation does not need to be reported under Item 404.<sup>173</sup> In some cases the result may nevertheless be that compensation information is disclosed under Item 402 while a related person transaction giving rise to that compensation is disclosed under Item 404. We believe the possibility of additional disclosure in the context of each of the respective items is preferable to the possibility that compensation is not properly and fully disclosed under Item 402.

### **Request for Comment**

- In light of the amendments to Item 404 that we also propose, are there any circumstances for which the current exclusion from Item 402 disclosure for transactions reported under Item 404 should be retained? If so, why?

### **8. Other Proposed Changes**

A company is currently permitted to omit from Item 402 disclosure “information regarding group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the company and that are available generally to all salaried employees.”<sup>174</sup> Because relocation plans, even when available generally to all salaried employees, are susceptible to operation in a discriminatory manner that favors executive officers, this

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<sup>171</sup> Current Items 402(a)(2) and 402(a)(5).

<sup>172</sup> Because current Item 402(a)(5) otherwise is redundant with current Item 402(a)(2), we propose to rescind Item 402(a)(5) in its entirety. We propose a conforming amendment to Item 402(a)(2).

<sup>173</sup> Proposed Instructions 5 and 6 to Item 404(a).

<sup>174</sup> Current Item 402(a)(7)(ii), which generally defines the term “plan.”

exclusion may deprive investors of disclosure of significant compensatory benefits.<sup>175</sup> For this reason, we propose to delete relocation plans from this exclusion. For the same reason, we are also deleting relocation plans from the exclusion from portfolio manager compensation in forms used by management investment companies to register under the Investment Company Act and offer securities under the Securities Act.<sup>176</sup> We also propose to revise the definition of “plan” so that it is more principles-based.<sup>177</sup>

### **Request for Comment**

- Should relocation plans be required to be disclosed as compensation? Should group life, health, hospitalization and medical reimbursement also be included in reportable compensation? Can these plans be operated in a manner that may obscure compensation disclosure? Are there other plans or benefits that should be excluded from the disclosure requirements of Item 402? If so, why?
- Should management investment companies be required to disclose all relocation plans as portfolio manager compensation? Should all group life, health, hospitalization, medical reimbursement, and pension and retirement plans and arrangements also be included in compensation that is disclosed for portfolio managers of management investment companies?

## **9. Compensation of Directors**

Director compensation has continued to evolve from simple compensation

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<sup>175</sup> See, e.g., Ellen Simon, At Corporate Helm, Extra Benefits Still Alive and Well, Assoc. Press, Apr. 26, 2004; and Carrie Johnson, Former Tyco Executive Takes Stand in Trial, Wash. Post, Feb. 11, 2004, at E2.

<sup>176</sup> Proposed amendment to Instruction 2 to Item 15(b) of Form N-1A; proposed amendment to Instruction 2 to Item 21.2 of Form N-2; proposed amendment to Instruction 2 to Item 22(b) of Form N-3.

<sup>177</sup> Proposed Item 402(a)(6)(ii).

packages mostly involving cash compensation and attendance fees to more complex packages, which can also include share-based compensation, incentive plans and other forms of compensation.<sup>178</sup> In light of this complexity, we have determined to propose formatted tabular disclosure for director compensation, accompanied by narrative disclosure of additional material information. In doing so, we are revisiting an approach that the Commission proposed in 1995 but did not adopt at that time.<sup>179</sup> The commenters supporting the proposal generally believed that it was appropriate to treat director compensation similarly to executive compensation.<sup>180</sup> The commenters opposing the proposal believed that non-executive directors were generally compensated uniformly, and therefore breaking out compensation for each director in a table often could yield repetitious data.<sup>181</sup>

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<sup>178</sup> See, e.g., National Association of Corporate Directors and Pearl Meyer & Partners, 2003-2004 Director Compensation Survey (2004); National Association of Corporate Directors, Report of the NACD Blue Ribbon Commission On Director Compensation (2001); and Dennis C. Carey, et al., How Should Corporate Directors Be Compensated?, Investment Dealers' Digest Inc.—Special Issue: Boards and Directors (Jan. 1996).

<sup>179</sup> 1995 Release. The 1995 proposal was coupled with a proposal to permit companies to reduce the detailed executive compensation information provided in the proxy statement by instead furnishing that information in the Form 10-K. We did not act upon the proposals.

<sup>180</sup> The Commission received approximately 153 letters supporting the proposal. Of those, 133, all individuals, expressed their views via a brief statement submitted using a form letter. Additional supporting commenters included corporations, associations, unions, and security holder resource providers. See, e.g., comment letters on the 1995 Release in File No. S7-14-95 from BellAtlantic Network Services, Inc.; Chevron Corporation; and Scott Paper Company (generally offering support for proposal). See also, e.g., comment letters from the American Bar Association; American Institute of Certified Public Accountants; Association of Investment Management and Research; American Society of Corporate Secretaries; Institutional Shareholder Services; and Ernst & Young LLP (favoring tabular disclosure of director compensation, but with suggested improvements to proposed rules).

<sup>181</sup> Approximately 20 commenters, primarily corporations and associations, opposed the rules. See, e.g., comment letters in File No. S7-14-95 from the American Corporate Counsel Association; AT&T Corp.; The Business Roundtable; Consolidated Edison Company of New York; Deere & Company; Lehman Brothers; Safeco Corporation; Sullivan & Cromwell; and SBC Communications, Inc.

Director compensation has continued to evolve since 1995 so that we are again proposing a Director Compensation Table, which would resemble the proposed Summary Compensation Table, but would present information only with respect to the company's last completed fiscal year.

#### DIRECTOR COMPENSATION

Name	Total (\$)	Fees earned or paid in cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
A						
B						
C						
D						
E						

The All Other Compensation column of the proposed Director Compensation Table would include, but not be limited to:

- all perquisites and other personal benefits if the total is \$10,000 or greater;
- all earnings on compensation that is deferred on a basis that is not tax-qualified;
- all tax reimbursements;
- annual company contributions or other allocations to vested and unvested defined contribution plans;



- for any security of the company or its subsidiaries purchased from the company or its subsidiaries (through deferral of fees or otherwise) at a discount from the market price of such security at the date of purchase, unless the discount is generally available to all security holders or to all salaried employees of the company, the compensation cost computed in accordance with FAS 123R;
- aggregate annual increase in actuarial value of all defined benefit and actuarial pension plans;
- annual company contributions to vested and unvested defined contribution and other deferred compensation plans;
- all consulting fees;
- awards under director legacy or charitable awards programs,<sup>182</sup> and
- the dollar value of any insurance premiums paid by, or on behalf of, the company for life insurance for the director's benefit.

In addition to the disclosure specified in the columns of the table, companies would be required to disclose, for each director, by footnote to the appropriate column, the outstanding equity awards at fiscal year end as would be required if the Outstanding Equity Awards at Fiscal Year-End table for named executive officers were required for directors.<sup>183</sup> The same instructions as provided in the Summary Compensation Table would govern analogous matters in the Director Compensation Table. As with the Summary Compensation Table, the proposed rules make clear that all compensation must

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<sup>182</sup> Under director legacy programs, also known as charitable award programs, registrants typically agree to make a future donation to one or more charitable institutions in the director's name, payable by the registrant upon a designated event such as death or retirement. The amount to be disclosed in the table would be the annual cost of such promises and payments, with footnote disclosure of the total dollar amount and other material terms of each such program.

<sup>183</sup> Proposed Instruction to Item 402(1)(2)(iv) and (v).

be included in the table.<sup>184</sup> As is the case with the current director disclosure requirement, companies would not be required to include in the director disclosure any amounts of compensation paid to a named executive officer and disclosed in the Summary Compensation Table with footnote disclosure indicating what amounts reflected in that table are compensation for services as a director. A proposed instruction to the Director Compensation Table would permit the grouping of directors in a single row of the table if all of their elements and amounts of compensation are identical.<sup>185</sup>

Following the table, narrative disclosure would describe any material factors necessary to an understanding of the table. Such factors may include, for example, a breakdown of types of fees.<sup>186</sup> We are not proposing the supplemental tables for directors.

#### **Request for Comment**

- Does the proposed table organize director compensation disclosure in a format that is easy to understand?
- Do the proposed table and narrative disclose information that is material to an investor's analysis of director compensation? Should other tables be required, such as the Grants of Performance-Based Awards Table and the Grants of All Other Equity Awards Table?
- Should named executive officers who are also directors be omitted from the table, with any compensation for services as a director reported only in the Summary Compensation Table, as is currently the case? If so, should there be some

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<sup>184</sup> The only exception would be if all perquisites received by the director total less than \$10,000, they would not need to be disclosed.

<sup>185</sup> Proposed Instruction to Item 402(1)(2).

- indication of their status as directors and compensation related to their director service in the Summary Compensation Table, the Director Compensation Table, or both? Should the nature or extent of compensation to the chairman of the board of directors be presented differently from that of other directors?
- With respect to disclosure of perquisites, should the director compensation apply the same \$10,000 disclosure threshold as proposed for the Summary Compensation Table? Should separate identification and quantification apply to director perquisites?
  - Does the proposed table cover any forms of compensation that typically are not awarded to directors and therefore should be omitted? Should the requirements be modified to make it easier to capture forms of compensation, if any, that develop in the future?
  - Does the proposed table omit any forms of compensation awarded to directors that should be specifically included or identified?
  - Should narrative disclosure regarding the company's policies and objectives with respect to director compensation and share ownership or retention policies accompany this table? Should it be included in the Compensation Discussion and Analysis?
  - Would more specific footnote disclosure, as opposed to the proposed accompanying narrative, provide additional material information regarding director compensation? Should there be supplemental tables for directors, or should we require disclosure of the number of shares, units, options and other

securities awarded to directors in addition to the grant date fair value of such awards?

## **C. Treatment of Specific Types of Issuers**

### **1. Small Business Issuers**

The Item 402 proposals would continue to differentiate between small business issuers and other issuers.<sup>187</sup> In crafting the proposals, we recognize that the executive compensation arrangements of small business issuers typically are less complex than those of other public companies. We also recognize that satisfying disclosure requirements designed to capture more complicated compensation arrangements may impose new, unwarranted burdens on small business issuers.

As proposed, small business issuers would be required to provide, along with related narrative disclosure:

- the Summary Compensation Table;<sup>188</sup>
- the Outstanding Awards at Fiscal Year-End Table;<sup>189</sup> and
- the Director Compensation Table.<sup>190</sup>

Also as proposed, small business issuers would only be required to provide information in the Summary Compensation Table for the last two fiscal years. In addition, small business issuers would be required to provide information for fewer named executive

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<sup>187</sup> The term small business issuer is defined by Item 10(a)(1) of Regulation S-B. Currently, under both Item 402 of Regulation S-B and Item 402 of Regulation S-K, a small business issuer is not required to provide the Compensation Committee Report, the Performance Graph, the Compensation Committee Interlocks disclosure, the Ten-Year Option/SAR Repricings Table, and the Option Grant Table columns disclosing potential realizable value or grant date value. The current rules also permit small business issuers to exclude the Pension Plan Table.

<sup>188</sup> Proposed Items 402(b) and 402(c) of Regulation S-B.

<sup>189</sup> Proposed Item 402(d) of Regulation S-B.

<sup>190</sup> Proposed Item 402(f) of Regulation S-B.

officers, namely the principal executive officer and the two most highly compensated officers other than the principal executive officer.<sup>191</sup> Narrative discussion of a number of items to the extent material would replace tabular or footnote disclosure, for example identification of other items in the All Other Compensation column and a description of post-employment payments and other benefits.<sup>192</sup> Small business issuers would not be required to provide a Compensation Discussion and Analysis.<sup>193</sup>

### **Request for Comment**

- Would reliance on narrative disclosure adversely affect comparability of disclosure among small business issuers? Are there particular forms of compensation that for this reason should instead be presented in a tabular format? If so, why?
- Should small business issuers be categorically exempted from providing a Compensation Discussion and Analysis? Are there particular elements of the proposed Compensation Discussion and Analysis in Item 402 of Regulation S-K that small business issuers should be required to address? If so, which elements and why?
- Are there other provisions of our rule proposal that should not apply to small business issuers?

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<sup>191</sup> Proposed Item 402(a) of Regulation S-B. Proposed Item 402(c)(1)(vii) of Regulation S-B would require an identification to the extent material of any item included under All Other Compensation in the Summary Compensation Table, however identification of an item would not be considered material under the proposal if it did not exceed the greater of \$25,000 or 10% of all items included in the specified category. All items of compensation would be required to be included in the Summary Compensation Table without regard to whether such items are required to be identified.

<sup>192</sup> Proposed Items 402(c) and 402(e) of Regulation S-B.

<sup>193</sup> We would also eliminate the current provision of Item 402 of Regulation S-K that allows small business issuers using forms that call for Regulation S-K disclosure to exclude the disclosure required by certain paragraphs of that Item. Current Item 402(a)(1)(i) of Regulation S-K.

- Should the Summary Compensation Table require disclosure of compensation for each of the last two fiscal years, or is only the last completed fiscal year necessary?
- Should compensation disclosure be provided for a larger group of executive officers than we have proposed? If so, which officers and why?
- Should we require small business issuers to provide an Option Exercises and Stock Vested Table?
- Should the quantitative threshold for identifying the most highly compensated executive officers remain the same in both Regulation S-B and Regulation S-K? For example, if we raise this threshold in Item 402 of Regulation S-K, should it remain \$100,000 for Regulation S-B? Should any other threshold be different for small business issuers?
- Should small business issuers also be required to identify perquisites and personal benefits valued, in the aggregate, in excess of \$10,000 and to quantify perquisites and personal benefits valued at the greater of \$25,000 or ten percent of total perquisites and other personal benefits?
- Should we require the supplemental tables to the Summary Compensation Table?
- Are there other items that should be specifically required to be discussed in the proposed narrative disclosure for small business issuers?

## **2. Foreign Private Issuers**

Currently a foreign private issuer will be deemed to comply with Item 402 of Regulation S-K if it provides the information required by Items 6.B. and 6.E.2. of Form 20-F, with more detailed information provided if otherwise made publicly available.

The proposals would continue this treatment of these issuers and clarify that the treatment of foreign private issuers under Item 402 parallels that under Form 20-F.

### **Request for Comment**

- Should we eliminate the provision which permits a foreign private issuer to comply with Item 402 by complying with the more limited disclosure requirements under Form 20-F with respect to management remuneration? Should a foreign private issuer that is required to comply with Item 402 (for example, by filing an annual report on Form 10-K) be required to provide all of the information required under Item 402 instead of the information required under Form 20-F?

### **3. Business Development Companies**

We are proposing to apply the same executive compensation disclosure requirements to business development companies that we are proposing for operating companies.<sup>194</sup> Currently, business development companies are required to provide executive compensation disclosure based, in part, on the requirements that apply to operating companies and, in part, on the requirements that apply to investment companies registered under the Investment Company Act. Moreover, the executive compensation disclosure requirements for business development companies are not uniform in Securities Act registration statements, proxy and information statements, and Form 10-K. Under Form 10-K, business development companies are required to furnish all of the information required by Item 402 of Regulation S-K for all of the persons covered by

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<sup>194</sup> Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act [15 U.S.C. 80a-2(a)(48)].

Item 402.<sup>195</sup> In proxy and information statements, business development companies are required to provide for directors and each of the three highest paid officers that have aggregate compensation from the company for the most recently completed fiscal year in excess of \$60,000, certain information required by Item 402 of Regulation S-K and certain other information that registered investment companies are required to provide.<sup>196</sup> In registration statements, business development companies are required to provide the same information required in proxy statements, but with respect to directors, members of the advisory board, and each of the three highest paid officers or any affiliated person of the company that have aggregate compensation from the company for the most recently completed fiscal year in excess of \$60,000.<sup>197</sup>

We are proposing to apply to business development companies the same executive compensation rules that apply to operating companies because the proposed disclosure requirements are intended to provide investors with a clearer and more complete picture of executive compensation, and we are concerned that this purpose would not be achieved through piecemeal application of some of the requirements. Our proposal would also eliminate the current inconsistency between Form 10-K, on the one hand, which requires business development companies to furnish all of the information required by Item 402 of Regulation S-K, and the proxy rules and Form N-2, on the other, which require business development companies to provide some of the information from Item 402 and other information that applies to registered investment companies. Finally,

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<sup>195</sup> Item 11 of Form 10-K.

<sup>196</sup> Items 8 and 22(b)(13) of Schedule 14A. These items require business development companies to provide certain information required by Item 402(b)(2)(iv) and (c) of Regulation S-K, as well as a compensation table and a brief description of the material provisions of certain pension, retirement and other plans.

<sup>197</sup> Item 18.14 of Form N-2.



we believe that, similar to operating companies, business development companies should furnish compensation disclosure on proxies relating to the compensation arrangements and other matters enumerated in Items 8(b) through (d) of Schedule 14A and not just in the case of director elections as currently required by Item 22(b)(13).

Under the proposals, the registration statements of business development companies would be required to include all of the disclosures required by Item 402 of Regulation S-K for all of the persons covered by Item 402.<sup>198</sup> This disclosure would also be required in the proxy and information statements of business development companies if action is to be taken with respect to the election of directors or with respect to the compensation arrangements and other matters enumerated in Items 8(b) through (d) of Schedule 14A.<sup>199</sup> Business development companies would also be required to make these disclosures in their annual reports on Form 10-K.<sup>200</sup>

As a result of these proposed amendments, the persons covered by the compensation disclosure requirements would be changed. The compensation disclosure in the proxy and information statements and registration statements of business development companies would be required to cover the same officers as for operating companies, including the principal executive officer and principal financial officer, as well as the three most highly compensated executive officers that have total

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<sup>198</sup> Proposed Item 18.15 of Form N-2. Under the proposals, business development companies would no longer be required to respond to Item 18.14 of Form N-2, and Item 18.14(c) of Form N-2 would be deleted. Current Items 18.15 and 18.16 of Form N-2 would be redesignated as Items 18.16 and 18.17, respectively. As a result of the redesignation of current Item 18.16 of Form N-2, a change to the cross reference to this Item in Instruction 8(a) of Item 24 of the form is also proposed.

<sup>199</sup> Proposed amendment to Item 8 of Schedule 14A. Under the proposals, business development companies would no longer be required to respond to Item 22(b)(13) of Schedule 14A, and Item 22(b)(13)(iii) of Schedule 14A would be deleted. Proposed amendments to Item 22(b)(13) of Schedule 14A.

compensation exceeding \$100,000,<sup>201</sup> instead of each of the three highest paid officers of the company that have aggregate compensation from the company for the most recently completed fiscal year in excess of \$60,000. In addition, the registration statements of business development companies would no longer be required to disclose compensation of members of the advisory board or certain affiliated persons of the company.

Finally, under the proposals, the proxy and information statements and registration statements of business development companies would not be required to include compensation from the “fund complex.” Currently, this information is required in some circumstances.<sup>202</sup>

### **Request for Comment**

- Should business development companies be required to comply with the same compensation disclosure requirements as operating companies or registered investment companies, a combination of the compensation disclosure requirements for operating companies and registered investment companies, or some other set of compensation disclosure requirements? Should the same compensation disclosure requirements apply to business development companies in registration statements, proxy and information statements, and Form 10-K? In addressing the appropriate compensation disclosure requirements for business development companies, commenters are requested to address separately the

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<sup>200</sup> Item 11 of Form 10-K.

<sup>201</sup> See Section II.B.6., above.

<sup>202</sup> See Instructions 4 and 6 to Item 22(b)(13)(i) of Schedule 14A; Instructions 4 and 6 to Item 18.14(a) of Form N-2 (requiring certain entries in the compensation table in the proxy and information statements and registration statements of business development companies to include compensation from the fund complex).

persons covered by the disclosure requirements and the disclosures required with respect to those persons. Commenters are also requested to address separately disclosures for executive officers and directors.

- Should all business development companies be subject to the same executive compensation disclosure or should we distinguish between smaller and larger business development companies? Should business development companies be subject to the executive compensation disclosure requirements of Regulation S-B filers?
- Should we require disclosure of compensation paid to affiliated persons of a business development company and members of the advisory board of the company?
- Should we require disclosure of certain compensation paid by the fund complex that includes a business development company?

#### **D. Conforming Amendments**

The Item 402 proposals necessitate conforming amendments to the Items of Regulations S-K and S-B and the proxy rules that cross reference amended paragraphs of Item 402. On this basis, the rule proposals would amend:

- the Item 201(d) of Regulations S-K and S-B and proxy rule references to the Item 402 definition of “plan;”<sup>203</sup>
- the Item 601(b)(10) of Regulation S-K reference to the Item 402 treatment of foreign private issuers;<sup>204</sup> and

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<sup>203</sup> Proposed amendments to: Instruction 2 to paragraph (d) of Item 201 of Regulation S-B; Instruction 2 to paragraph (d) of Item 201 of Regulation S-K; Exchange Act Rules 14a-6(a)(4) and 14c-5(a)(4); and Instruction 1 to Item 10(c) of Schedule 14A.

- the proxy rule references to Item 402 retirement plan disclosure.<sup>205</sup>

### **E. General Comment Requests on the Item 402 Proposals**

We request comment on any aspect of these proposals. In particular:

- Would the proposals effectively provide clearer, more complete disclosure of executive and director compensation? If not, what changes are needed to accomplish this result?
- Are the proposals sufficiently broad-based to continue to operate effectively as new forms of compensation are developed in the future? If not, what changes are necessary to achieve this flexibility?
- To clarify what other filed documents provide information about executive compensation, should a company be required to list in its annual proxy statement for the election of directors all other documents filed since the last proxy statement (such as Forms 8-K and exhibits filed with Forms 10-K and 10-Q) that contain this information? Instead, should such a list be provided solely as an EDGAR-filed annex to the proxy statement?
- Would the presentation and content of the executive and director compensation disclosure be improved by making the information available in the form of interactive data? For example, could an understanding of the information reported in the proposed tables be enhanced by the ability to access more detailed information regarding discrete amounts or items reported in the tables? If the presentation of interactive data would be desirable, what would be the best means

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<sup>204</sup> Proposed amendment to Item 601(b)(10)(iii)(C)(5).

<sup>205</sup> Proposed amendments to Item 10(b)(1)(ii) and the Instruction following Item 10(c) of Schedule 14A.

for introducing interactive data capabilities into the proposed Item 402 disclosure requirements? For example, should we develop a data format that could be used to submit the information that has interactive capability while at the same time having the information readable on its face? Should we consider having the information provided using Extensible Business Reporting Language, also known as XBRL? Could the information be provided in a form that permits interactive capability in proxy and information statements that are made available on the Internet or otherwise electronically?

### **III. Proposed Revisions to Form 8-K and the Periodic Report Exhibit Requirements**

In March 2004, the Commission adopted amendments to Form 8-K that significantly expanded the number of events that are reportable on Form 8-K and reduced the reporting deadline for most Form 8-K disclosure items to four business days after the triggering event.<sup>206</sup> These amendments became effective on August 23, 2004. As part of our broader effort to revise our executive and director compensation disclosure requirements, we are proposing revisions to Item 1.01 of Form 8-K, which currently requires this real-time disclosure about an Exchange Act reporting company's entry into a material definitive agreement outside of the ordinary course of the company's business, as well as any material amendment to such an agreement. Our staff's experience over the last year suggests that this item has elicited executive compensation disclosure regarding types of matters that do not appear always to be unquestionably or presumptively

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<sup>206</sup> Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15593] (the "Form 8-K Adopting Release").

material, which is the standard we set for the expanded Form 8-K disclosure events.<sup>207</sup>

We therefore propose to revise Items 1.01 and 5.02 to require real-time disclosure of employee compensation events that more clearly satisfy this standard.

In addition to the proposed amendments to Items 1.01 and 5.02 of Form 8-K, we propose to revise General Instruction D of Form 8-K to permit companies in most cases to omit the Item 1.01 heading if multiple items including Item 1.01 are applicable, so long as all of the substantive disclosure required by Item 1.01 is included.

**A. Proposed Revisions to Items 1.01 and 5.02 of Form 8-K**

Item 1.01 of Form 8-K requires an Exchange Act reporting company to disclose, within four business days, the company's entry into a material definitive agreement outside of its ordinary course of business, or any amendment of such agreement that is material to the company. When we initially proposed this item, several commenters stated that it would be difficult to determine, within the shortened Form 8-K filing period, whether a particular definitive agreement met the materiality threshold of Item 1.01, and whether the agreement was outside of the ordinary course of business.<sup>208</sup> Some of these commenters suggested that we apply to Item 1.01 the standards used in pre-existing Item 601(b)(10) of Regulation S-K governing the filing as exhibits to Commission reports of material contracts entered into outside the ordinary course because these standards had

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<sup>207</sup> We stated in Section I of the Form 8-K Adopting Release: "The revisions that we adopt today will benefit markets by increasing the number of unquestionably or presumptively material events that must be disclosed currently."

<sup>208</sup> See, e.g., comment letters on Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8106 (June 17, 2002) [67 FR 42913] in File No. S7-22-02 from the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association; Cleary, Gottlieb, Steen & Hamilton; Intel Corporation; Professor Joseph A. Grundfest, et al; Perkins Coie LLP; Sherman & Sterling; and Sullivan & Cromwell.

been in place for many years and were familiar to reporting companies.<sup>209</sup>

In response to the concerns raised by these comments, we adopted Item 1.01 of Form 8-K so that it used the standards of Item 601(b)(10) to determine the types of agreements that are material to a company and not in the ordinary course of business. Item 601(b)(10) of Regulation S-K requires a company to file, as an exhibit to Securities Act and Exchange Act filings, material contracts that are not made in the ordinary course of business and are to be performed in whole or part at or after the filing of the registration statement or report, or were entered into not more than two years before the filing. The item refers specifically to employment compensation arrangements and establishes a company's obligation to file the following as exhibits:

- any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any named executive officer (as defined by Item 402(a)(3) of Regulation S-K) participates;
- any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates, unless immaterial in amount or significance; and
- any compensation plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights in which any employee (whether or not an

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See e.g., comment letter in File No. S7-22-02 from the Section of Business Law of the American Bar Association.

executive officer of the company) participates unless immaterial in amount or significance.<sup>210</sup>

Therefore, entry into these types of contracts triggers the filing of a Form 8-K within four business days. Importantly, the requirement for directors and named executive officers does not include an exception for those that are “immaterial in amount or significance.”

The incorporation of the Item 601(b)(10) standards into Item 1.01 of Form 8-K has therefore significantly affected executive compensation disclosure practices. Prior to the Form 8-K amendments, it was customary for a company’s annual proxy statement to be the primary vehicle for disclosure of executive and director compensation information. However, Item 1.01 of amended Form 8-K has resulted in executive compensation disclosures that are much more frequent and accelerated than those included in a company’s proxy statement. In addition, particularly because of the terms of Item 601(b)(10), Item 1.01 of Form 8-K has triggered compensation disclosure of the types of

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<sup>210</sup> Item 601(b)(10)(iii) of Regulation S-K. We note the provision in Item 601(b)(10)(iii)(A) that carves out any plan, contract or arrangement in which named executive officers and directors do not participate that is “immaterial in amount or significance.” In 1980, the Commission adopted amendments to Regulation S-K that consolidated all of the exhibit requirements of various disclosure forms into a single item in Regulation S-K. Amendments Regarding Exhibit Requirements, Release No. 33-6230 (Aug. 27, 1980) [45 FR 58822], at Section II.B. This item was a forerunner of the current Item 601. As part of that 1980 adopting release, the definition of material contract contained in the new item was also revised in an effort to reduce the number of remunerative plans or arrangements that must be filed. Not long after, though, the staff discovered that rather than reduce the number of exhibits filed, the provision actually had the opposite effect. The staff found that the revised definition of material contract “has resulted in registrants filing a large volume of varied remunerative contracts involving directors and executive officers, contracts which are not material and which would not have been filed under the previously existing ‘material in amount or significance’ standard.” Technical Amendment Regarding Exhibit Requirement, Release No. 33-6287 (Feb. 6, 1981) [46 FR 11952], at Section I. Therefore, in February 1981, the Commission added “unless immaterial in amount or significance” to the definition of “material contracts” as applied to remunerative plans, contracts or arrangements participated in by executives that are not named executive officers. Id. We reiterate that this phrase was intended to indicate that whether plans, contracts or arrangements which executive officers other than named executive officers participate are to included in the requirements of 601(b)(10) must be determined on the basis of materiality.



matters that, in some cases, appear to fall short of the “unquestionably or presumptively material” standard associated with the expanded Form 8-K disclosure items. Companies and their counsel have raised concerns that the new Form 8-K requirements have resulted in real-time disclosure of compensation events that should be disclosed, if at all, in a company’s proxy statement for its annual meeting or as an exhibit to the company’s next periodic report, such as the Form 10-Q or Form 10-K.<sup>211</sup>

We believe that much of the disclosure regarding employment compensation matters required in real-time under the new Form 8-K requirements is viewed by investors as material.<sup>212</sup> However, we also believe that it would be appropriate to restore a more balanced approach to this aspect of Form 8-K that is designed to elicit unquestionably or presumptively material information on a real-time basis, but seeks to limit Form 8-K disclosure of information below that threshold. Accordingly, we propose to amend Item 1.01 of Form 8-K to eliminate employment compensation arrangements and to cover such arrangements under a modified broader Item 5.02.<sup>213</sup>

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<sup>211</sup> See, e.g., Melissa Klein Aguilar, This Side of Caution: New Regs. Prompt 8-K Increases, Compliance Week, Aug. 23, 2005; Scott S. Cohen, Editorial: Debating the Materiality of “Material Definitive Agreements,” Compliance Week, Feb. 8, 2005; and Patrick McGeehan, Now, an Advance Look at Those Big Paychecks, N.Y. Times, Sept. 26, 2004, at 36.

<sup>212</sup> See, e.g., Jerry Knight, Tiny SEC Filing Gave a Big Hint to Vastera’s Plans, Wash. Post, Jan. 24, 2005, at E1; and Alex Berenson, Merck Offering Top Executives Rich Way Out, N.Y. Times, Nov. 30, 2004, at A1.

<sup>213</sup> We propose deleting the last sentence of current Instruction 1 to Item 1.01 of Form 8-K, which references the portions of Item 601(b)(10) that specifically relate to management compensation and compensatory plans. In place of the deleted sentence, we propose to add a sentence specifying that agreements involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) of Regulation S-K need not be disclosed under Item 1.01 of Form 8-K. This change also will apply to disclosure of terminations of material definitive agreements under Item 1.02 of Form 8-K, which references the definition of “material definitive agreement” in Item 1.01 of Form 8-K. Instead of being required to be disclosed based on the general requirements with regard to material definitive agreements in Item 1.01 and Item 1.02, employment compensation arrangements would be covered under Item 5.02 of Form 8-K.

Item 5.02 of Form 8-K currently generally requires disclosure within four business days of the appointment or departure of directors and specified officers. In particular, Item 5.02 requires disclosure if a company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, retires, resigns or is terminated from that position<sup>214</sup> or if a company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions.<sup>215</sup> Item 5.02 also requires disclosure if a director retires, resigns, is removed, or declines to stand for re-election.<sup>216</sup> The required disclosure currently includes a brief description of the material terms of any employment agreement between the registrant and the officer and a description of disagreements, if any.

We propose to modify Item 5.02 to capture generally the currently required information under that item, as well as additional information regarding material employment compensation arrangements involving named executive officers that currently fall under Item 1.01. Our proposal will both modify the overall requirements for disclosure of employment compensation arrangements on Form 8-K and locate all such disclosure under a single item. We propose to accomplish this by taking the following steps:

- expanding the information regarding retirement, resignation or termination to include all persons falling within the definition of named executive officers for

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<sup>214</sup> Item 5.02(b) of Form 8-K.

<sup>215</sup> Item 5.02(c) of Form 8-K.

<sup>216</sup> Item 5.02(a) of Form 8-K.

the company's previous fiscal year, whether or not included in the list currently specified in Item 5.02;<sup>217</sup>

- expanding the disclosure items covered under Item 5.02 beyond employment agreements to require a brief description of any material plan, contract or arrangement to which a covered officer or director is a party or in which he or she participates that is entered into or materially amended in connection with any of the triggering events specified in Item 5.02, or any grant or award to any such covered person, or modification thereto, under any such plan, contract or arrangement in connection with any such event;<sup>218</sup>
- in respect of the principal executive officer, the principal financial officer, or persons falling within the definition of named executive officer for the company's previous fiscal year, expanding the disclosure items to include a brief description of any material new compensatory plan, contract or arrangement, or new grant or award thereunder (whether or not written), and any material amendment to any compensatory plan, contract or arrangement (or any modification to a grant or award thereunder), whether or not such occurrence is in connection with a triggering event specified in Item 5.02. Grants or awards or modifications thereto will not be required to be disclosed if they are consistent with the terms of previously disclosed plans or arrangements and they are disclosed the next time

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<sup>217</sup> The Item would continue to cover the officers specified therein, whether or not named executive officers for the previous or current years, and all directors.

<sup>218</sup> Plans, contracts or arrangements (but not material amendments or grants or awards or modifications thereto) may be denoted by reference to the description in the company's most recent annual report on Form 10-K or proxy statement.

the company is required to provide new disclosure under Item 402 of Regulation S-K; and

- Adding a requirement for disclosure of salary and bonus for the most recent fiscal year that was not available at the latest practicable date in connection with disclosure under Item 402 of Regulation S-K.<sup>219</sup>

In the case of each of these disclosure items proposed for Item 5.02, we emphasize that we are proposing that a brief description of the specified matter be included. We have observed that in response to the current requirement under Item 1.01, some companies have included disclosure that resembles an updating of the disclosure required under current Item 402 of Regulation S-K. In the context of current disclosure under Form 8-K, we are seeking a disclosure that informs investors of specified material events and developments. However, the information we are seeking does not perforce extend to the information necessary to comply with Item 402.

#### **Request for Comment**

- Is there a particular benefit to receiving information regarding employment compensation on a current basis rather than annually or quarterly? What information is material in that regard?
- Is disclosure of material information about executive and director compensation and related person transactions avoided if comprehensive disclosure of compensation and related party transactions only occurs annually? Should we also require quarterly disclosure of material changes to information required by

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<sup>219</sup> See Section II.B.1.b. above for a discussion of the reporting delay that exists under the current disclosure rules when bonus and salary are not determinable at the most recent practicable date.

- Items 402 and 404 in each company's Form 10-Q?
- Would a quarterly update of material changes to Item 402 and Item 404 disclosure provide meaningful disclosure to investors that they cannot get through other sources? If not, why?
  - Would quarterly updates eliminate the need for most of the current disclosure about executive and director compensation transactions provided under Item 1.01 of Form 8-K? Should the information we propose to require under Item 5.02(e) of Form 8-K only be required quarterly?
  - Are the proposed revisions to Items 1.01 and 5.02 of Form 8-K the most effective means to achieve an appropriate balance regarding real-time director and executive compensation disclosure? Please describe any suggested alternatives in detail.
  - Should we require disclosure of all amendments to the plans, contracts and arrangements encompassed by our proposed disclosure requirements under Item 5.02(e) of Form 8-K? Only material amendments?

**B. Proposed Extension of Limited Safe Harbor under Section 10(b) and Rule 10b-5 to Item 5.02(e) of Form 8-K and Exclusion of that Item from Form S-3 Eligibility Requirements**

We propose to extend the safe harbors regarding Section 10(b) and Rule 10b-5 and Form S-3 eligibility in the event that a company fails to timely file reports required by Item 5.02(e) of Form 8-K. In the final rules for the new Form 8-K requirements, we adopted a limited safe harbor from liability under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder for failure to timely file reports required by Form 8-K Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a). The safe harbor applies until the filing due date

of the company's quarterly or annual report for the period in question. As we stated at the time, we believe that these items may require management to make rapid materiality and similar judgments within the timeframe required for filing of a Form 8-K. Under those circumstances we concluded that the risk of liability under these provisions was sufficiently disproportionate to justify the limited safe harbor of fixed duration. For the same reasons, we believe that the safe harbor should also extend to proposed Item 5.02(e) of Form 8-K. We therefore propose to amend Exchange Act Rules 13a-11(c) and 15d-11(c) accordingly.

In addition, under our current rules, a company forfeits its eligibility to use Form S-3 if it fails to timely file all reports required under Exchange Act Sections 13(a) or 15(d) during the 12 months prior to filing of the registration statement.<sup>220</sup> For the same reasons, when adopting the new Form 8-K rules, we revised the Form S-3 eligibility requirements so that a company would not lose its eligibility to use Form S-3 registration statements if it failed to timely file reports required by the Form 8-K items to which the Section 10(b) and Rule 10b-5 safe harbor applies.<sup>221</sup> In particular, the burden resulting from a company's sudden loss of eligibility to use Form S-3 could be a disproportionately large negative consequence of an untimely Form 8-K filing under one of the specified items.<sup>222</sup> We believe that this safe harbor should be extended to proposed Item 5.02(e) of Form 8-K. Therefore, we propose to amend General Instruction I.4 of Form S-3, which

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<sup>220</sup> General Instruction I.A.3 to Form S-3.

<sup>221</sup> Form 8-K Adopting Release, at Section II.E.

<sup>222</sup> Id.

pertains to the eligibility requirements for use of Form S-3 to reflect this position.<sup>223</sup>

**Request for Comment**

- Should we extend the Section 10(b) and Rule 10b-5 safe harbor and the Form S-3 safe harbor to all of Item 5.02 or just the provision proposed?

**C. General Instruction D to Form 8-K**

Frequently an event may trigger a Form 8-K filing under multiple items, particularly under both Item 1.01 and another item. General Instruction D to Form 8-K currently permits a company to file a single Form 8-K to satisfy one or more disclosure items, provided that the company identifies by item number and caption all applicable items being satisfied and provides all of the substantive disclosure required by each of the items. In order to promote prompt filings on Form 8-K and avoid potential non-compliance with Form 8-K due to inadvertent exclusions of captions, we propose a revision to General Instruction D to permit companies to omit the Item 1.01 heading in a Form 8-K also disclosing any other Item, so long as the substantive disclosure required by Item 1.01 is included in the Form 8-K. This would not extend to allowing a company to omit any other caption if the Item 1.01 caption is included.

**Request for Comment**

- Is it appropriate to allow a company to omit the Item 1.01 heading in a Form 8-K disclosing any other item?

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<sup>223</sup> Because Form S-2 was eliminated effective December 1, 2005, a similar proposed change to the eligibility rules of Form S-2 is unnecessary. Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44721], at Section V.B.3.c.

#### **D. Foreign Private Issuers**

We propose revising the exhibit instructions to Form 20-F under which foreign private issuers would be required to file any employment or compensatory plan with management or directors (or portion of such plan) only when the foreign private issuer either is required to publicly file the plan (or portion of it) in its home country or if the foreign private issuer had otherwise publicly disclosed the plan.<sup>224</sup>

Under Item 6.B.1 of Form 20-F, a foreign private issuer must disclose the compensation of directors and management on an aggregate basis and, additionally, on an individual basis, unless individual disclosure is not required in the issuer's home country and is not otherwise publicly disclosed by the foreign private issuer. Under the exhibit instructions to Form 20-F, management contracts or compensatory plans in which directors or members of management participate generally must be filed as exhibits, unless the foreign private issuer provides compensation information on an aggregate basis and not on an individual basis. Under these rules, an issuer that provides any individualized compensation disclosure is required to file as an exhibit to Form 20-F management employment agreements that potentially relate to matters that have not otherwise been disclosed.

The proposed revision to the exhibit instructions to Form 20-F<sup>225</sup> is intended to be consistent with the existing disclosure requirements under Form 20-F relating to executive compensation matters for foreign private issuers. In the same way that executive compensation disclosure under Form 20-F largely mirrors the disclosure that a foreign private issuer makes under home country requirements or voluntarily, so too the

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<sup>224</sup> We are also proposing a similar revision to Item 601(b)(10)(iii)(C)(5) of Regulation S-K.



public filing of management employment agreements as an exhibit to Form 20-F would under our proposal mirror the public availability of such agreements under home country requirements or otherwise. In addition, we believe that the proposed amendments may encourage foreign private issuers to provide more compensation disclosure in their SEC filings by eliminating privacy concerns associated with filing an individual's employment agreement when such agreement is not required to be made public by a home country exchange or securities regulator. As foreign disclosure related to executive remuneration varies in different countries but continues to improve,<sup>226</sup> the proposed revisions would recognize that trend and provide for greater harmonization of international disclosure standards with respect to executive compensation in a manner consistent with other requirements of Form 20-F.

#### **Request for Comment**

- Should we require the filing of employment agreements by foreign private issuers when individualized compensation information is disclosed? Should we instead require the filing of those portions of management employment agreements and plans that relate to the information that is disclosed on an individualized basis regardless of whether those portions are required to be made public in the issuer's home country or otherwise?

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<sup>225</sup> Proposed Instruction 4(c) to Exhibits to Form 20-F.

<sup>226</sup> Many jurisdictions now require or encourage disclosure of executive compensation information. For example, enhanced disclosure of executive remuneration is included as part of the European Commission's 2003 Company Law Action Plan. See Guido Ferrarini and Niamh Moloney, Executive Remuneration in the EU: The Context for Reform, European Corporate Governance Institute, Law Working Paper N. 32/2005 (April 2005).

#### IV. Beneficial Ownership Disclosure

We propose to amend Item 403(b)<sup>227</sup> by adding a requirement for footnote disclosure of the number of shares pledged as security by named executive officers, directors and director nominees. To the extent that shares beneficially owned by named executive officers, directors and director nominees are used as collateral, these shares may be subject to material risk or contingencies that do not apply to other shares beneficially owned by these persons. These circumstances have the potential to influence management's performance and decisions.<sup>228</sup> As a result, we believe that the existence of these securities pledges could be material to shareholders.<sup>229</sup> Because significant shareholders who are not members of management are in a different relationship with other shareholders and have different obligations to them, the proposals would not require disclosure of their pledges pursuant to Item 403(a), other than pledges that may result in a change of control currently required to be disclosed.<sup>230</sup> The proposals also would specifically require disclosure of beneficial ownership of directors' qualifying shares, which is currently not required, because the beneficial ownership disclosure should include a complete tally of the securities beneficially owned by directors.

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<sup>227</sup> Item 403(b) of Regulation S-K and Item 403(b) of Regulation S-B are proposed to be revised in the same manner.

<sup>228</sup> See, e.g., Marianne M. Jennings, The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics So Complex, 1 U. St. Thomas L.J. 995, 1010 (Spring 2004) (arguing that the extension of loans to the CEO of WorldCom, which were collateralized by WorldCom shares owned by the CEO, contributed to WorldCom's financial demise).

<sup>229</sup> This proposal is similar to a proposal the Commission made in 2002. See Form 8-K Disclosure of Certain Management Transactions, Release No. 33-8090 (Apr. 12, 2002) [67 FR 19914].

<sup>230</sup> Current Item 403(c) of Regulation S-K. See also Items 6 and 7(3) of Schedule 13D [17 CFR 240.13d-101].

### **Request for Comment**

- Should any specific categories of loans, such as margin loans, be treated differently under the proposal to disclose management pledges of beneficially owned securities? If so, please explain why.
- Should directors' qualifying shares continue to be excluded? If so, explain why that information is not material.

### **V. Certain Relationships and Related Transactions Disclosure**

We believe that, in addition to disclosure regarding executive compensation, a materially complete picture of financial relationships with a company involves disclosure regarding related party transactions. Therefore, we are also proposing significant revisions to Item 404 of Regulation S-K “Certain Relationships and Related Transactions.” In 1982, various provisions that had been adopted in a piecemeal fashion and had been subject to frequent amendment were consolidated into Item 404 of Regulation S-K.<sup>231</sup> Today we propose to amend Item 404 of Regulation S-K and S-B to streamline and modernize this disclosure requirement, while making it more principles-based. Although the proposals would significantly modify this disclosure requirement, its purpose - to elicit disclosure regarding transactions and relationships, including indebtedness, involving the company and related persons and the independence of directors and nominees for director and the interests of management - would remain unchanged.

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<sup>231</sup> See the 1982 Release. For a discussion of these provisions, see also Disclosure of Certain Relationships and Transactions Involving Management, Release No. 33-6416 (July 9, 1982) [47 FR 31394], at Section II.

As discussed in greater detail below, the proposal has four parts:<sup>232</sup>

- Item 404(a) would contain a general disclosure requirement for related person transactions, including those involving indebtedness.<sup>233</sup>
- Item 404(b) would require disclosure regarding the company's policies and procedures for the review, approval or ratification of related person transactions.
- Item 404(c) would require disclosure regarding promoters of a company.<sup>234</sup>
- New Item 407 would consolidate current corporate governance disclosure requirements.<sup>235</sup> Proposed Item 407(a) would require disclosure regarding the independence of directors, including whether each director and nominee for director of the registrant is independent, as well as a description of any relationships not disclosed under paragraph (a) of Item 404 that were considered when determining whether each director and nominee for director is independent.

#### **A. Transactions with Related Persons**

We are proposing revisions to Item 404 to make the certain relationships and related transactions disclosure requirements clearer and easier to follow. The proposals would retain the principles for disclosure of related person transactions that are specified in current Item 404(a), but would no longer include all of the instructions that serve to delineate what transactions are reportable or excludable from disclosure based on bright lines that can depart from a more appropriate materiality analysis. Instead, proposed Item

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<sup>232</sup> The discussion that follows focuses on changes to Regulation S-K, with Section V.E.1. explaining the modifications proposed for Regulation S-B. References throughout the following discussion are to current or proposed Items of Regulation S-K, unless otherwise indicated.

<sup>233</sup> As previously noted, related party transactions are currently disclosed under Item 404(a). Indebtedness is currently disclosed under Item 404(c).

<sup>234</sup> Disclosure requiring promoters is currently required under Item 404(d).

404(a) would consist of a general statement of the principle for disclosure, followed by specific disclosure requirements and instructions. The instructions would explain the related persons covered by the Item, the scope of transactions covered by the Item, the method for computation of the amounts involved in the relationship or transaction, the interaction with Item 402, special requirements for indebtedness with banks, and the materiality of certain ownership interests.

The proposed Item would extend to disclosure of indebtedness. Currently, Item 404(a) requires disclosure regarding transactions involving the company and certain related persons,<sup>236</sup> and Item 404(c) requires disclosure regarding indebtedness.<sup>237</sup> We propose to consolidate these two provisions in order to eliminate confusion regarding the circumstances in which each item applies and streamline duplicative portions of current paragraphs (a) and (c) of Item 404.

### **1. Broad Principle for Disclosure**

Proposed Item 404(a) would articulate a broad principle for disclosure; it would state that a company must provide disclosure regarding:

- any transaction since the beginning of the company's last fiscal year, or any

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<sup>235</sup> These matters are currently required pursuant to various provisions, including Item 7 of Schedule 14A and Items 306, 401(h), (i) and (j), 402(j) and 404(b).

<sup>236</sup> The related persons specified in current Item 404(a) are: (1) any director or executive officer of the company; (2) any nominee for election as a director; (3) any security holder who is known to the company to own of record or beneficially more than five percent of any class of the company's voting securities; and (4) any member of the immediate family of any of the foregoing persons.

<sup>237</sup> The related persons specified in current Item 404(c) are: (1) any director or executive officer of the company; (2) any nominee for election as a director; (3) any member of the immediate family of any of the persons specified in (1) or (2) above; (4) any corporation or organization (other than the company or a majority-owned subsidiary of the company) of which any of the persons in (1) or (2) above is an executive officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities; and (5) any trust or other estate in which any of the persons in (1) or (2) above has a substantial beneficial interest or as to which such person serves as a trustee or in a similar capacity.

- currently proposed transaction;
- in which the company was or is to be a participant;
  - in which the amount involved exceeds \$120,000; and
  - in which any related person had, or will have, a direct or indirect material interest.

We propose to eliminate current Instruction 1 to Item 404(a), which is repetitive of the general materiality standard applicable to the item. By proposing to delete this instruction we do not intend to change the materiality standard applicable to Item 404(a). The “materiality” standard for disclosure currently embodied in Item 404(a) would be retained; a company would disclose based on whether the related person had, or will have, a direct or indirect material interest in the transaction. The materiality of any interest would continue to be determined on the basis of the significance of the information to investors in light of all the circumstances and the significance of the interest to the person having the interest.<sup>238</sup> The relationship of the related persons to the transaction, and with each other, and the amount involved in the transaction would be among the factors to be considered in determining the materiality of the information to investors.

We propose to eliminate current Instruction 7 to Item 404(a), which establishes certain presumptions regarding materiality and may operate to exclude some transactions from disclosure that might otherwise require disclosure under the principles enunciated by the Item. We also propose to eliminate current Instruction 9 to Item 404(a), which indicates that the \$60,000 threshold is not a bright line materiality standard. We propose to eliminate current Instruction 9 to Item 404(a) because it is repetitive of the general

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<sup>238</sup> See Basic v. Levinson and TSC Industries v. Northway.

materiality standard applicable to the Item.<sup>239</sup> We believe that application of the materiality principles under the Item would be more consistent with a principles-based approach and would lead to more appropriate disclosure outcomes than application of the instructions that we propose to eliminate.

In addition, the proposals would:

- call for disclosure if a company is a “participant” in a transaction, rather than if it is “a party” to the transaction, as “participant” more accurately connotes the company’s involvement;
- modify the \$60,000 threshold for disclosure to \$120,000 to adjust for inflation;
- include a defined term for “transaction” to provide that it includes a series of similar transactions and to make clear its broad scope; and
- include a single defined term for “related persons.”<sup>240</sup>

As is currently the case, disclosure would be required for three years in registration statements filed pursuant to the Securities Act or the Exchange Act.<sup>241</sup>

Finally, the rule proposals would include a technical modification. Currently, Item 404(a) states that disclosure must be provided regarding situations involving “the registrant or any of its subsidiaries.” Because companies must include subsidiaries in making materiality determinations in all circumstances, the reference to “subsidiaries” is

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<sup>239</sup> It is possible that some registrants have been operating under a misconception. The current \$60,000 threshold is not, and the proposed \$120,000 threshold would not be, a bright line materiality standard. The rule calls for, and would continue to call for, a materiality analysis of transactions above the threshold in order to determine if the related person has a direct or indirect material interest.

<sup>240</sup> The “related persons” covered by the rules proposal are discussed below in Section V.A.1.b.

<sup>241</sup> However, if the disclosure were being incorporated by reference into a registration statement on Form S-4, the additional two years of disclosure would not be required. Proposed Instruction 1 to Item 404.

superfluous, and we propose to eliminate it. This proposal would not change the scope of disclosure required under the Item.<sup>242</sup>

### **Request for Comment**

- Should we recast Item 404(a) as a more principles-based disclosure requirement as proposed? Why or why not?
- In recasting Item 404(a) as a more principles-based disclosure requirement, should we eliminate all of the current instructions, not only the ones we propose eliminating? Are there any concepts in the instructions to Item 404(a) that we propose to eliminate that should be retained? As a result of eliminating the instructions to Item 404(a), would there be any categories of transactions which would have an unclear disclosure status? Although the analysis required for any particular transaction would be fact-specific, should we provide further guidance or examples regarding the disclosure status of particular types of direct or indirect interests?
- Is it appropriate to adjust the threshold for disclosure to \$120,000? Should there be no threshold? Should the threshold also operate on a sliding scale (for example, the lower of \$120,000 or 1% of the average of total assets for the last three completed fiscal years<sup>243</sup> or the lower of \$120,000 or a percentage of annual corporate expenses) to capture smaller transactions for smaller companies?

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<sup>242</sup> For the same reason, we are eliminating the references to “subsidiaries” in the “compensation committee interlocks and insider participation in compensation decisions” disclosure requirement in current Item 402(j). This proposal would not change the scope of disclosure required under the rule. See proposed Item 407(e)(4).

<sup>243</sup> This is the standard proposed for Item 404 of Regulation S-B, which is discussed in Section V.E.1. below.



Explain whether a higher or lower threshold, or no threshold, would result in more effective disclosure.

- In Item 404(a), should we require a company to be “involved” rather than to be “a participant” in transactions subject to disclosure?

**a. Indebtedness**

Section 402 of the Sarbanes-Oxley Act prohibits most personal loans by an issuer to its officers and directors.<sup>244</sup> This development raises the issue of whether disclosure of indebtedness of the sort required under our current rules should be maintained. We believe that the approach to disclosure of indebtedness involving related persons that we propose today would be appropriate because of the scope of the direct and indirect interests covered by our disclosure requirements, because related persons include persons not covered by the prohibitions, and because there are certain exceptions to the prohibitions. We propose, however, to eliminate the current distinction between indebtedness and other types of related person transactions.

As a result of integrating paragraph (c) of Item 404 into paragraph (a) of Item 404, the proposals would change some situations in which indebtedness disclosure is required. First, disclosure of indebtedness transactions would be required with regard to all related persons covered by the related person transaction disclosure requirement, including significant shareholders.<sup>245</sup> Second, the rule proposals would require disclosure of all material indirect interests in indebtedness transactions of related persons, including

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<sup>244</sup> Codified in Section 13(k) of the Exchange Act [15 U.S.C. 78m(k)].

<sup>245</sup> The related person transaction disclosure requirement in current Item 404(a) covers significant shareholders, while the indebtedness disclosure requirement in current Item 404(c) does not. The significant shareholders covered would continue to be any security holder who is known to the registrant to own of record or beneficially more than five percent of any class of the registrant’s voting securities. Proposed Instruction 1.b. to Item 404(a).

significant shareholders and immediate family members.<sup>246</sup> Disclosure of material indirect interests of these related persons in transactions involving the company currently is, and would continue to be, required by Item 404(a). Currently, Item 404(c) requires disclosure of specific indirect interests of directors, nominees for director, and executive officers of the registrant in indebtedness through corporations, organizations, trusts, and estates.<sup>247</sup> We believe that disclosure requirements for indebtedness and for other related person transactions should be congruent. In particular, we believe that loans by companies other than financial institutions should be treated like any other related person transactions, and, as discussed below, we propose to address certain ordinary course loans by financial institutions in an instruction to Item 404(a).

#### **Request for Comment**

- Is our proposal appropriate in light of the prohibition on personal loans to officers and directors in the Sarbanes-Oxley Act?
- Should we combine the related person and indebtedness disclosure requirements in paragraphs (a) and (c) of Item 404? As a result of combining these disclosure requirements, would there be categories of indebtedness transactions for which disclosure would be required that should not be required or for which disclosure would not be required that should be disclosed?
- Should the disclosure requirements for indebtedness be extended to significant shareholders?

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<sup>246</sup> As a result of integrating paragraph (c) of Item 404 into paragraph (a) of Item 404, the rule proposals would set a \$120,000 threshold and require disclosure only if there is a direct or indirect material interest in such an indebtedness transaction, while Item 404(c) currently generally requires disclosure of all indebtedness exceeding \$60,000.

**b. Definitions**

We propose to define the terms “transaction,” “related person” and “amount involved” to streamline Item 404(a) and clarify the broad scope of financial transactions and relationships covered by the rule.

The term “transaction” would have a broad scope in proposed Item 404(a).<sup>248</sup> As proposed, this term is not to be interpreted narrowly, but rather would broadly include, but not be limited to, any financial transaction, arrangement or relationship or any series of similar transactions, arrangements or relationships. The proposals also would specifically note that the term “transactions” is defined to include indebtedness and guarantees of indebtedness.

The proposed definition of “related person” would identify the persons covered, and clarify the time periods during which they would be covered. As proposed, the term “related person”<sup>249</sup> would mean any person who was in any of the following categories at any time during the specified period for which disclosure under paragraph (a) of Item 404 would be required:

- any director or executive officer of the registrant and his immediate family members; and
- if disclosure were provided in a proxy or information statement involving the election of directors, any nominee for director and the immediate family members of any nominee for director.

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<sup>247</sup> Disclosure of these interests currently is required by subparagraphs (c)(4) and (c)(5) of Item 404. Under the rule proposals, these subparagraphs would be eliminated. See note 237 for a full description of the related parties specified in these subparagraphs.

<sup>248</sup> The definition of “transaction” is in proposed Instruction 2 to Item 404(a).

<sup>249</sup> The definition of “related person” is in proposed Instruction 1 to Item 404(a).

In addition, a security holder known to the registrant to own of record or beneficially more than five percent of any class of the company's voting securities or any immediate family member of any such person, when a transaction in which such security holder or family member had a direct or indirect material interest occurred or existed would also be a related person.

This is the same list of persons covered by current Item 404(a). This proposed definition of "related person" would result in requiring disclosure for all transactions involving the company and a person (other than a significant shareholder or family member of such shareholder) that occurred during the last fiscal year, if the person was a "related person" during any part of that year.<sup>250</sup> A person who had such a position or relationship giving rise to the person being a "related person" during only part of the last fiscal year may have had a material interest in a transaction with the registrant during that year. Although current Item 404(a) does not specifically indicate whether disclosure is required for the transaction in this situation, the history of Item 404 suggests that disclosure would be required if the requisite relationship existed at the time of the transaction, even if the person was no longer a related person at the end of the year.<sup>251</sup>

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<sup>250</sup> The principle for disclosure would only apply to nominees for director if disclosure were being provided in a proxy or information statement involving the election of directors. Also, ongoing disclosure would not be required regarding nominees for director who were not elected (unless a nominee was nominated again for director).

<sup>251</sup> This position, which had been included in the proxy rule provisions that were the precursor to Item 404, was deleted from those provisions in 1967 as duplicative of a note that applied to all of the disclosure required in Schedule 14A (including the related party disclosure requirement in Schedule 14A). Adoption of Amendments to Proxy Rules and Information Rules, Release No. 34-8206 (Dec. 14, 1967) [32 FR 20960], at "Schedule 14A - Item7(f)." Note C to Schedule 14A currently provides that "information need not be included for any portion of the period during which such person did not hold any such position or relationship, provided a statement to that effect is made." The rule proposals would amend Note C to Schedule 14A so that it would no longer apply to disclosure of related person transactions.

We believe that, because of the potential for abuse and the close proximity in time between the transaction and the person’s status as a “related person,” it is appropriate to require disclosure for transactions in which the person had a material interest occurring at any time during the fiscal year. For example, it is possible that a material interest of a person in a transaction during this proximity in time could influence the person’s performance of his or her duties.

We believe that transactions with persons who have been or who will become significant shareholders (or their family members), but are not at the time of the transaction, raise different considerations and are harder to track, and thus we propose to exclude them. Disclosure would be required, however, regarding a transaction that begins before a significant shareholder becomes a significant shareholder, and continues (for example, through the on-going receipt of payments) on or after the person becomes a significant shareholder.

Under the rule proposals, the term “immediate family member” of a related person would mean any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and any person (other than a tenant or employee) sharing the household of any director, nominee for director, executive officer, or significant shareholder of the registrant.<sup>252</sup> The proposed definition would differ from the current definition in that it includes stepchildren, stepparents, and any person (other than a tenant or employee) sharing the household of a related person.

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<sup>252</sup> These definitions would replace current instructions to paragraphs (a) and (c) of Item 404.

The proposed definition of “amount involved” would incorporate two concepts included in current Item 404 regarding how to determine the “amount involved” in transactions, and to clarify that the amounts reported must be in dollars even if the amount was set or expensed in a different currency.<sup>253</sup> Under the proposals, the term “amount involved” would mean the dollar value of the transaction, or series of similar transactions, and would include:

- in the case of any lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments due on or after the beginning of the company’s last fiscal year, including any required or optional payments due during or at the conclusion of the lease;<sup>254</sup> and
- in the case of indebtedness, the largest aggregate principal amount of all indebtedness outstanding at any time since the beginning of the company’s last fiscal year and all amounts of interest payable on it during the last fiscal year.<sup>255</sup>

**Request for Comment**

- Does the definition of “transaction” make clear its broad scope? Are there any additional categories that it should specifically identify? Alternatively, is it overly inclusive? If so, explain how.
- Should the same categories of people be covered by the disclosure requirements currently in paragraphs (a) and (c) of Item 404? Specifically, are there any persons who would be defined as “related persons” for whom indebtedness

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<sup>253</sup> The definition of “amount involved” is in proposed Instruction 3 to Item 404(a).

<sup>254</sup> This proposal is based on current Instruction 3 to Item 404(a).

<sup>255</sup> This proposal is based on and clarifies current Item 404(c).

disclosure should not be required or are there any additional persons who should be covered?

- The proposed changes to Item 404 would require disclosure of indirect interests in indebtedness of related persons. Should they?
- Should disclosure be required regarding portions of a period during which a person did not have the relationship giving rise to the disclosure requirement? Is it appropriate, as we propose, to exclude significant shareholders and their immediate family members from this approach?
- Should we expand the definition of “immediate family member” as proposed? Specifically, are there any categories of people that should be added to, or removed from, the proposed definition?
- In 2002 we issued a release regarding MD&A disclosure. At that time, we noted the possible need for related party disclosure in circumstances additional to those specified in Item 404.<sup>256</sup> Are there any circumstances that fall within the MD&A

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The release stated that:

Registrants should...consider the need for [MD&A] disclosure about parties that fall outside the definition of “related parties,” but with whom the registrant or its related parties have a relationship that enables the parties to negotiate terms of material transactions that may not be available from other, more clearly independent, parties on an arm’s-length basis. For example, an entity may be established and operated by individuals that were former senior management of, or have some other current or former relationship with, a registrant. The purpose of the entity may be to own assets used by the registrant or provide financing or services to the registrant. Although former management or persons with other relationships may not meet the definition of a related party pursuant to FAS 57, the former management positions may result in negotiation of terms that are more or less favorable than those available on an arm’s-length basis from clearly independent third parties that are material to the registrant’s financial position or results of operations. In some cases, investors may be unable to understand the registrant’s reported results of operations without a clear explanation of these arrangements and relationships.

Commission Statement about Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8056 (Jan. 22, 2002) [67 FR 3746], at Section II.C.

requirements that should also be covered by Item 404 where disclosure currently is not required, or would not be required under the rule proposals?

- Is there any reason to change the current meaning of amount involved in transactions involving leases, which we propose to retain?

## **2. Disclosure Requirements**

Proposed subparagraphs of Item 404(a) would provide the disclosure requirements for related person transactions. The company would be required to describe the transaction, including:

- the person's relationship to the company;
- the person's interest in the transaction with the company, including the related person's position or relationship with, or ownership in, a firm, corporation, or other entity that is a party to or has an interest in the transaction; and
- the dollar value of the amount involved in the transaction and of the related person's interest in the transaction.<sup>257</sup>

Registrants would also be required to disclose any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Consistent with the principles-based approach that we propose to apply to related person transaction disclosure, we have, as noted above, eliminated many of the instructions that provide bright line tests that may be inconsistent with general materiality

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As is the case today, the dollar value would be computed without regard to the amount of the profit or loss involved in the transaction. Because of the manner in which the value of the amount involved is calculated for indebtedness, as discussed above, disclosure with respect to indebtedness would include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, as well as the amount of principal and interest paid during



standards. Similarly, we propose to eliminate a current instruction that, in the case of a related person transaction involving a purchase of assets by the company or sale of assets to the company, calls for specific disclosure of the cost of the assets if acquired within two years of the transaction. We would note, however, that if such information was material under the proposed standards of Item 404(a), because, for example, the recent purchase price to the related person was materially less than the sale price to the company, or the sale price to the related person was materially more than the recent purchase price to the company, disclosure of such prior purchase price could be required.<sup>258</sup>

Currently, disclosure must be provided regarding amounts possibly owed to the company under Section 16(b) of the Exchange Act.<sup>259</sup> The purpose of related person transaction disclosure differs from the purpose of Section 16(b). Accordingly, the rule proposals eliminate this Section 16(b)-related disclosure requirement.

#### **Request for Comment**

- Should Item 404 require specific disclosure of the person determining the registrant's purchase or sale price for registrant purchases or sales of assets not in the ordinary course of business?
- Should Item 404 require disclosure of Section 16(b)-related indebtedness? Why or why not?

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the period for which disclosure is provided, the aggregate amount of principal outstanding as of the latest practicable date, and the rate or amount of interest payable on the indebtedness.

<sup>258</sup> Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)], Rules 10b-5 [17 CFR 240.10b-5] and 12b-20 [17 CFR 240.12b-20] under the Exchange Act and Section 17 of the Securities Act [15 U.S.C. 77q].

<sup>259</sup> Current Instruction 4 to Item 404(c).

- Consistent with our principles-based approach, should we specify any other elements of the transaction for disclosure?

### **3. Exceptions**

The proposed rules would include categories of transactions that do not fall within the principle and therefore are subject to disclosure exceptions that we believe are consistent with our principles-based approach.<sup>260</sup> The first category of transactions involves compensation. Disclosure of compensation to an executive officer would not be required if:

- the compensation is reported pursuant to Item 402 of Regulation S-K; or
- the executive officer is not an immediate family member of a related person and such compensation would have been reported under Item 402 as compensation earned for services to the company if the executive officer was a named executive officer, and such compensation had been approved as such by the compensation committee of the board of directors (or group of independent directors performing a similar function) of the company.

Disclosure of compensation to a director (or nominee for director) would not be required if:

- the compensation is reported pursuant to proposed Item 402(1).<sup>261</sup>

Since the disclosure either would be reported under Item 402, or would not be required under Item 402, we do not believe the transactions fall within our proposed principle or will have already been disclosed. We believe the transactions involving compensation

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<sup>260</sup> Proposed Instructions 4, 5, 6, 7 and 8 to Item 404(a).

<sup>261</sup> Proposed Instructions 5 and 6 to Item 404(a), which would replace current Instruction 1 to Item 404.

that do not fall within these exceptions would be within the scope of the proposed Item 404(a) principle for disclosure. These exceptions would clarify the limited situations in which disclosure of compensation to related persons is not required under Item 404.<sup>262</sup>

The second category of transactions involves three types of situations we believe do not raise the potential issues underlying our principle for disclosure. First, in the case of transactions involving indebtedness, the following items of indebtedness would be excluded from the calculation of the amount of indebtedness and need not be disclosed because they do not have the potential to impact the parties as the transactions for which disclosure is required: amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business.<sup>263</sup>

Second, also in the case of a transaction involving indebtedness, if the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T<sup>264</sup> and the loans are not disclosed as nonaccrual, past due, restructured or potential problems<sup>265</sup> disclosure under proposed paragraph (a) of Item 404 may consist of a statement, if correct, that the loans to such persons satisfied the following conditions:

- they were made in the ordinary course of business;

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<sup>262</sup> In particular, current Instruction 1 to Item 404 covers the scope of Items 402 and 404. We propose to eliminate this instruction.

<sup>263</sup> This proposal is based on current Instruction 2 to Item 404(c).

<sup>264</sup> 12 CFR Part 220.

<sup>265</sup> See Item III.C.1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies [17 CFR 229.802(c)].

- they were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the bank; and
- they did not involve more than the normal risk of collectibility or present other unfavorable features.<sup>266</sup>

This proposed exception is based on a current instruction to Item 404(c),<sup>267</sup> and is modified to be more consistent with the prohibition of the Sarbanes-Oxley Act on personal loans to officers and directors.<sup>268</sup>

Finally, we propose an instruction that indicates that a person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the company shall not be deemed to have an indirect “material” interest within the meaning of paragraph (a) of Item 404 if:

- the interest arises only: (i) from the person’s position as a director of another corporation or organization which is a party to the transaction; or (ii) from the direct or indirect ownership by such person and all other related persons, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or (iii) from both such position and ownership; or
- the interest arises only from the person’s position as a limited partner in a partnership in which the person and all other related persons, have an interest of

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<sup>266</sup> Proposed Instruction 7 to Item 404(a).

<sup>267</sup> Current Instruction 3 to Item 404(c), which would be eliminated.

<sup>268</sup> Specifically, the language of current Instruction 3 to paragraph (c) of Item 404 would be modified to replace the reference “comparable transactions with other persons” with the phrase “comparable loans with persons not related to the lender.”

less than ten percent, and the person is not a general partner of and does not have another position in the partnership.<sup>269</sup>

### **Request for Comment**

- Does proposed Item 404(a) simplify and clarify the requirements currently contained in paragraphs (a) and (c) of Item 404?
- Would the proposed rule clarify the situations in which compensation would be reportable under Item 404? Are there any categories of compensation for which it would be unclear whether disclosure would be required under proposed Item 404?
- We propose to exclude from the “amount involved” disclosure requirements indebtedness due for purchases subject to usual trade terms, ordinary business travel and expense payments, and ordinary course business transactions as is currently the case. Is this exclusion appropriate? Why or why not?
- Do the current instructions that we propose to modify or eliminate provide necessary guidance for determining if disclosure is necessary? Should any of these current instructions be retained? Should other instructions be added to make the application of the principle for disclosure clearer?
- Does proposed Instruction 8 to Item 404(a), which indicates that a person having the specified positions or relationships with a person that engages in a transaction with the company shall not be deemed to have an indirect material interest in the

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<sup>269</sup> Proposed Instruction 8 to Item 404(a). This proposal is based on parts A and B of current Instruction 8 to Item 404(a). This proposal would omit the portion of the current instruction (Instruction 8.C.) regarding interests arising solely from holding an equity or a creditor interest in a person other than the company that is a party to the transaction, when the transaction is not material to the other person. This portion of the current instruction may result in inappropriate non-disclosure of transactions without regard to whether they are material to the company. In addition, we propose to eliminate current Instruction 6 to Item 404(a) that covers a subset of transactions covered by this proposed instruction, and therefore is duplicative.

transaction, provide sufficient guidance for determining whether disclosure is necessary in the circumstances identified in the instruction? Should the potential exclusions contemplated in the current instructions to Item 404(a), including current Instruction 6 (excluding remuneration transactions for services when the person's interest arises solely from a ten percent equity ownership interest) and current Instruction 8.C. (excluding transactions where the interest arises from an equity or creditor interest in another person and the transaction is not material to the other person) be retained or expanded?

**B. Procedures for Approval of Related Person Transactions**

We propose adopting a new requirement for disclosure of the policies and procedures established by the company and its board of directors regarding related person transactions. State corporate law and increasingly robust corporate governance practices support or provide for such procedures in connection with transactions involving conflicts of interest.<sup>270</sup> We believe that this type of information is material to investors, and our rule proposals would therefore require disclosure of policies and procedures regarding related person transactions under new paragraph (b) of Item 404.

Specifically, the proposal would require a description of the company's policies and procedures for the review, approval or ratification of transactions with related persons that would be reportable under paragraph (a) of Item 404. The description would include the material features of these policies and procedures that are necessary to understand them. While the material features of such policies and procedures would vary

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<sup>270</sup> Del. Code Ann. tit. 8, §144 (2004). See also NYSE, Inc. Listed Company Manual Section 307.00 and NASD Manual, Marketplace Rules 4350(h) and 4360(i).

depending on the particular circumstances, examples of such features may include, in given cases, among other things:

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

The proposal would also require identification of any transactions required to be reported under paragraph (a) of Item 404 where the company's policies and procedures did not require review, approval or ratification or where such policies and procedures were not followed.

#### **Request for Comment**

- Should we require disclosure regarding the review, approval or ratification of related person transactions? Should the rule include the proposed requirements? Are there other types of information that are material that should be included in the description of the approval process?
- Should we require disclosure of transactions required to be reported under Item 404(a) where a company's policies and procedures did not require review or were not followed?

#### **C. Promoters**

The proposals would require a company to provide disclosure regarding the identity of promoters and its transactions with those promoters if the company had a

promoter at any time during the last five fiscal years. The proposed disclosure would be required in Securities Act registration statements on Form S-1 (generally, the registration statement form for initial public offerings, offerings by unseasoned issuers or those with less than \$75 million public float and offerings by issuers otherwise ineligible to use Form S-3 or S-4) or on Form SB-2 (a registration statement form that small business issuers may use) and Exchange Act Form 10 (used to register securities initially under the Exchange Act) or Form 10-SB (a registration form that small business issuers may use).

The proposed disclosure would include:

- the names of the promoters;
- the nature and amount of anything of value received by each promoter from the company and the nature and amount of any consideration received by the company; and
- additional information regarding any assets acquired by the company from a promoter.

The proposed disclosure requirements are consistent with those currently required regarding promoters. However, this disclosure is not currently required if the company has been organized more than five years ago, even if the company otherwise had a promoter within the last five years. Our staff's experience in reviewing registration statements, especially of smaller companies, suggests that the more appropriate five-year test would relate to the period of time during which the company had a promoter for which the disclosure should be provided, as our proposal provides, rather than the date of organization of the company.<sup>271</sup> We also are proposing to require the same disclosure

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<sup>271</sup> The proposed rules would similarly revise the disclosure requirement referencing promoters in Item 401(g)(1) of Regulation S-K. In addition, our proposal would add Form SB-2 to the list of



that is required for promoters for any person who acquired control, or is part of a group that acquired control, of an issuer that is a shell company.<sup>272</sup>

### **Request for Comment**

- Does the proposed requirement cover the circumstances where promoter disclosure would be material to investors? If not, what other circumstances should be covered?
- Does the proposed requirement cover circumstances where the required disclosure would not be material to investors? If so, in what circumstance?

### **D. Corporate Governance Disclosure**

We propose to consolidate our disclosure requirements regarding director independence and related corporate governance disclosure requirements under a single disclosure item and to update such disclosure requirements regarding director independence to reflect our current requirements and current listing standards.<sup>273</sup>

Our current requirements provide for disclosure of business relationships between a director or nominee for director and the company that may bear on the ability of

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registration statement forms in Item 404 for which promoter disclosure would be required. While this revision would update the registration statement forms listed in Item 404, it would not change the promoter disclosure requirement of Form SB-2.

<sup>272</sup> Proposed Item 404(c)(2). The term “group” would have the same meaning as in Exchange Act Rule 13d-5(b)(1) [17 CFR 240.13d-5(b)(1)], that is, any two or more persons that agree to act together for the purpose of acquiring, holding, voting, or disposing of equity securities of an issuer.

<sup>273</sup> Proposed Item 407 of Regulations S-K and S-B. As proposed, Item 407 would consolidate corporate governance disclosure requirements located in several places under our rules and the principal markets’ listing standards, including in particular our requirements under current Items 306, 401(h), (i) and (j), 402(j) and 404(b) of Regulation S-K and Item 7 of Schedule 14A under the Exchange Act. We are not proposing any changes to the substance of Item 306, Item 401(h), (i) or (j), or Item 402(j) as part of this consolidation. However, the proposed rules would reorder some provisions in Item 306 and reflect the relevant Public Company Accounting Oversight Board rules. See [PCAOB Rulemaking: Public Company Accounting Oversight Board; Order Approving Proposed Technical Amendments to Interim Standards Rules](#), Release No. 34-49624 (Apr. 28,

directors and nominees for director to exercise independent judgment in the performance of their duties.<sup>274</sup> In addition, as directed by the Sarbanes-Oxley Act of 2002, we adopted a rule requiring national securities exchanges to adopt listing standards requiring independent audit committees meeting the standards of our rule.<sup>275</sup> Further, in 2003 and 2004, we approved amendments to additional listing standards, including those of the New York Stock Exchange and Nasdaq,<sup>276</sup> that imposed specific additional independence

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2004) [69 FR 24199]; and Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Release No. 33-8223 (Apr. 25, 2003) [68 FR 2336].

<sup>274</sup> Current Item 404(b).

<sup>275</sup> Section 10A(m) of the Exchange Act [15 U.S.C. 78j-1(m)], as added by Section 301 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.); Exchange Act Rule 10A-3 [17 CFR 240.10A-3]; and Standards Relating to Listed Company Audit Committees, Release No. 33-8220 (Apr. 9, 2003) [68 FR 18788].

<sup>276</sup> NASD and NYSE Listing Standards Release. The other exchanges have also adopted corporate governance listing standards. See Order Granting Approval of Proposed Rule Change by the American Stock Exchange LLC and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Relating to Enhanced Corporate Governance Requirements Applicable to Listed Companies, Release No. 34-48863 (Dec. 1, 2003) [68 FR 68432]; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Corporate Governance, Release No. 34-49881 (June 17, 2004) [69 FR 35408]; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and 3 to the Proposed Rule Change by the Chicago Stock Exchange, Inc. Relating to Governance of Issuers on the Exchange, Release No. 34-49911 (June 24, 2004) [69 FR 39989]; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. to Amend Chapter XXVII, Section 10 of the Rules of the Board of Governors by Adding Requirements Concerning Corporate Governance Standards of Exchange-Listed Companies, Release No. 34-49955 (July 1, 2004) [69 FR 41555]; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Chicago Board Options Exchange, Incorporated, Relating to Enhanced Corporate Governance Requirements for Listed Companies, Release No. 34-49995 (July 9, 2004) [69 FR 42476]; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by National Stock Exchange Relating to Corporate Governance, Release No. 34-49998 (July 9, 2004) [69 FR 42788]; and Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. to Amend the Corporate Governance Requirements for PCX Listed Companies, Release No. 34-50677 (Nov. 16, 2004) [69 FR 68205].

The Commission has previously received a rulemaking petition submitted by the AFL/CIO, which requested the Commission to amend Items 401 and 404 of Regulation S-K to require disclosure about transactions with non-profit organizations (letter dated Dec. 12, 2001 from Richard Trumka, Secretary-Treasurer, AFL/CIO, File No. 4-499, available at [www.sec.gov/rules/petitions/petn4-499.pdf](http://www.sec.gov/rules/petitions/petn4-499.pdf)) and a rulemaking petition submitted by the Council of Institutional Investors, which requested amendments to Item 401 of Regulation S-K to require disclosure of certain transactions between directors, executive officers and nominees (letter dated Oct. 1, 1997, as amended Oct. 19, 1998, from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, File No. 4-

standards for boards of directors, and the compensation and nominating committees or persons performing similar functions. Currently, each listed company determines whether its directors and committee members are independent based on definitions that it adopts which, at a minimum, are required to comply with the listing standards applicable to the company.

The proposals would include a disclosure requirement identifying the independent directors of the company (and, in the case of disclosure in proxy or information statements, nominees for director) under the definition for determining board independence applicable to it. The proposals would also require disclosure of any members of the compensation, nominating and audit committee that the company had not identified as independent under the definition of independence for that board committee applicable to it.

More specifically, if the company is an issuer<sup>277</sup> with securities listed, or for which it has applied for listing, on a national securities exchange<sup>278</sup> or in an automated inter-dealer quotation system of a national securities association<sup>279</sup> which has requirements that a majority of the board of directors be independent, the proposal would require disclosure of those directors and director nominees that the company identifies as independent (and committee members not identified as independent), using a definition

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404). We believe these requests have in large part been addressed by revised listing standards instituted by the exchanges, so that we are not now proposing additional action under these petitions.

<sup>277</sup> Under the rule proposals, “listed issuer” would have the same meaning as in Exchange Act Rule 10A-3.

<sup>278</sup> Under the rule proposals “national securities exchange” means a national securities exchange registered pursuant to Section 6(a) of Exchange Act [15 U.S.C. 78f(a)].

<sup>279</sup> Under the rule proposals “automated inter-dealer quotation system of a national securities association” means an automated inter-dealer quotation system of a national securities association registered pursuant to Section 15A(a) of the Exchange Act [15 U.S.C. 78o-3(a)].

for independence for directors (and for committee members) that is in compliance with the applicable listing standards. If the company is not a listed issuer, the proposals would require disclosure of those directors and director nominees that the company identifies as independent (and committee members not identified as independent) using the definition for independence for directors (and for committee members) of a national securities exchange or a national securities association, specified by the company. The company would be required to apply the same definition consistently to all directors and also to use the independence standards of the same national securities exchange or national securities association for purposes of determining the independence of members of the compensation, nominating and audit committees.<sup>280</sup>

The proposals would require an issuer that has adopted definitions of independence for directors and committee members to disclose whether those definitions are posted on the company's Web site, or include the definitions as an appendix to the company's proxy materials at least once every three years or if the policies have been materially amended since the beginning of the company's last fiscal year.<sup>281</sup> Further, if the policies are not on the company's Web site, or included as an appendix to the company's proxy statement, the company would have to disclose in which of the prior fiscal years the policies were included in the company's proxy statement.

In addition, the proposals would require, for each director or director nominee identified as independent, a description of any transactions, relationships or arrangements

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<sup>280</sup> Similar disclosure is currently required pursuant to Item 7(d)(2)(ii)(C) and Item 7(d)(3)(iv) of Schedule 14A. As part of our consolidation of these provisions into proposed Item 407, we propose to revise these provisions to reflect the general approach discussed above with regard to disclosure of director independence for board and committee purposes.

<sup>281</sup> Proposed Item 407(a)(2).

not disclosed pursuant to paragraph (a) of Item 404 that were considered by the board of directors of the company in determining that the applicable independence standards were met.

This independence disclosure would be required for any person who served as a director of the company during any part of the year for which disclosure must be provided,<sup>282</sup> even if the person no longer serves as director at the time of filing the registration statement or report or, if the information is in a proxy statement, if the director's term of office as a director will not continue after the meeting. In this regard, we believe that the independence status of a director is material while the person is serving as director, and not just as a matter of reelection.<sup>283</sup>

The proposals also would revise the current disclosure required regarding the audit committee and nominating committee<sup>284</sup> to eliminate duplicative committee member independence disclosure and to update the required audit committee charter disclosure requirement for consistency with the more recently adopted nominating committee charter disclosure requirements.<sup>285</sup> As a result, the audit committee charter would no longer be required to be delivered to security holders if it is posted on the company's Web site.<sup>286</sup> We also propose moving the disclosure required by Section 407

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<sup>282</sup> However, disclosure would not be required for persons no longer serving as a director in registration statements under the Securities Act or the Exchange Act filed at a time when the company is not subject to the reporting requirements of Exchange Act Sections 13(a) or 15(d). Disclosure would not be required of anyone who was a director only during the time period before the company made its initial public offering if he was no longer a director at the time of the offering. Proposed Instruction to Item 407(a).

<sup>283</sup> For this reason, we do not propose to incorporate the concept in current Instruction 4 to Item 404(b) into proposed Item 407(a).

<sup>284</sup> Current Item 7 of Schedule 14A.

<sup>285</sup> However, we are not proposing to revise the provision that the audit committee report is furnished and not filed.

<sup>286</sup> Proposed Item 407(d)(1) and Instruction 2 to Item 407.

of the Sarbanes-Oxley Act regarding audit committee financial experts to Item 407, although we are not proposing any substantive changes to that requirement.

In addition to the disclosures currently required regarding audit and nominating committees of the board of directors, we propose requiring similar disclosure regarding compensation committees.<sup>287</sup> The company would also be required to describe its processes and procedures for the consideration and determination of executive and director compensation including:

- the scope of authority of the compensation committee (or persons performing the equivalent functions);
- the extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority to other persons, specifying what authority may be so delegated and to whom;
- whether the compensation committee's authority is set forth in a charter or other document, and if so, the company's Web site address at which a current copy is available if it is so posted, and if not so posted, attaching the charter to the proxy statement once every three years;
- any role of executive officers in determining or recommending the amount or form of executive and director compensation; and
- any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the

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<sup>287</sup> Current Item 7(d) of Schedule 14A. These new proposed requirements also would be in proposed Item 407(e).

compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement and identifying any executive officer within the company the consultants contacted in carrying out their assignment.

In addition, as noted above, disclosure would be required regarding each member of the compensation committee that the registrant has identified as not independent.

Further, the rule proposals would consolidate into this compensation committee disclosure requirement the disclosure currently required in Item 402 regarding compensation committee interlocks and insider participation in compensation decisions.<sup>288</sup>

Finally, for registrants other than registered investment companies, the rule proposals would eliminate an existing proxy disclosure requirement regarding directors that have resigned or declined to stand for re-election<sup>289</sup> which is no longer necessary since it has been superseded by a disclosure requirement in Form 8-K.<sup>290</sup> For registered investment companies, which do not file Form 8-K, the requirement would be moved to Item 22(b) of Schedule 14A.<sup>291</sup> Also, the rule proposals would combine various proxy disclosure requirements regarding board meetings and committees into one location.<sup>292</sup>

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<sup>288</sup> Current Item 402(j).

<sup>289</sup> Item 7(g) of Schedule 14A.

<sup>290</sup> Item 5.02(a) of Form 8-K.

<sup>291</sup> Proposed Item 22(b)(17) of Schedule 14A.

<sup>292</sup> Current paragraphs (d)(1), (f), and (h)(3) of Item 7 of Schedule 14A would be included in proposed Item 407(b).

In addition, we propose two instructions to Item 407 to combine repetitive provisions, one relating to independence disclosure, and the other relating to board committee charters.<sup>293</sup>

### **Request for Comment**

- Should the disclosure requirements proposed to be consolidated in Item 407 continue to remain separate? If so, why? Is the proposed location of this consolidated disclosure appropriate, including the proposed options for disclosing adopted independence definitions?
- Are there independence standards that would be preferable to the ones referenced in proposed new Item 407?
- Should companies that are not listed on a national securities exchange or on an inter-dealer quotation system of a national securities association be able to reference their own standards of independence that they have adopted, or should those companies be required to refer to established listing standards as proposed?
- Should we require as proposed a description of transactions considered (other than those that would be reported under proposed Item 404(a)) when determining if the independence standards were met?
- Is there any reason why we should not eliminate the requirement that companies provide disclosure in their proxy statements regarding directors who have resigned or declined to stand for re-election?<sup>294</sup>

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<sup>293</sup> Proposed Instructions 1 and 2 to Item 407. Proposed Instruction 2 also includes a requirement that the charter be provided if it is materially amended.

<sup>294</sup> Item 7(g) of Schedule 14A.



- Are there circumstances in which disclosure should not be required under proposed Item 407(a)? Should disclosure not be required for a director who is no longer a director at the time of filing any registration statement or report? Should disclosure not be required if information is being presented in a proxy or information statement for a director whose term of officer as a director will not continue after the meeting to which the statement relates?
- Given that registered investment companies do not file Form 8-K, should we continue to require registered investment companies to make proxy statement disclosures pursuant to current Item 7(g) of Schedule 14A regarding directors who have resigned or declined to stand for re-election?
- Should we also move the disclosure required by Rule 10A-3(d) (under which companies must disclose whether they have relied on an exemption from the audit committee independence requirements of Rule 10A-3) to proposed Item 407?
- Should the audit committee charter disclosure requirement be changed to be consistent with the nominating committee charter disclosure requirements? Should the compensation committee charter disclosure requirement be the same? Should there be any changes to the proposed compensation committee disclosure requirements?
- Are there any disclosure requirements regarding compensation consultants that we should add to or delete or change from the proposal?

## **E. Treatment of Specific Types of Issuers**

### **1. Small Business Issuers**

Proposed Item 404 of Regulation S-B is substantially similar to proposed Item 404 of Regulation S-K, except for the following two matters:

- paragraph (b) relating to policies and procedures for reviewing related party transactions is proposed not to be included in Regulation S-B, and
- Regulation S-B would provide for a disclosure threshold of the lesser of \$120,000 or one percent of the average of the small business issuer's total assets for the last three completed fiscal years, to require disclosure for small business issuers that may have material related person transactions even though smaller than the absolute dollar amount of \$120,000.

Both proposed items would consist of disclosure requirements regarding related person transactions and promoters. These provisions of Item 404 of Regulation S-B would be substantially identical to those of Item 404 of Regulation S-K, except for certain changes conforming proposed Item 404 of Regulation S-B to current Item 404 of Regulation S-B.

These changes consist of the following:

- throughout proposed Item 404 of Regulation S-B using the two year time period for disclosure in current Item 404 of Regulation S-B;
- retaining in proposed Item 404 of Regulation S-B an instruction in current Item 404 of Regulation S-B regarding underwriting discounts and commissions;<sup>295</sup> and

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<sup>295</sup> This instruction, which is current Instruction 2 to Item 404 of Regulation S-B, is proposed Instruction 9 to Item 404 of Regulation S-B.

- not including an instruction in proposed Item 404 of Regulation S-B regarding the treatment of foreign private issuers that is included in proposed Item 404 of Regulation S-K.<sup>296</sup>

In addition, proposed Item 404 of Regulation S-B would retain a paragraph from current Item 404 of Regulation S-B requiring disclosure of a list of all parents of the small business issuer showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent, if any.

One conforming change that we are not making, however, concerns the calculation of a related person's interest in a given transaction. Current Item 404(a) of Regulation S-B differs from current Item 404(a) of S-K with respect to, among other things, the calculation of the dollar value of a person's interest in a related transaction. Current Instruction 4 to Item 404(a) of Regulation S-K specifically provides that the amount of such interest shall be computed without regard to the amount of profit or loss involved in the transaction. In contrast, current Item 404(a) of Regulation S-B contains no such instruction. We propose that the method of calculation of a related person's interest in a transaction will be the same for both Regulation S-B and Regulation S-K. We believe that differences, if any, between the types of transactions that small business issuers may engage in with related persons as compared to transactions of larger issuers would not warrant a different approach for calculating a related person's interest in a transaction.

Proposed Item 407 of Regulation S-K is substantially identical to proposed Item 407 of Regulation S-B,<sup>297</sup> except that it would it would not require disclosure regarding

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<sup>296</sup> This instruction, which is current Instruction 3 to Item 404 of Regulation S-K, is not included in current Item 404 of Regulation S-B.

compensation committee interlocks and insider participation in compensation decisions, since Regulation S-B currently does not require disclosure of this information.<sup>298</sup>

### **Request for Comment**

- Should small business issuers be categorically exempted from any additional aspect of the proposed Item 404 or Item 407 disclosure requirements? If so, which requirements and why? Should any of the proposed exclusions not be excluded? If so, why?
- Currently Item 404(a) of Regulation S-K states that companies are not to consider the amount of profit or loss when computing the amount involved in a transaction, but Item 404 of Regulation S-B does not include this statement. We propose to provide the same instruction in both Regulation S-K and Regulation S-B. Should Item 404(a) of Regulation S-B continue to omit this instruction? Why or why not?
- Currently Item 404(a) of Regulation S-K specifically provides for using the value of the aggregate amount of all periodic payments or installments when computing the amount involved in a transaction, but Item 404 of Regulation S-B does not. Should Item 404(a) of Regulation S-B, as does proposed Instruction 3 to Item 404(a) of Regulation S-B, provide for this?
- Is the definition of “related person” in Item 404 of Regulation S-B sufficiently broad? Should this definition be expanded to include consultants and advisors?

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<sup>297</sup> Current paragraphs (e), (f), and (g) of Item 401 of Regulation S-B would become paragraphs (d)(5), (d)(4) and (c)(3), respectively, of Item 407 of Regulation S-B.

<sup>298</sup> This disclosure is currently required under Item 402(j) of Regulation S-K.

- Should we use a different alternative threshold for disclosure in proposed Item 404(a) of Regulation S-B? For example the lesser of \$120,000 or a percentage of annual corporate expenses?

## **2. Foreign Private Issuers**

Currently a foreign private issuer will be deemed to comply with Item 404 of Regulation S-K if it provides the information required by Item 7.B. of Form 20-F. The proposals would retain this approach, but would require that if more detailed information is required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded, that same information must also be disclosed pursuant to Item 404.

### **Request for Comment**

- Is there any reason to discontinue this treatment of foreign private issuers? Should a foreign private issuer that is required to comply with Item 404 (for example, by filing an annual report on Form 10-K) be required to provide all of the information required under Item 404 instead of the information required under Form 20-F?

## **3. Registered Investment Companies**

We propose to revise Items 7 and 22(b) of Schedule 14A to reflect the reorganization that we have proposed with respect to operating companies. Under the proposals, information that is currently required to be provided by registered investment companies under Item 7 would instead be required by Item 22(b).<sup>299</sup> The requirements of

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<sup>299</sup> Proposed amendments to Item 7(e) of Schedule 14A. Business development companies would furnish the information required by Item 7 of Schedule 14A, in addition to the information required by Items 8 and 22(b) of Schedule 14A. See proposed amendments to Items 7, 8, and 22(b) of Schedule 14A.

Item 7 that are currently applicable to registered investment companies regarding the nominating and audit committees, board meetings, the nominating process, and shareholder communications generally would be included in Item 22(b) by cross-references to the appropriate paragraphs of proposed Item 407 of Regulation S-K.<sup>300</sup> The substance of these requirements would not be altered. In addition, the proposed revisions to Item 22(b) would directly incorporate disclosures relating to the independence of members of nominating and audit committees that are similar to those contained in proposed Item 407(a) of Regulation S-K and currently contained in Item 7.<sup>301</sup>

We are also proposing to raise from \$60,000 to \$120,000 the threshold for disclosure of certain interests, transactions, and relationships of each director or nominee for election as director who is not or would not be an “interested person” of an investment company within the meaning of Section 2(a)(19) of the Investment Company Act.<sup>302</sup> This disclosure is required in investment company proxy and information

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<sup>300</sup> Proposed Items 22(b)(15)(i) and (ii)(A) and 22(b)(16)(i) of Schedule 14A. Proposed Item 22(b)(15)(i) would require the information required by Items 407(b)(1) and (2) and (f), corresponding to the information that registered investment companies are required to provide pursuant to current Items 7(f) and 7(h). Proposed Item 22(b)(15)(ii)(A) would require the information required by proposed Items 407(c)(1) and (2), corresponding to the information that registered investment companies are required to provide pursuant to current Items 7(d)(2)(i) and 7(d)(2)(ii) (other than the nominating committee independence disclosures required by current Item 7(d)(2)(ii)(C)). Proposed Item 22(b)(16)(i) would require closed-end investment companies to provide the information required by proposed Items 407(d)(1) through (3), corresponding to the information that closed-end investment companies are required to provide pursuant to current Item 7(d)(3) (other than the audit committee independence disclosures required by Items 7(d)(3)(iv)(A)(1) and (B)).

<sup>301</sup> Proposed Items 22(b)(15)(ii)(B) and (16)(ii) of Schedule 14A. Proposed Item 22(b)(15)(ii)(B) requires disclosure about the independence of nominating committee members that is similar to those required by current Item 7(d)(2)(ii)(C) and proposed Item 22(b)(16)(ii) requires disclosure about the independence of audit committee members that is similar to those required by current Items 7(d)(3)(iv)(A)(1) and (B).

<sup>302</sup> Proposed amendments to Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A; proposed amendments to Items 12(b)(6), 12(b)(7), and 12(b)(8) of Form N-1A; proposed amendments to Items 18.9, 18.10, and 18.11 of Form N-2; proposed amendments to Items 20(h), 20(i), and 20(j) of Form N-3.

statements and registration statements. The increase in the disclosure threshold would correspond to the proposal to increase the disclosure threshold for Item 404 from \$60,000 to \$120,000.

**Request for Comment**

- Should we reorganize in the manner proposed the disclosures that registered investment companies are currently required to make under Item 7 of Schedule 14A? If not, how should these disclosures be organized? Should any substantive changes be made to the proposed disclosures?
- Is it appropriate to adjust to \$120,000 the threshold for disclosure of certain interests, transactions, and relationships of each director or nominee for election as director who is not or would not be an “interested person” of an investment company? Should there be no threshold? Should the threshold also operate on a sliding scale (for example, the lower of \$120,000 or 1% of total or net assets for the last three completed fiscal years or the lower of \$120,000 or a percentage of annual expenses) to capture smaller transactions for smaller companies? Explain whether a higher or lower threshold, or no threshold, would result in more effective disclosure.

**F. Conforming Amendments**

The changes we propose to Item 404 necessitate conforming amendments to other rules that refer specifically to Item 404.

## 1. Regulation Blackout Trading Restriction

We are proposing conforming changes to Regulation Blackout Trading Restriction,<sup>303</sup> also known as Regulation BTR, which we adopted to clarify the scope and operation of Section 306(a)<sup>304</sup> of the Sarbanes-Oxley Act of 2002 and to prevent evasion of the statutory trading restriction.<sup>305</sup> Rule 100 of Regulation BTR defines terms used in Section 306(a) and Regulation BTR, including the term “acquired in connection with service or employment as a director or executive officer.”<sup>306</sup> Under this definition, one of the specified methods by which a director or executive officer directly or indirectly acquires equity securities in connection with such service is an acquisition “at a time when he or she was a director or executive officer, as a result of any transaction or business relationship described in paragraph (a) or (b) of Item 404 of Regulation S-K.”<sup>307</sup> To conform this provision of Regulation BTR to the proposed Item 404 amendments, we propose to amend Rule 100(a)(2) so that it references only transactions described in paragraph (a) of Item 404.

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<sup>303</sup> 17 CFR 245.100-104.

<sup>304</sup> 15 U.S.C. 7244(a), entitled “Prohibition of Insider Trading During Pension Fund Blackout Periods.”

<sup>305</sup> Insider Trades During Pension Fund Blackout Periods, Release No. 34-47225 (Jan. 22, 2003) [68 FR 4337]. Section 306(a) makes it unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security) during any pension plan blackout period with respect to such equity security, if the director or executive officer acquired the equity security in connection with his or her service or employment as a director or executive officer. This provision equalizes the treatment of corporate executives and rank-and-file employees with respect to their ability to engage in transactions involving issuer equity securities during a pension plan blackout period if the securities were acquired in connection with their service to, or employment with, the issuer.

<sup>306</sup> This term is defined in Rule 100(a) of Regulation BTR.

<sup>307</sup> Rule 100(a)(2) of Regulation BTR.



## 2. Rule 16b-3 Non-Employee Director Definition

We also are proposing conforming amendments to the definition of Non-Employee Director in Exchange Act Rule 16b-3. Section 16(b) provides an issuer (or shareholders suing on its behalf) the right to recover from an officer, director, or ten percent shareholder profits realized from a purchase and sale of issuer equity securities within a period of less than six months. However, Rule 16b-3 exempts transactions between issuers of securities and their officers and directors if specified conditions are met. In particular, acquisitions from and dispositions to the issuer are exempt if the transaction is approved in advance by the issuer's board of directors, or board committee composed solely of two or more Non-Employee Directors.<sup>308</sup>

The definition of "Non-Employee Director," among other things, limits these directors to those who:

- do not directly or indirectly receive compensation from the issuer, its parent or subsidiary for consulting or other non-director services, except for an amount that does not exceed the Item 404(a) dollar disclosure threshold;
- do not possess an interest in any other transaction for which Item 404(a) disclosure would be required; and
- are not engaged in a business relationship required to be disclosed under Item 404(b).

As described above, the Item 404 proposals would substantially revise or rescind the Item 404 provisions on which the Non-Employee Director definition is based. To minimize potential disruptions and because no problems have been brought to our

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<sup>308</sup> Exchange Act Rules 16b-3(d)(1) and 16b-3(e).

attention regarding any aspect of the current definition, the proposed conforming amendment would continue to permit consulting and similar arrangements subject to limits measured by reference to the proposed Item 404(a) disclosure requirements.<sup>309</sup> The amendment would delete the provision referring to business relationships subject to disclosure under Item 404(b), without otherwise revising the text of the rule.<sup>310</sup> Because the disclosure threshold of Item 404(a) would be raised from \$60,000 to \$120,000, however, the effect in some cases may be to permit previously ineligible directors to be Non-Employee Directors.<sup>311</sup> In other cases, where proposed Item 404(a) may require disclosure of business relationships not subject to disclosure under current Item 404(b), some current Non-Employee Directors may become ineligible.

#### **Request for Comment**

- Should the Rule 16b-3 Non-Employee Director definition continue to permit consulting or similar arrangements with the issuer, as proposed?
- Is the proposed Item 404(a) disclosure threshold an appropriate limit for permitting consulting or similar arrangements? Instead, should the dollar limit be lower, such as the current \$60,000 threshold? Explain the basis for recommending a different dollar limit.

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<sup>309</sup> Because it appears appropriate that the standards for an exemption from Section 16(b) liability be readily determinable by reference to the exemptive rule, and not variable depending upon where the issuer's securities are listed, we do not propose to base the amended definition on the listing standards for director independence applicable to the issuer.

<sup>310</sup> Exchange Act Rule 16b-3(b)(3)(ii), which defines a Non-Employee Director of a closed-end investment company as "a director who is not an "interested person" of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act of 1940," would not be revised.

<sup>311</sup> As under the current rule, each test referring to Item 404 will be measured by reference to the Regulation S-K Item, even if the disclosure requirements applicable to the company are governed by Regulation S-B.

- For business relationships for which disclosure is not required by current Item 404(b), but would be under proposed Item 404(a), should there be a different test? Are there any particular transactions or relationships that would become disclosable under proposed Item 404(a) that should not render a director ineligible to be a Non-Employee Director? If so, explain why.
- Would continued use of Item 404 as a measure for defining Non-Employee Directors place an undue burden on companies in forming their Non-Employee Director committees? Would reference to another disclosure requirement or standard be better?

### **3. Other Conforming Amendments**

The changes we propose to Item 404, along with the consolidation of provisions into Item 407, necessitate conforming amendments to various forms and schedules under the Securities Act and the Exchange Act. The rule proposals would amend:

- forms that require disclosure of the information required by Item 404 to instead require disclosure of the information required by proposed Items 404 and 407(a);<sup>312</sup>
- some forms that require disclosure of the information required by Item 404(a) or by Items 404(a) and (c), to instead require disclosure of the information required by proposed Items 404(a) and (b), or proposed Item 404(a), as appropriate;<sup>313</sup>

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<sup>312</sup> See proposed amendments to Item 15 of Form SB-2, Item 11(n) of Form S-1, Item 18(a)(7)(iii) and Item 19(a)(7)(iii) of Form S-4, Item 23 of Form S-11, Item 7 of Form 10, Item 13 of Form 10-K, Item 7 of Form 10-SB, and Item 12 of Form 10-KSB. The proposed amendments to Forms SB-2, 10-SB and 10-KSB would require disclosure of the information required by proposed Items 404 and 407(a) of Regulation S-B.

<sup>313</sup> See proposed amendments to Item 7(b) of Schedule 14A, which refers to proposed Items 404(a) and (b), and Item 22(b)(11) and the Instruction to Item 22(b)(11) of Schedule 14A, and Item 5.02(c)(2) of Form 8-K, which refer to proposed Item 404(a). The proposed amendments to Form

- a form that cross-references an instruction in Item 404 which we propose to eliminate to instead include the text of this instruction;<sup>314</sup>
- Item 7 of Schedule 14A to require disclosure of the information required by proposed Item 407(a) rather than current Item 404(b), and to eliminate current paragraphs (d)-(h) which are duplicative of proposed Item 407 and replace them with a requirement to disclose information specified by corresponding paragraphs of Item 407;
- forms that require disclosure of the information required by Item 402 to instead require disclosure of the information required by proposed Item 402 and Item 407(e)(4);<sup>315</sup>
- some forms that require disclosure of the information required by Item 401 to instead require disclosure of the information required by Item 401 and paragraphs (c)(3), (d)(4) and/or (d)(5) of proposed Item 407, as appropriate;<sup>316</sup>
- forms that require disclosure of the information required by Item 401(j), to instead require disclosure of the information required by proposed Item 407(c)(3);<sup>317</sup> and

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8-K that reference paragraphs (a) and (b) of Item 404 of Regulation S-B would require disclosure of the information required by proposed Item 404(a) of Regulation S-B.

<sup>314</sup> See proposed amendments to Item 23 of Form S-11.

<sup>315</sup> See proposed amendments to Item 8 of Schedule 14A, Item 11(l) of Form S-1, General Instruction I.B.4.(c) to Form S-3, Items 18(a)(7)(ii) and 19(a)(7)(ii) of Form S-4, Item 22 of Form S-11, Item 6 of Form 10 and Item 11 of Form 10-K.

<sup>316</sup> See proposed amendments to General Instruction I.B.4.(c) of Form S-3, and Item 10 of Form 10-K, which refer to Item 401 and paragraphs (c)(3), (d)(4) and (d)(5) of proposed Item 407, and Item 7(b) of Schedule 14A, which refers to Item 401 and paragraphs (d)(4) and (d)(5) of proposed Item 407. The proposed amendments to Forms SB-2, 10-SB and 10-KSB would require disclosure of the information required by proposed Items 401 and 407(c)(3), (d)(4) and (d)(5) of Regulation S-B. We are not proposing any changes to the reference to Item 401 in Note G to Form 10-K, however, because the portion of Item 401 applicable in Note G (certain disclosure regarding

- Item 10 of Form N-CSR to include a cross reference to proposed Item 407(c)(2)(iv) of Regulation S-K and proposed Item 22(b)(15) of Schedule 14A, in lieu of the current reference to Item 7(d)(2)(ii)(G) of Schedule 14A.

In addition, conforming amendments would be made to a provision in Regulation AB, which currently requires disclosure of the information required by Items 401, 402 and 404, so that instead it would require disclosure of the information required by proposed Items 401, 402, 404 and paragraphs (a), (c)(3), (d)(4), (d)(5) and (e)(4) of Item 407.<sup>318</sup>

## **VI. Plain English Disclosure**

We are proposing that most of the disclosure required by proposed Items 402, 403, 404 and 407 be provided in plain English. We propose that this plain English requirement apply when information responding to these items is included (whether directly or through incorporation by reference) in reports required to be filed under Exchange Act Sections 13(a) or 15(d).

In 1998, we adopted rule changes requiring issuers to write the cover page, summary and risk factors section of prospectuses in plain English and apply plain English principles to other portions of the prospectus.<sup>319</sup> These rules transformed the landscape of public offering disclosure and made prospectuses more accessible to investors. We

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executive officers) does not include the part of Item 401 that we propose to combine into proposed Item 407.

<sup>317</sup> See proposed amendments to Item 5 in Part II of Form 10-Q, and Item 5 in Part II of Form 10-QSB. The proposed amendments to Item 5 in Part II of Form 10-QSB would require disclosure of the information required by proposed Item 407(c)(3) of Regulation S-B.

<sup>318</sup> See proposed amendments to Item 1107(e) of Regulation AB.

<sup>319</sup> Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6369] (adopting revisions to Securities Act Rule 421 [17 CFR 230.421]). We have also required that risk factor disclosure included in annual reports and Summary Term Sheets in business combination filings be in plain English. See General Instruction 1A. to Form 10-K and Item 1001 of Regulation M-A [17 CFR 229.1001], respectively.

believe that plain English principles should apply to the disclosure requirements that we propose to revise, so disclosure provided in response to those requirements is easier to read and understand. Clearer, more concise presentation of executive and director compensation, related person transactions, beneficial ownership and corporate governance matters can facilitate more informed investing and voting decisions in the face of complex information about these important areas.

We propose to add Exchange Act Rules 13a-20 and 15d-20 to require that companies prepare their executive and director compensation, related person transactions, beneficial ownership and corporate governance disclosures included in Exchange Act reports using plain English principles, including the following standards:

- present information in clear, concise sections, paragraphs and sentences;
- use short sentences;
- use definite, concrete, everyday words;
- use the active voice;
- avoid multiple negatives;
- use descriptive headings and subheadings;
- use a tabular presentation or bullet lists for complex material, wherever possible;
- avoid legal jargon and highly technical business and other terminology;
- avoid frequent reliance on glossaries or defined terms as the primary means of explaining information, defining terms in the glossary or other section of the document only if the meaning is unclear from the context and using a glossary only if it facilitates understanding of the disclosure; and

- in designing the presentation of the information, include pictures, logos, charts, graphs, schedules, tables or other design elements so long as the design is not misleading and the required information is clear, understandable, consistent with applicable disclosure requirements and any other included information, drawn to scale and not misleading.

The proposed rule would also provide additional guidance on drafting the disclosure that would comply with plain English principles, including guidance as to the following practices that registrants should avoid:

- legalistic or overly complex presentations that make the substance of the disclosure difficult to understand;
- vague “boilerplate” explanations that are imprecise and readily subject to different interpretations;
- complex information copied directly from legal documents without any clear and concise explanation of the provision(s); and
- disclosure repeated in different sections of the document that increases the size of the document but does not enhance the quality of the information.

Under the proposed rules, if the executive compensation, beneficial ownership, related person transaction or corporate governance matters disclosure were incorporated by reference into an Exchange Act report from a company’s proxy or information statement, the disclosure would be required to be in plain English in the proxy or information statement.<sup>320</sup> The plain English rules are proposed as part of the disclosure rules

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<sup>320</sup> See, e.g., General Instruction G(3) to Form 10-K and General Instruction E.3. to Form 10-KSB (specifying information that may be incorporated by reference from a proxy or information statement in an annual report on Form 10-K or 10-KSB).

applicable to filings required under Sections 13(a) and 15(d) of the Exchange Act. We believe that these plain English requirements are best administered by the Commission under these rules.

**Request for Comment**

- Will the plain English requirements discussed above be sufficient to discourage boilerplate and promote clear, more user-friendly Exchange Act reports and proxy or information statements? If not, how should we revise the requirements?
- Are there differences between proxy statements and Exchange Act reports which would require different requirements in order to accomplish the objectives of plain English? If so, what are the different requirements and how should the different requirements be addressed?
- In addition to the proposal, should we require that information provided under proposed Items 402, 403, 404 and 407 in other filings, such as Form S-1, be written in plain English?
- Since only portions of the disclosure under proposed Item 407 would be required to be included in Exchange Act reports, should we specifically require that all Item 407 disclosure be in plain English? If so, how should we impose this requirement?
- Should we require that all or portions of proxy or information statements be in plain English? If so, should a plain English requirement apply to disclosure provided by anyone who solicits a proxy with a proxy statement, or should it be limited to just companies making a solicitation of their shareholders? Should



shareholder proposals under Exchange Act Rule 14a-8<sup>321</sup> or financial statements and related disclosures under Item 13 of Schedule 14A be excluded from any plain English requirements applicable to proxy statements? Would a plain English requirement under the proxy rules have the potential to increase disputes, including possible litigation, that could inappropriately delay or frustrate the conduct of solicitations and shareholder meetings or otherwise interfere with the proper operation of the proxy rules?

## **VII. Transition**

We propose that, following their adoption, the proposed new rules and amendments would become effective following publication of the adopting release in the Federal Register as follows:

- for Forms 10-K and 10-KSB, for fiscal years ending 60 days or more after publication;
- for Forms 8-K, for triggering events that occur 60 days or more after publication;
- for Securities Act and Investment Company Act registration statements (including post-effective amendments) and Exchange Act registration statements that become effective 120 days or more after publication; and
- for proxy statements that are filed 90 days or more after publication.<sup>322</sup>

We do not propose to require companies to “restate” compensation or related person transaction disclosure for fiscal years for which they previously were required to

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<sup>321</sup> 17 CFR 240.14a-8.

<sup>322</sup> The proposed amendments to the cross-references in Item 10 of Form N-CSR would appear in the Form concurrent with the effective date of the amendments to our proxy rules, and would be effective for a particular registrant’s Forms N-CSR that are filed after the filing of any proxy statement that includes a response to proposed Item 407(c)(2)(iv) of Regulation S-K (as required

apply the current rules. Instead, the proposed Summary Compensation Table and disclosure required by proposed Item 404(a) would be required only for the most recent fiscal year.<sup>323</sup> This would result in phased-in implementation of the proposed Summary Compensation Table amendments and proposed Item 404(a) disclosure over a three-year period for Regulation S-K companies, and a two-year period for Regulation S-B companies.

### **Request for Comment**

- Is the proposed effectiveness schedule workable?
- Is the proposed phased-in transition provision for the amended Summary Compensation Table and proposed related person transaction disclosure necessary? Could companies revise the previous years' required disclosure to conform to the amended requirements without incurring undue costs or burdens?
- Are any special transition provisions necessary for any other aspects of the proposed amendments? If so, explain what would be needed and why.

### **General Request for Comments**

We request and encourage any interested person to submit comments on any aspect of our proposals and any other matters that might have an impact on the amendments. We request comment from companies and all users of the executive compensation, related party and corporate governance information required by Commission rules that may be affected by the proposals. With respect to any comments,

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by proposed Item 22(b)(15) of Schedule 14A). The substance of the information required by the Item would not be changed.

<sup>323</sup> The other proposed executive and director compensation disclosure requirements which relate to the last completed fiscal year would not be affected by this proposed transition approach. The Summary Compensation Table would be treated differently because, as proposed, it would require disclosure of compensation to the named executive officers for the last three fiscal years.

we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

## **VIII. Paperwork Reduction Act**

### **A. Background**

The proposed rules and amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995.<sup>324</sup> We are submitting these to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act.<sup>325</sup> The titles for this information are:<sup>326</sup>

- (1) “Regulation S-B” (OMB Control No. 3235-0417);
- (2) “Regulation S-K” (OMB Control No. 3235-0071);
- (3) “Form SB-2” (OMB Control No. 3235-0418);
- (4) “Form S-1” (OMB Control No. 3235-0065);
- (5) “Form S-4” (OMB Control Number 3235-0324);
- (6) “Form S-11” (OMB Control Number 3235-0067);
- (7) “Regulation 14A and Schedule 14A” (OMB Control Number 3235-0059);
- (8) “Regulation 14C and Schedule 14C” (OMB Control Number 3235-0057);
- (9) “Form 10” (OMB Control No. 3235-0064);
- (10) “Form 10-SB” (OMB Control No. 3235-0419);

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<sup>324</sup> 44 U.S.C. 3501 *et seq.*

<sup>325</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>326</sup> The paperwork burden from Regulations S-K and S-B is imposed through the forms that are subject to the requirements in those Regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by each of Regulations S-K and S-B to be a total of one hour.

- (11) “Form 10-K” (OMB Control No. 3235-0063);
- (12) “Form 10-KSB” (OMB Control No. 3235-0420);
- (13) “Form 8-K” (OMB Control No. 3235-0060); and
- (14) “Form N-2” (OMB Control No. 3235-0026).

We adopted all of the existing regulations and forms pursuant to the Securities Act and the Exchange Act. In addition, we adopted Form N-2 pursuant to the Investment Company Act. These regulations and forms set forth the disclosure requirements for annual<sup>327</sup> and current reports, registration statements, proxy statements and information statements that are prepared by issuers to provide investors with the information they need to make informed investment decisions in registered offerings and in secondary market transactions, as well as informed voting decisions in the case of proxy statements.

Our proposed amendments to existing forms and regulations are intended to:

- provide investors with a clearer and more complete picture of compensation awarded to, earned by or paid to principal executive officers, principal financial officers, the highest paid executive officers other than the principal executive officer and principal financial officer and directors;
- provide investors with better information about key financial relationships among companies and their executive officers, directors, significant shareholders and their respective immediate family members;
- include more complete information about independence regarding members of the board of directors and board committees;

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<sup>327</sup> The pertinent annual reports are those on Form 10-K or 10-KSB.

- reorganize and modify the type of executive and director compensation information that must be disclosed in current reports; and
- require most of the disclosure required under these proposals to be provided in plain English.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The information collection requirements related to annual and current reports, registration statements, proxy statements and information statements would be mandatory. However, the information collection requirements relating exclusively to proxy and information statements would only apply to issuers subject to the proxy rules. There would be no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

## **B. Summary of Information Collections**

The proposals would increase existing disclosure burdens for annual reports on Form 10-K<sup>328</sup> and registration statements on Forms 10, S-1, S-4 and S-11 by requiring:

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<sup>328</sup> The proposed disclosure requirements regarding executive and director compensation, beneficial ownership, related person transactions and parts of the proposed corporate governance disclosure requirements are in Form 10-K, Schedule 14A and Schedule 14C. Form 10-K permits the incorporation by reference of information in Schedules 14A or 14C to satisfy the disclosure requirements of Form 10-K. The analysis that follows assumes that companies would either provide the proposed disclosure in a Form 10-K only, if the company is not subject to the proxy rules, or would incorporate the required disclosure into the Form 10-K by reference to the proxy or information statement if the company is subject to the proxy rules. This approach takes into account the burden from the proposed disclosure requirements that are included in both the Form 10-K and in Schedule 14A or 14C.

- an expanded and reorganized Summary Compensation Table, which would require expanded disclosure of a “total compensation” amount, and information necessary for computing the total amount of compensation, such as the grant date fair value of stock-based and option-based awards computed in accordance with FAS 123R, and the aggregate increase in actuarial value of defined benefit and actuarial pension plans;
- disclosure at lower thresholds of information regarding perquisites and other personal benefits;
- a more focused presentation of compensation plan awards in a Grants of Performance-Based Awards Table and a Grants of All Other Equity Awards Table, which would build upon existing tabular disclosures regarding long term incentive plans and awards of option and stock appreciation rights to supplement the information proposed to be included in the Summary Compensation Table;
- expanded disclosure regarding holdings and exercises by named executive officers of outstanding previously awarded stock, options and similar instruments which would include the grant date of the award, the vesting date of restricted stock and similar instruments and amounts (both number of shares and value) realized upon vesting and the previously reported grant date fair value of awards exercised or vested;
- improved narrative disclosure accompanying data presented in the executive compensation tables and a new Compensation Discussion and Analysis section to explain material elements of compensation of named executive officers;

- disclosure regarding up to three employees who were not executive officers and whose total compensation for the last completed fiscal year was greater than that of any of the named executive officers;
- new tables and narrative disclosure regarding retirement plans and nonqualified defined contribution and other deferred compensation plans;
- expanded disclosure regarding post-employment payments other than pursuant to retirement and deferred compensation plans;
- a new table and improved narrative disclosure for director compensation to replace current disclosure requirements;
- disclosure regarding additional related persons under the proposed related person transaction disclosure requirement;
- new disclosure regarding a company's policies and procedures for the review, approval or ratification of transactions with related persons;
- new and reorganized disclosure regarding corporate governance matters such as the independence of directors and members of the nominating, compensation and audit committees of the board of directors; and
- additional disclosure regarding pledges of securities by officers and directors and directors' qualifying shares.

At the same time, the proposals would decrease existing disclosure burdens for annual reports on Form 10-K and registration statements on Form 10, S-1, S-4 and S-11 by:

- eliminating requirements to provide a Compensation Committee Report and Performance Graph in proxy materials and information statements, which would

- substantially offset the increased burdens regarding Compensation Discussion and Analysis that would be required to be included or incorporated by reference in annual reports or registration statements;
- eliminating tabular presentation regarding projected stock option values under alternative stock appreciation scenarios, which would substantially offset the increased burdens regarding equity holdings and exercises;
  - eliminating a generalized tabular presentation regarding defined benefit plans, which would offset in part the increased burdens regarding defined benefit plan disclosure;
  - increasing the dollar value threshold for determining if related person transaction disclosure is required from \$60,000 to \$120,000; and
  - eliminating a current disclosure requirement regarding specific director relationships that could affect independence.

In addition, the proposals may increase or decrease existing disclosure burdens, or not affect them at all, for annual reports on Form 10-K and registration statements on Form 10, S-1, S-4 and S-11, depending on a company's particular circumstances, by:

- eliminating the requirement to include in proxy or information statements a compensation committee report on the repricing of options and stock appreciation rights and a table reporting on the repricing of options and stock appreciation rights over the past ten years, in favor of a narrative discussion of repricings, if any occurred in the last fiscal year, which would be required to be included or incorporated by reference in annual reports and registration statements; and



- eliminating or reducing the scope of instructions that provide bright line tests for determining whether transactions with related persons are required to be disclosed in particular circumstances.

Specifically with respect to proxy and information statements, the proposals would impose a new disclosure requirement regarding the company's processes and procedures for the consideration and determination of executive and director compensation, and disclosure regarding the availability of the compensation committee's charter (if it has one), either as an appendix to the proxy or information statement at least once every three fiscal years or on the company's Web site. These proposals would not require a compensation committee to establish or maintain a charter. The proposed disclosure that would be required regarding compensation committees is similar to what is currently required for audit committees and nominating committees. The proposals would decrease existing disclosure requirements for proxy and information statements by eliminating a current disclosure requirement regarding the resignation of directors, as well as eliminating current requirements to provide a Compensation Committee Report, Performance Graph and a compensation committee report on the repricing of options and stock appreciation rights. However, the extent to which eliminating current requirements to provide a Compensation Committee Report, Performance Graph and a compensation committee report on the repricing of options and stock appreciation rights reduces burdens for proxy and information statements would be offset to a substantial extent, as discussed above, by the proposed Compensation Discussion and Analysis and narrative disclosure requirement regarding repricings and other modifications, both of which would be required to be included or incorporated by reference in annual reports and

registration statements. We estimate that, on balance, the proposed changes that are specific to proxy or information statements would not result in incremental burdens on proxy or information statement collections of information.

The proposals would increase existing disclosure burdens for annual reports on Form 10-KSB<sup>329</sup> and registration statements on Forms 10-SB and SB-2 filed by small business issuers by requiring:

- an expanded and reorganized Summary Compensation Table, which would require expanded disclosure of a “total compensation” amount, and information necessary for computing the total amount of compensation, such as the grant date fair value of stock-based and option-based awards computed in accordance with FAS 123R and the aggregate increase in actuarial value of defined benefit and actuarial pension plans;
- disclosure at lower dollar thresholds for information regarding perquisites and other personal benefits;
- expanded disclosure regarding holdings of previously awarded stock, options and similar instruments, which would include the value of stock and other similar incentive plan awards that had not vested;
- a new table for director compensation, to replace current narrative disclosure requirements;
- a narrative description of retirement plans;
- disclosure regarding additional related persons under the proposed related person transaction disclosure requirement;

- new and reorganized disclosure regarding corporate governance matters such as the independence of directors and members of the nominating, compensation and audit committees of the board of directors; and
- additional disclosure regarding pledges of securities by officers and directors, and director qualifying shares.

At the same time, the proposals would decrease existing disclosure burdens for annual reports on Form 10-KSB and registration statements on Form 10-SB and SB-2 filed by small business issuers by:

- reducing by two the number of named executive officers for the purposes of executive compensation disclosure, to include only the principal executive officer and the two most highly compensated executive officers other than the principal executive officer;
- reducing the required information in the Summary Compensation Table from three years to two years of data;
- eliminating tabular disclosure of grants of options and stock appreciation rights in the last fiscal year;
- eliminating tabular disclosure regarding exercises of options and stock appreciation rights;
- eliminating tabular disclosure regarding long term incentive plan awards in the last fiscal year; and
- eliminating a current disclosure requirement regarding specific director relationships that could affect independence.

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<sup>329</sup>

The same analysis as discussed above with regard to the relationship of Form 10-K to the

In addition, the proposals may increase or decrease, or not affect, existing disclosure burdens for annual reports on Form 10-KSB or registration statements on Form 10-SB and SB-2 filed by small business issuers depending on the small business issuer's particular circumstances, by:

- eliminating the requirement to include a compensation committee report on the repricing of options and stock appreciation rights, in favor of a narrative discussion of repricings, if any occurred in the last fiscal year;
- changing the dollar value threshold used for determining if related person transaction disclosure is required from \$60,000 to the lesser of \$120,000 or one percent of the average of the small business issuer's total assets for the last three completed fiscal years; and
- eliminating or reducing the scope of instructions that provide bright line tests for determining whether transactions with related persons are required to be disclosed in particular circumstances.

The proposals would decrease existing disclosure burdens for Forms N-1A, N-2, and N-3 by increasing to \$120,000 the current \$60,000 threshold in such forms for disclosure of certain interests, transactions, and relationships of disinterested directors, although as discussed below we do not believe the increase in the disclosure threshold will significantly impact the hours of company personnel time and cost of outside professionals in responding to these items. The proposals would increase the existing disclosure burdens for Form N-2 by requiring business development companies to provide additional disclosure regarding compensation. However, the proposals would

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disclosure required in proxy or information statements is also applied to Form 10-KSB.

decrease the existing disclosure burden by no longer requiring compensation disclosure with respect to certain affiliated persons and the advisory board of business development companies and by no longer requiring business development companies to disclose certain compensation from the fund complex.

The proposals would decrease the Form 8-K disclosure burdens, by limiting both the existing requirement to disclose a company's entry into a material definitive agreement outside of the ordinary course of business or any material amendment to such an agreement and the requirement to collect information regarding directors, executive officers other than named executive officers and officers covered by Item 5.02 of Form 8-K. By focusing the Form 8-K disclosure requirement on more presumptively material employment agreements, plans or arrangements of a narrower group of executive officers, the number of Form 8-Ks filed each year relating to executive and director compensation matters should be reduced.

We do not believe that our proposals regarding exhibit filing requirements for Form 20-F and our proposed treatment for foreign private issuers under the revised rules would impose any incremental increase or decrease in the disclosure burden for these issuers.

### **C. Paperwork Reduction Act Burden Estimates**

For purposes of the Paperwork Reduction Act, we estimate the annual incremental increase in the paperwork burden for companies to comply with our proposed collection of information requirements to be approximately 537,792 hours of in-house company personnel time and to be approximately \$69,794,000 for the services of outside

professionals.<sup>330</sup> These estimates include the time and the cost of preparing and reviewing disclosure, filing documents and retaining records. Our methodologies for deriving the above estimates are discussed below.

Our estimates represent the average burden for all issuers, both large and small. As described below, we expect that the burdens and costs could be greater for larger issuers and lower for smaller issuers. For Exchange Act annual reports on Form 10-K or 10-KSB,<sup>331</sup> or current reports on Form 8-K, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden is carried by outside professionals retained by the issuer at an average cost of \$300 per hour.<sup>332</sup> For Securities Act registration statements on Forms SB-2, S-1, S-4, S-11, or N-2 and Exchange Act registration statements on Form 10 or 10-SB, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of \$300 per hour.<sup>333</sup> The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

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<sup>330</sup> For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

<sup>331</sup> We apply the same allocation of burden with regard to proxy or information statements.

<sup>332</sup> In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of \$300 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings.

<sup>333</sup> As mentioned above, we do not believe that the proposal to increase to \$120,000 the current \$60,000 threshold in Forms N-1A, N-2, and N-3 for disclosure of certain interests, transactions, and relationships of disinterested directors will significantly impact the hours of company personnel time and cost of outside professionals in responding to these items.

## **1. Securities Act Registration Statements, Exchange Act Registration Statements and Exchange Act Annual Reports**

For the purposes of the Paperwork Reduction Act, we estimate that, over a three year period,<sup>334</sup> the annual incremental disclosure burden imposed by the proposed revisions would average 67 hours per Form 10-K; 35 hours per Form 10-KSB; 60 hours per Form 10; 30 hours per Forms 10-SB and SB-2; 60 hours per Forms S-1, S-4 and S-11; and 1.675 hours per Form N-2. To the extent that companies incorporate information proposed to be required by reference to proxy or information statements, the proposed plain English requirements would apply to disclosure in those statements, however the incremental burden of preparing plain English disclosure is factored into the burden estimates for Forms 10-K and 10-KSB. We estimate that the proposed amendments to Item 22(b) of Schedule 14A and the proposal to increase to \$120,000 the current \$60,000 threshold in Forms N-1A, N-2, and N-3 for disclosure of certain interests, transactions, and relationships of disinterested directors will not impose an annual incremental disclosure burden.

These estimates were based on the following assumptions:

- On an ongoing basis, the hours of company personnel time and outside professional time required to prepare the disclosure under proposed Item 402 of Regulation S-K (executive and director compensation) would increase in light of the expansion and reorganization of the proposed disclosure requirements relative to the current disclosure requirements on these topics, in particular the requirements regarding Compensation Discussion and Analysis.

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<sup>334</sup> We calculated an annual average over a three year period because OMB approval of Paperwork Reduction Act submissions covers a three year period.

- Companies filing annual reports on Form 10-K that would be required to include Item 402 of Regulation S-K, as we propose to amend it, and proposed Item 407(e)(4) of Regulation S-K (regarding compensation committee interlocks and insider participation), would experience higher costs in responding to these disclosure requirements in the first year of compliance with them, and, to a lesser extent, in the second year, as systems are implemented to obtain the relevant data and compliance efforts with respect to new or expanded disclosure requirements, with lower incremental costs expected in subsequent years.<sup>335</sup>
- On an ongoing basis, the hours of company personnel time and outside professional time required to prepare the disclosure under proposed Item 404 (related person transactions), 407(a) (director independence) and paragraphs (e)(1) through (e)(3) of Item 407 (compensation committee functions) of both Regulation S-K and Regulation S-B would be approximately the same as for compliance with the current related party transaction disclosure and disclosure about the board of directors required by existing Item 404 of Regulations S-K and S-B and Item 7 of Schedule 14A.<sup>336</sup> Other revisions proposed to be made by moving disclosure requirements relating to corporate governance to Item 407 of Regulations S-K and S-B would not change the substance of existing disclosure

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<sup>335</sup> For Form 10-K, we estimate that it would take issuers 120 additional hours to prepare the proposed disclosure in year one, and 55 hours in year two and 25 hours in year three and thereafter, which results in an average of 67 hours over the three year period. This estimate takes into account that the burden would be incurred by either including the proposed disclosure in the report directly or incorporating by reference from a proxy or information statement.

<sup>336</sup> Similarly, on an ongoing basis, the hours of company personnel time and outside professional time required to prepare the disclosure required by the proposed conforming revisions to Item 22(b) relating to the independence of members of nominating and audit committees of investment companies would be approximately the same as for compliance with the current requirements regarding disclosure of the independence of nominating and audit committee members of investment companies required by existing Item 7 of Schedule 14A.



and would therefore not increase burdens, particularly for proxy or information statements where much of the disclosure is currently required.

- Companies filing registration statements on Forms 10, S-1, S-4 and S-11 that are not already filing periodic reports pursuant to Exchange Act Sections 13(a) or 15(d) would in many cases not have been required to comply with the proposed disclosure requirements prior to filing such registration statements, and would therefore take an estimated 60 hours to comply with the proposed changes in the disclosure requirements. The additional time required by these registrants to obtain the relevant data and to compile the required information is offset to some extent by the fact that only one year of compensation information would generally be required for presentation in the Summary Compensation Table, as compared to three years for issuers already subject to Exchange Act reporting requirements.<sup>337</sup>
- Small business issuers filing annual reports on Form 10-KSB would be subject to lower incremental costs than other issuers as a result of the proposals, given the reduced disclosure required by Item 402 of Regulation S-B relative to Item 402 of Regulation S-K, as described above. As with companies filing annual reports on Form 10-K, we expect that small business issuers would experience higher costs in responding to the proposed disclosure requirements in the first year of compliance with them, as systems are implemented to obtain the relevant data and

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Our estimates of the number of annual responses to the collections of information are based on the number of filings made in the period from October 1, 2004 through September 30, 2005. In order to factor in disclosure that may be incorporated by reference from other filings, we have estimated that 496 out of 619 registration statements on Form S-4 would include the required information contemplated by these rule proposals through incorporation by reference to a Form 10-K or Form 10-KSB.

compliance efforts with respect to new or expanded disclosure requirements are implemented, with lower incremental costs in subsequent years.<sup>338</sup>

- Small business issuers filing registration statements on Forms 10-SB and SB-2 that are not already filing periodic reports pursuant to Exchange Act Sections 13(a) or 15(d) would not have been required to comply with the proposed disclosure requirements prior to filing such registration statements, and would therefore take an estimated 30 additional hours to comply with the proposed changes in the disclosure requirements. The additional time required by these registrants to obtain the relevant data and to compile the required information is offset to some extent by the fact that only one year of compensation information would generally be required for presentation in the Summary Compensation Table, as compared to two years for small business issuers already subject to Exchange Act reporting requirements.
- Based on our experience with the requirement we adopted in 1998 for companies to write certain sections of prospectuses in plain English, drafting documents in plain English would result in an initial increase in time and cost burdens in the first year of implementation, and to a lesser extent, the second year, with those time or cost burdens decreasing in the year following implementation of the new rules. The plain English rule proposals would not affect the substance of the

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<sup>338</sup> For Form 10-KSB, we estimate that it would take issuers 70 additional hours to prepare the proposed disclosure in year one, and 25 additional hours in year two and 10 additional hours in year three and thereafter, which results in an average of 35 additional hours over the three year period. This estimate assumes that the burden would be incurred by either including the proposed disclosure in the report directly or incorporating by reference from a proxy or information statement.

- required disclosure, and companies that have filed registration statements under the Securities Act are already familiar with the requirements.
- We estimate that the proposals to increase to \$120,000 the current \$60,000 threshold for disclosure of certain interests, transactions, and relationships of disinterested directors in Forms N-1A, N-2, and N-3 and in proxy and information statements would neither increase nor decrease the annual paperwork burden, because these forms are already required to disclose these interests, transactions, and relationships in amounts exceeding \$60,000, and we do not believe the increase in the disclosure threshold will significantly impact the hours of company personnel time and cost of outside professionals in responding to these items.
  - Business development companies filing Form N-2 would be required to include Item 402 of Regulation S-K, as we propose to amend it, and would experience higher costs in responding to these disclosure requirements in the first year of complying with them, and, to a lesser extent, in the second year, as systems are implemented to obtain the relevant data and compliance efforts with respect to new or expanded disclosure requirements are implemented, with lower incremental costs expected in subsequent years.<sup>339</sup>

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<sup>339</sup> For Form N-2, we estimate that it would take business development companies 100 additional hours to prepare the proposed disclosure in year one, 50 hours in year two and 25 hours in year three and thereafter, which results in an average of 58 hours for each business development company to comply with the proposed compensation disclosures that would be required on Form N-2. We estimate an average annual incremental disclosure burden of 1.675 hours per Form N-2, based on 58 hours per Form N-2 filing by business development companies times 27 filings on Form N-2 by business development companies (representing all Form N-2 and N-2/A filings by business development companies during the year ended December 31, 2005) (58 hours times 27 Form N-2 filings (including amendments) = 1,566 hours), divided by 935 total annual filings on Form N-2 (representing all Form N-2 and N-2/A filings during the year ended December 31,

Tables 1 and 2 below illustrate the incremental annual compliance burden in the collection of information in hours and cost for Exchange Act periodic reports for companies other than registered investment companies, Securities Act registration statements and Exchange Act registration statements.

Table 1: Calculation of Incremental Paperwork Reduction Act Burden Estimates for Exchange Act Periodic Reports

Form	Annual Responses	Incremental Hours/Form	Incremental Burden	75% Issuer	25% Professional	\$300 Professional Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*\$300
10-K <sup>340</sup>	8,602	67	576,334	432,250.5	144,083.5	\$43,225,050
10-KSB	3,504	35	122,640	91,980.0	30,660.0	\$9,198,000
Total			698,974	524,230.5		\$52,423,050

Table 2: Calculation of Incremental Paperwork Reduction Act Burden Estimates for Securities Act Registration Statements and Exchange Act Registration Statements

Form	Annual Responses	Incremental Hours/Form	Incremental Burden	25% Issuer	75% Professional	\$300 Professional Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*\$300
10	72	60	4,320	1,080.0	3,240.0	\$972,000
10-SB	166	30	4,980	1,245.0	3,735.0	\$1,120,500
SB-2	885	30	26,550	6,637.5	19,912.5	\$5,973,750
S-1	528	60	31,680	7,920.0	23,760.0	\$7,128,000
S-4	123	60	7,380	1,845.0	5,535.0	\$1,660,500
S-11	60	60	3,600	900.0	2,700.0	\$810,000
N-2	935	1.675	1,566	391.5	1,174.5	\$352,350
Total			80,076	20,019.0		\$18,017,100

## 2. Exchange Act Current Reports

For purposes of the Paperwork Reduction Act, we estimate that the proposals affecting the collection of information requirements related to current reports on Form 8-K would reduce the annual paperwork burden by approximately 6,458 hours of company personnel time and by a cost of approximately \$645,750 for the services of outside

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2005) (1,566 hours divided by 935 filings on Form N-2 (including amendments) = 1.675 hours per Form N-2 (including amendments)).

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The burden estimates for Form 10-K and 10-KSB assume that the proposed requirements are satisfied by either including information directly in the annual reports or incorporating the information by reference from the proxy statement or information statement in Schedule 14A or Schedule 14C, respectively. As described above, we estimate that the proposed changes to executive compensation disclosure and corporate governance matters that would be included only in proxy or information statements (and thus not in Securities Act registration statements or Exchange Act reports or registration statement) would not, on balance, impose an incremental burden.

professionals. This estimate reflects the reduction in the number of filings that could result from our proposals. These estimates were based on the following assumptions:

- the number of annual responses for Form 8-K is estimated to be 110,416.<sup>341</sup>

Based on a study of current reports on Form 8-K filed in September 2005, we estimate that approximately 22,083 current reports filed on Forms 8-K would be filed pursuant to Item 1.01 of Form 8-K.

- based on a review of Item 1.01 Form 8-K filings made in September 2005, we estimate that 6,625 of the 22,083 current reports on Form 8-K filed under Item 1.01 would relate to executive or director compensation matters.
- based on a review of Item 1.01 Form 8-K filings made in September 2005, we estimate that 1,722 fewer Form 8-Ks would be filed because of more focused current reporting of executive officer and director compensation transactions under proposed Item 5.02(e) of Form 8-K.<sup>342</sup>

#### **D. Request for Comment**

We request comment in order to: (a) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collections of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether

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<sup>341</sup> This is based on the number of responses made in the period from October 1, 2004 through September 30, 2005.

<sup>342</sup> For Form 8-K, the current burden estimate is 5 hours per filing. We estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden is carried by outside professionals retained by the issuer at an average cost of \$300 per hour. The computation of the reduction in burden is thus based on 1,722 fewer Form 8-Ks filed with a per filing burden of 3.75 hours carried by the company and 1.25 hours at a cost of \$300 per hour (or \$375 per filing).

there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.<sup>343</sup>

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington DC 20503, and should send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-9303, with reference to File No. S7-03-06. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7-03-06, and be submitted to the Securities and Exchange Commission, Office of Filings and Information Services, Branch of Records Management, 6432 General Green Way, Alexandria VA 22312. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

## **IX. Cost-Benefit Analysis**

### **A. Background**

We are proposing revisions to our rules governing disclosure of executive and director compensation, related person transactions, director independence and other

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<sup>343</sup> Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

corporate governance matters and security ownership of officers and directors. The proposed revisions to the executive and director compensation disclosure rules are intended to provide investors with a clearer and more complete picture of compensation to principal executive officers, principal financial officers, the highest paid executive officers and directors. We also propose to revise our rules relating to current reports on Form 8-K to require real-time disclosure of only executive and director compensation events that are unquestionably or presumptively material, thereby reducing the number of filings for events relating to executive officers other than named executive officers and those officers specified in Item 5.02. We also propose to revise our closely related rules requiring disclosure regarding the extent to which executive officers, directors, significant shareholders and other related persons participate in financial transactions and relationships with the issuer. We are proposing to amend our beneficial ownership disclosure requirement to require disclosure regarding pledges of securities by management and directors' qualifying shares. Finally, we are proposing that most of the disclosure that would be required under the proposed amendments be provided in plain English, so that investors can more easily understand this information when it is required to be included in Exchange Act reports or it is incorporated by reference from proxy or information statements.

## **B. Summary of Proposals**

In light of the complexity of, and variations in, compensation programs, the sometimes inflexible and highly formatted nature of current Item 402 of Regulation S-K and S-B has resulted, in some cases, in disclosure that does not clearly inform investors as to all elements of compensation. The proposed changes to Item 402 would apply a

broader approach that would eliminate some tables, simplify or refocus other tables, reflect total current compensation in the Summary Compensation Table, and reorganize the compensation table to group together compensation elements that have similar functions so that the quantitative disclosure is both more informative and more easily understood. This improved quantitative disclosure would be complemented by enhanced narrative disclosure clearly and comprehensively describing the context in which compensation is paid and received. In particular, the narrative disclosure requirements would provide transparency regarding company compensation policies and procedures, and be sufficiently flexible to operate effectively as new forms of compensation continue to evolve.

Under the proposals, the scope and presentation of information in Item 402 of Regulation S-B would differ in a number of significant ways from Item 402 of Regulation S-K. Item 402 of Regulation S-B would:

- limit the named executive officers for whom disclosure would be required to a smaller group, consisting of the principal executive officer and the two other highest paid executive officers;<sup>344</sup>
- require a revised Summary Compensation Table to disclose compensation information for the small business issuer's two most recent fiscal years, and to require that narrative disclosure accompany the Summary Compensation Table;<sup>345</sup>

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<sup>344</sup> Current Item 402(a)(2) of Regulation S-B requires compensation disclosure for all individuals serving as the small business issuer's chief executive officer and the small business issuer's four other highest paid officers other than the chief executive officer.

<sup>345</sup> Current Item 402(b)(1) of Regulation S-B requires disclosure of compensation of the named executive officers for each of the last three fiscal years, and narrative disclosure is not currently required to accompany the Summary Compensation Table, however the proposed narrative disclosure would address some elements of compensation currently required in tables in current Item 402 of Regulation S-B.



- provide a higher threshold for separate identification of categories of “All Other Compensation” in the Summary Compensation Table;
- require a new Outstanding Equity Awards at Fiscal Year-End Table that would include expanded disclosure regarding holdings of previously awarded stock, options and similar instruments, which would include the value of stock and other similar incentive plan awards that had not vested;
- require additional narrative disclosure addressing the material terms of defined benefit and defined contribution plans and other post-termination compensation arrangements; and
- require a new Director Compensation Table.

Item 402 of Regulation S-B would not include the following disclosures that would be required by proposed Item 402 of Regulation S-K:

- Compensation Discussion and Analysis;
- a third fiscal year of Summary Compensation Table disclosure; and
- the supplementary Grants of Performance-Based Awards Table and Grants of All Other Equity Awards Table, the Option Exercises and Stock Vested Table, the Retirement Plan Potential Annual Payments and Benefits Table, and the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table and the separate Potential Payments Upon Termination or Change-in-Control narrative section, while providing a general requirement to discuss the material terms of retirement plans and the material terms of contracts providing for payment upon a termination or change in control.

The application of Item 1.01 of Form 8-K to compensatory arrangements has raised concerns that real-time disclosure may be required for executive compensation events that are not unquestionably or presumptively material, and that are more appropriately disclosed, if at all, in the company's proxy statement for its annual meeting of shareholders. The proposed amendments to Items 1.01 and 5.02 of Form 8-K would focus real-time disclosure on compensation arrangements with executives and directors that we believe are unquestionably or presumptively material, and eliminate the obligation to file Form 8-K with respect to other compensatory arrangements.

Current Item 404 of Regulation S-K was adopted to consolidate various provisions previously adopted in a piecemeal fashion. The proposals would revise Item 404 of Regulation S-K to streamline and modernize it, while making it more principles-based. Indebtedness of related persons is limited by the Sarbanes-Oxley Act, and the disclosure requirement regarding indebtedness of related persons would be combined into the requirement regarding other transactions with related persons. This consolidated disclosure requirement would apply to an expanded group of related persons. While the current principles for disclosure would be retained, the proposal would increase the \$60,000 threshold for disclosure currently in paragraphs (a) and (c) of Item 404 to \$120,000 and eliminate or reduce the scope of certain instructions delineating what transactions are reportable or excludable. Existing disclosure requirements in Item 404 regarding transactions with promoters would slightly expanded to apply when a company had a promoter over the past five years, as well as to require analogous disclosure regarding transactions with control persons of a shell company. With respect to registered investment companies and business development companies, proposed

amendments to Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A and to Forms N-1A, N-2, and N-3 would similarly increase to \$120,000 the current \$60,000 threshold for disclosure of certain interests, transactions, and relationships of each director (and, in the case of Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A, each nominee for election as director) who is not or would not be an “interested person” of the fund within the meaning of Section 2(a)(19) of the Investment Company Act (and their immediate family members). In addition, Form N-2 would require business development companies to include the compensation disclosure required by Item 402 of Regulation S-K, as we propose to amend it.

The proposals also would replace the disclosure requirement for certain business relationships currently in Item 404(b) of Regulation S-K, which focuses on relationships relevant to director independence, with requirements for director independence disclosure discussed below. Under the proposals, the disclosure currently required by the certain business relationship disclosure requirement may be required by the consolidated disclosure requirement regarding transactions and relationships with related persons in Item 404(a) of Regulation S-K. Proposed Item 404(b) of Regulation S-K would require disclosure regarding the company’s policies for the review, approval or ratification of transactions with related persons.

We propose similar amendments to Item 404 of Regulation S-B, which would result in a more detailed related person transaction disclosure requirement than currently exists in Item 404 of Regulation S-B. However, unlike Item 404 of Regulation S-K, Item 404 of Regulation S-B would not require disclosure regarding the company’s policies for the review, approval or ratification of transactions with related persons. We propose to

retain the requirement that transactions occurring within the last two years must be disclosed under Item 404 of Regulation S-B, whereas Item 404 of Regulation S-K requires disclosure for the last fiscal year, unless the information is included in a Securities Act or Exchange Act registration statement, where information as to the last three fiscal years is required.

We propose to adopt a new disclosure requirement in Item 407 of Regulations S-K and S-B that would consolidate disclosures required in several places throughout our rules addressing director independence, board committee functions and other related corporate governance matters. This proposed Item, which would require new disclosure regarding independence of members of the board of directors and board committees, is intended to enhance disclosures regarding independence required by corporate governance listing standards of the national securities exchanges and the inter-dealer quotation systems of a national securities association.<sup>346</sup>

To the extent that shares beneficially owned by named executive officers, directors and director nominees are used as collateral for loans, these shares are subject to risks or contingencies that do not apply to other shares beneficially owned by these persons. These circumstances have the potential to influence management's performance and decisions. As a result, we believe that the existence of these securities pledges could be material to shareholders and should be disclosed. We therefore propose to amend Item 403 of Regulation S-K and Regulation S-B to require this disclosure as well as disclosure regarding directors' beneficial ownership of qualifying shares.

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<sup>346</sup> We also propose conforming revisions to Item 22(b) relating to the independence of members of nominating and audit committees of investment companies.

We propose to require that most of the information that is required by these amendments be provided in plain English in Exchange Act reports or in proxy or information statements incorporated by reference into those reports. The plain English requirements would make these documents easier to understand.

The proposed changes to Item 402 of Regulation S-K, Items 402 and 404 of Regulation S-B, and Form 8-K would affect all companies reporting under Sections 13(a) and 15(d) of the Exchange Act, other than registered investment companies. The proposed changes to Item 404 of Regulation S-K would affect all companies reporting under Sections 13(a) and 15(d) of the Exchange Act, other than registered investment companies, and all companies, including registered investment companies, filing proxy or information statements with respect to the election of directors. The proposed changes to Items 402 and 404 of Regulation S-K and Regulation S-B would also affect additional companies filing Securities Act and Exchange Act registration statements. The proposed changes to Item 22(b) of Schedule 14A will affect business development companies and registered investment companies filing proxy statements with respect to the election of directors. The proposed changes to Form N-1A will affect open-end investment companies registering with the Commission on Form N-1A. The proposed changes to Form N-2 will affect closed-end investment companies (including business development companies) registering with the Commission on Form N-2. The proposed changes to Form N-3 will affect separate accounts, organized as management investment companies and offering variable annuities, registering with the Commission on Form N-3.

### **C. Benefits**

As discussed, the overall goal of the executive and director compensation

proposals would be to provide investors with clearer, better organized and more complete disclosure regarding the mix, size and incentive components of executive and director compensation. This goal would be accomplished by eliminating some tables and other disclosures that we believe may no longer be useful to investors, revising other tables so that they are more informative, and requiring new tabular and new quantitative estimate disclosure for retirement plans and similar benefits and director compensation. The proposals would require enhanced narrative disclosure, in the form of a Compensation Discussion and Analysis section and narrative disclosure accompanying the tables, to explain the significant factors underlying the compensation decisions reflected in the tabular data. The proposals also would require companies to report the total amount of compensation for named executive officers and directors, and provide important context to the disclosure of total compensation.

Improved disclosure under the proposals of certain forms of compensation, such as stock-, option- and incentive plan-based compensation, as well as retirement and other post-employment compensation, combined with the ability of investors to track the elements of executive and director compensation and the relative weights of those elements over time (and the reasons why companies allocate compensation in the manner that they do), would enable investors to make comparisons both within and across companies. A presentation facilitating the comparability and different elements of compensation in different companies should make it easier for investors to analyze both the manner of compensation across companies and the quality of disclosure of compensation across companies. Disclosure of total compensation would benefit investors by reducing the need to make individual computations in order to assess the size

of current compensation. Further, improved executive and director compensation disclosure would enhance investors' understanding of this use of corporate resources and the actions of boards of directors and compensation committees in making decisions in this area.<sup>347</sup> Particularly with respect to the proxy statement for the annual meeting at which directors are elected, this improved disclosure would provide better information to shareholders for purposes of evaluating the actions of the board of directors in fulfilling its responsibilities to the company and its shareholders.

We believe that the extent to which increased transparency and completeness in executive and director compensation disclosure would result in broader benefits depends at least in part on the extent to which current executive and director compensation practices are aligned with the interests of investors as reflected in their investment and voting decisions. Any changes to a company that might occur, including changes in corporate governance, changes in control, changes in the employment of particular executives or other changes could depend to some extent on the degree to which improved transparency in executive and director compensation would affect investors' decision-making with respect to that company.

Improved transparency in executive and director compensation under these proposals could have other benefits in terms of the allocative efficiency of affected corporations with regard to the use of resources for executive compensation relative to other corporate needs, as well as improvements in efficiency of managerial labor markets. Benefits such as these depend on the extent to which the proposals, including

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<sup>347</sup> For a discussion of the debate concerning board of directors and managerial decision-making in the area of executive compensation, see, e.g., Steven M. Bainbridge, Executive Compensation: Who Decides?, 83 Tex. L. Rev. 1615 (2005).

requirements to disclose a total amount of compensation and more detail regarding compensation policies, could alter existing policies or practices in these areas. We emphasize that we are not seeking to foster any given directional or other impacts. Our objective is to increase transparency to enable decision-makers to make more informed decisions, which could result in different policies or practices or increase investor confidence in existing policies or practices.

The proposed amendments to Form 8-K would facilitate shareholder and investor access to real-time disclosure of public companies' significant personnel and compensation decisions by focusing this disclosure only on what we believe are the most important compensatory arrangements with executive officers and directors. This information would be filed pursuant to Item 5.02(e) of Form 8-K. To find this information, shareholders and investors no longer would need to examine multiple Item 1.01 disclosures relating to other actions. Companies would also be relieved of obligations to quickly report arguably less important compensation information on Form 8-K.

The proposed amendments to Item 404 would provide investors with more complete disclosure of related person transactions and director independence, and new disclosure regarding a company's policies and procedures for the review, approval or ratification of relationships with related persons. These proposals would enhance investors' understanding of how corporate resources are used in related person transactions, and provide improved information to shareholders for purposes of better evaluating the actions of the board of directors and executive officers in fulfilling their responsibilities to the company and its shareholders.



In addition, by combining similar provisions of current Item 404 into a single combined disclosure requirement, the proposals would reduce confusion regarding the disclosure required when more than one of the item's current provisions applies to a relationship. Improved corporate governance disclosure in proposed Item 407 would provide investors with better organized and more complete information regarding the independence of members of the board of directors. In addition, companies would benefit from having one disclosure item to satisfy in making required corporate governance disclosures. The proposed amendments to Item 403 of Regulation S-K and Regulation S-B would provide investors with disclosure of pledges of the securities beneficially owned by management and directors and full disclosure of beneficial ownership by directors, including directors' qualifying shares.

Proposed changes to Items 22(b)(7), 22(b)(8) and 22(b)(9) of Schedule 14A and to Forms N-1A, N-2, and N-3 would decrease the disclosure burden imposed on registered investment companies by increasing the threshold for disclosure of certain interests, transactions, and relationships of each director (and, in the case of Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A, each nominee for election as director) who is not or would not be an "interested person" of the fund within the meaning of Section 2(a)(19) of the Investment Company Act (and their immediate family members).

Finally, presentation in plain English would facilitate investor understanding of most of the matters contemplated by our proposals.

The benefits of clearer, more useful disclosure are difficult to quantify.

#### **D. Costs**

In our view, the proposed revisions to the executive officer and director

compensation disclosure requirements would increase the costs of complying with the Commission's rules. The proposed revisions to the related person transaction, director independence and corporate governance disclosure requirements would generally not increase costs. We further believe that the costs related to preparing required disclosure in plain English would be short-term costs arising mainly in the first two years of implementation.<sup>348</sup> Increased costs under the proposals would largely impact companies required to comply with the proposals; any net increase in costs would ultimately be borne by shareholders of those companies. If our assumptions regarding these costs and current practices are not correct or complete, then costs may prove to be higher.

We believe that compliance with these proposals would, on balance, be more costly for companies than compliance with the existing disclosure requirements, with the highest incremental annual costs occurring principally in the first two years as companies and their advisors would determine how best to compile and report information in response to new or expanded disclosure requirements.

The improved quantitative and textual disclosure regarding executive and director compensation that we are proposing would incrementally increase costs for companies in several ways as a result of the new or expanded requirements. First, we propose that companies provide a Compensation Discussion and Analysis involving a discussion and analysis of material factors underlying compensation decisions reflected in the tabular presentations.<sup>349</sup> Second, we propose to require narrative disclosure to accompany

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<sup>348</sup> The proposed plain English requirements would require both the rewriting of existing disclosures in plain English, as well as drafting new disclosures in plain English, such as Compensation Discussion and Analysis.

<sup>349</sup> The Compensation Discussion and Analysis, unlike the current Compensation Committee Report and the Performance Graph, but like all of the rest of the current compensation disclosure, would be considered filed and as such would be part of the documents for which certifications apply.

tabular presentations so that the data included in the tables may be understood in context. Third, we propose to expand disclosure regarding compensation-related equity-based and other plan-based holdings, as well as retirement and similar plans. Finally, we propose a director compensation table that would require more detailed information regarding director compensation than is specified in the current narrative disclosure requirement.<sup>350</sup> Each of these proposed revisions would seek to elicit more complete and clearer information than is currently required under existing rules.

While the Summary Compensation Table as proposed to be revised would require reporting of the grant date fair value of stock-based and option-based awards under the proposals, we do not believe that this change would increase costs for companies, because the computation of the grant date fair values of stock, options and similar instruments already is required for financial statement purposes as a result of the implementation of FAS 123R. Companies may incur additional costs, however, in determining incremental changes in the actuarial value of retirement benefits for the purposes of reporting such compensation in the Summary Compensation Table. Costs

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The release adopting our certification requirements discussed the costs and benefits of the requirements as follows:

The new certification requirement may lead to some additional costs for issuers. The new rules require an issuer's principal executive and financial officers to review the issuer's periodic reports and to make the required certification. To the extent that corporate officers would need to spend additional time thinking critically about the overall context of their company's disclosure, issuers would incur costs (although investors would benefit from improved disclosure). The certification requirement creates a new legal obligation for an issuer's principal executive and financial officers, but does not change the standard of legal liability . . . [T]he new rules are likely to provide significant benefits by ensuring that information about an issuer's business and financial condition is adequately reviewed by the issuer's principal executive and financial officers . . . Conversely, the new rules are likely to provide significant benefits by ensuring that information about an issuer's business and financial condition is adequately reviewed by the issuer's principal executive and financial officers.

Certification Release, at Section VII.

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See current Item 402(f) of Regulation S-B and Item 402(g) of Regulation S-K.

may also arise from the reporting of other compensation in the All Other Compensation Column of the Summary Compensation Table. We do not believe that the addition of a “Total” column to the Summary Compensation Table in and of itself would increase costs, because existing disclosure requirements already mandate the disclosure of all compensation, and the mechanical process of adding up disclosure amounts would not be significant. Additional costs may be incurred in preparing and presenting required disclosures regarding up to three highly paid non-executive employees, retirement benefits, deferred compensation and post-termination or change in control payments to the extent that information regarding these matters is not currently collected in a way that would facilitate disclosure under the proposals. In addition, because named executive officers would be based on total compensation rather than salary and bonus, some companies may need to track more employees to determine which are the most highly compensated.

Under the proposals regarding Form 8-K, disclosure regarding executive and director arrangements and other plans that would no longer be required to be reported within four days under Item 1.01 of Form 8-K would be required to be disclosed by way of the exhibit filing requirements on at least a quarterly basis. To the extent that a reduction in timeliness of this information would reduce its value to investors, the proposals may impose costs on investors.

We believe that there would not be a significant increase in the cost of complying with the related person transaction disclosure requirement. The proposals may increase the cost of complying with this disclosure requirement by eliminating or reducing the scope of certain instructions and by expanding the group of related persons covered to

include additional “immediate family members” and also, in the case of indebtedness transactions, significant shareholders.<sup>351</sup> Similarly, with respect to registered investment companies and business development companies, proposed amendments to Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A and to Forms N-1A, N-2, and N-3 would increase to \$120,000 the current \$60,000 threshold for disclosure of certain interests, transactions, and relationships of each director (and, in the case of Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A, each nominee for election as director) who is not or would not be an “interested person” of the fund within the meaning of Section 2(a)(19) of the Investment Company Act (and their immediate family members). Since these forms already require such disclosure using the \$60,000 threshold, we do not believe the proposals would impose additional costs.

Proposed Item 404(b) of Regulation S-K would introduce new costs by imposing new disclosure requirements on companies regarding their policies for review, approval or ratification of related person transactions. In order to comply with their policies for the review, approval or ratification of related person transactions or the determination of executive and director compensation we understand that companies would incur costs of collecting the type of information that would be required to be disclosed. These costs would be higher to the extent companies do not already collect this information either pursuant to their corporate governance policies or through directors’ and officers’ questionnaires. The proposed rules would not require companies to create new policies for review, approval or ratification of relationships with related persons or the

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<sup>351</sup> Significant shareholders are those identified under proposed Instruction 1.b.(i) to Item 404 of Regulation S-K, that is, any security holder who is known to the registrant to own of record or beneficially more than five percent of any class of the registrant’s voting securities.

determination of executive and director compensation; however, to the extent that companies do create new policies that require the collection of different or additional information, they may incur incremental costs.

The proposed disclosures regarding director independence are similar to existing disclosure requirements under the proxy rules regarding the independence of directors who are members of the company's audit and nominating committees. Thus, for companies that are subject to the proxy rules, the task of complying with the proposed disclosure requirement regarding director independence could be performed by the same person or group of persons responsible for compliance under the current rules. Because the current rules already require companies subject to the proxy rules to collect and disclose information about the independence of directors who serve on the audit and nominating committees, this proposed disclosure should not impose significant new costs for the collection of information by companies that are subject to the proxy rules. The new disclosure requirement regarding director and committee member independence may require disclosure of additional relationships with related persons. Additional costs may be incurred in seeking this information. However, such costs are limited by the extent to which companies already identify and track the relationships that may be required to be disclosed for the purposes of complying with existing disclosure requirements or corporate governance listing standards.

We believe that, overall, the costs noted above that are associated with the proposed disclosure requirements for related person transactions and director independence will be offset by cost decreases associated with narrowing the scope of other disclosure requirements under the proposal. In this regard, we believe that

companies will generally be required to provide an amount of information that is comparable to what is currently required by our rules, but under the proposals the information regarding these matters would be presented in a manner that recognizes recent changes such as the imposition of corporate governance listing standards at the major markets.

Our plain English proposal would require that companies use a clear writing style to present the information about executive and director compensation, related person transactions, beneficial ownership and some corporate governance matters that would be required to be disclosed in Exchange Act reports such as annual reports on Forms 10-K or 10-KSB. We believe the proposed rules, if adopted, would result in a short-term increase in costs for companies as they rewrite the information required to be included in annual reports or incorporated by reference from proxy or information statements, but few additional costs after the first year or two of implementation, as companies become familiar with the organizational, language, and document structure changes necessary to comply with these proposals. Additional costs, if any, should be one-time or otherwise short-term.

We believe that there would be little, if any, increase in the cost of complying with the beneficial ownership rule proposals. A company would be required to disclose named executive officer, director and director nominee pledges of securities, and directors' full beneficial ownership of equity securities, including directors' qualifying shares. The company could inquire as to this information in questionnaires it already circulates to the company's officers and directors.

For purposes of the Paperwork Reduction Act, we have estimated the annual incremental increase in the paperwork burden for companies to comply with our proposed collection of information requirements to be approximately 537,792 hours of in-house company personnel time and to be approximately \$69,794,000 for the services of outside professionals. These costs are based on our estimates that the annual incremental disclosure burden imposed by the revisions that we propose today would average 67 hours per Form 10-K; 35 hours per Form 10-KSB; 60 hours per Form 10; 30 hours per Forms 10-SB and SB-2; 60 hours per Forms S-1, S-4 and S-11; and 1.675 hours per Form N-2. We estimate that the proposed amendments to Item 22(b) of Schedule 14A and the proposal to increase to \$120,000 the current \$60,000 threshold for disclosure of certain interests, transactions, and relationships of each director in Forms N-1A, N-2, and N-3 will not impose an annual incremental disclosure burden. These estimated costs include an estimated reduction in costs attributable to current reports on Form 8-K of approximately 6,458 hours of company personnel time and by a cost of approximately \$645,750 for the services of outside professionals, based on an estimate that 1,722 fewer Form 8-Ks would be filed because of more focused current reporting of compensation transactions. Based on these estimates for the purposes of the Paperwork Reduction Act and assuming that the cost of in-house company personnel time is \$175, the total estimated incremental costs of the proposals would be approximately \$163,908,000. We have not quantified other costs which might arise as a result of implementation of the rules, especially to the extent that such costs could arise as a result of changes in policies, practices or other behavior attributable to the proposed disclosure requirements. These



costs could be more than those estimated for the purposes of the Paperwork Reduction Act.

**E. Request for Comment**

- We solicit quantitative data to assist our assessment of the benefits and costs of increased disclosure resulting from: (1) requiring narrative disclosure regarding executive and director compensation in the form of Compensation Discussion and Analysis and narrative disclosures accompanying the tabular presentations, and eliminating the Compensation Committee Report and Performance Graph; (2) expanding disclosure, in a tabular format, of director compensation; and (3) requiring the more focused and in some cases expanded tabular presentation of executive compensation. We also solicit such data regarding the benefits and costs of any other aspects of the executive compensation disclosure proposals.
- We solicit quantitative data to assist our assessment of the benefits and costs of revising the requirements for current reporting of executive and director compensation arrangements on Form 8-K to focus on those arrangements which are unquestionably material.
- We solicit quantitative data to assist our assessment of the benefits and costs of increased disclosure resulting from: (1) expanding the group of related persons covered by current Item 404(a) to include additional “immediate family members;” (2) expanding the required relationship disclosure to include significant shareholders as related persons who may have reportable indebtedness relationships; and (3) requiring disclosure of a registrant’s policies for approval of relationships involving related persons and the independence of directors. We

also solicit such data regarding the benefits and costs of any other aspects of the related person transactions disclosure requirements.

- Do companies currently have policies and procedures regarding the review, approval, authorization or ratification of relationships with related persons? If not, what cost would a company incur to institute such policies?
- Are there any public companies that currently provide information to the public regarding their policies and procedures related to the review, approval, authorization or ratification of relationships with related persons? If so, is there any information available as to whether investors find this information to be useful?
- We solicit quantitative data to assist our assessment of the benefits and costs associated with increased disclosure and the proposed application of plain English principles to the disclosure resulting from most of the proposed requirements.
- What are the direct and indirect costs associated with the proposals?
- What are the costs in the first year of compliance versus subsequent years?
- We solicit comments on the degree to which companies already collect the information that the proposed rules would require to be disclosed.

**X. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation**

Exchange Act Section 23(a)(2)<sup>352</sup> requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the

Exchange Act. Furthermore, Securities Act Section 2(b),<sup>353</sup> Exchange Act Section 3(f)<sup>354</sup> and Investment Company Act Section 2(c)<sup>355</sup> require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposed amendments to Regulations S-K and S-B, to Items 8 and 22(b) of Schedule 14A, and to Forms N-1A, N-2, and N-3 are intended to improve the completeness and clarity of executive compensation and related person transaction disclosure available to investors and the financial markets. These proposals would enhance investors' understanding of how corporate resources are used, and enable shareholders to better evaluate the actions of the board of directors and executive officers in fulfilling their responsibilities.

The proposed amendments to Form 8-K are intended to facilitate the ability of investors and shareholders to access real-time disclosure of public companies' employee compensation events that are unquestionably or presumptively material by requiring this disclosure only for the compensatory agreements with specified executive officers. To find this information, shareholders and investors no longer would need to examine multiple Form 8-K disclosures relating to other executive officers or other material non-ordinary course definitive agreements.

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<sup>352</sup> 15 U.S.C. 78w(a)(2).

<sup>353</sup> 15 U.S.C. 77b(b).

<sup>354</sup> 15 U.S.C. 78c(f).

<sup>355</sup> 15 U.S.C. 80a-2(c).

The proposals to expand and consolidate into one item the director independence and related corporate governance disclosure requirements in proposed Item 407 of Regulation S-K would improve shareholders' and investors' understanding of the composition and functions of the board of directors and board committees. Proposed amendments to beneficial ownership reporting requiring disclosure of pledged securities and director qualifying shares are intended to improve the disclosure regarding security holdings of directors and executive officers.

The proposal to require most of the information required in these proposals to be written in plain English is intended to make Exchange Act reports and proxy or information statements incorporated by reference in those reports easier to understand.

Thus, the proposed rules would enhance existing reporting requirements by providing more effective material disclosure to investors in a timely manner. We anticipate that these proposals would improve investors' ability to make informed investment and voting decisions and, therefore lead to increased efficiency and competitiveness of the U.S. capital markets.

Because only companies subject to the reporting requirements of Sections 13 and 15 of the Exchange Act, and companies filing registration statements under the Securities Act, would be required to make the proposed disclosures required by Items 402, 404 and 407, competitors not in those categories could gain an informational advantage. However, with respect to executive compensation, as under current Item 402, registrants would not be required to disclose target levels with respect to specific quantitative or qualitative performance-related factors, or any factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse

effect on the company. Notwithstanding this exception for competitively sensitive information, competitors could potentially gain additional insight into the executive compensation policies of companies through disclosure required in Compensation Discussion and Analysis and in other portions of the required disclosure. Further, the availability of more broad-based compensation disclosure may provide additional information to be used by competitors in recruiting executive talent.

We request comment on whether the proposals, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views, if possible.

#### **XI. Initial Regulatory Flexibility Act Analysis**

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Securities Act and Exchange Act that seek to improve the clarity and completeness of companies' disclosure of the compensation earned by the principal executive officer, principal financial officer,<sup>356</sup> other highly paid executive officers and all members of the board of directors, and of related person transactions. These proposed revisions include revising the executive and director compensation disclosure requirements, modifying our rules so that only elements of compensation that are unquestionably or presumptively material to investors must be disclosed in current reports of Form 8-K, streamlining and modernizing disclosure requirements regarding related person transactions, adding disclosure regarding pledges of securities beneficially owned by executive officers and

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<sup>356</sup> The principal financial officer is not specified as a named executive officer in Item 402 of Regulation S-B.

directors and regarding directors' qualifying shares, consolidating corporate governance disclosure requirements and expanding disclosure regarding the independence of the board of directors, as well as requiring that all disclosure required by the proposed items to be provided in plain English.

**A. Reasons for the Proposed Action**

Since the enactment of the Securities Act and the Exchange Act, the Commission has on a number of occasions explored the best methods for communicating clear, concise and meaningful material information about executive and director compensation and relationships with the issuer. With regard to compensation, at different times, the Commission has adopted rules mandating narrative, tabular, and combinations of narrative and tabular disclosure as the best method for presenting compensation disclosure in a manner that is concise and useful to investors. From time to time, the Commission has reconsidered executive and director compensation information requirements in light of changing trends in executive compensation, or due to concerns about the usefulness of disclosure elicited under then applicable rules. Most recently, in 1992, the Commission proposed and adopted amendments to the disclosure rules that moved away from the mostly narrative disclosure approach adopted in 1983 to formatted tables which sought to capture the various elements of compensation and promote comparability from year to year and from company to company.

While this tabular approach remains a sound basis for disclosure, its sometimes inflexible and formatted nature has, especially in light of the complexity of and variations in compensation programs, resulted in some cases in disclosure that does not clearly inform investors as to all elements of compensation, notwithstanding the express

requirement to do so in the rules. Accordingly, the proposals under current consideration seek a broader-based approach to eliciting executive compensation disclosure while retaining comparability.

Form 8-K requires disclosure of the entry into, amendment of and termination of material definitive agreements entered into outside the ordinary course of business.

Under our current definitions in Regulation S-K, many agreements regarding executive compensation are deemed to be material agreements entered into outside the ordinary course, and when for purposes of consistency we adopted those definitions for use in the expanded Form 8-K requirements, we incorporated all of these executive compensation agreements into the current Form 8-K disclosure requirements. Therefore, many agreements regarding executive compensation are required to be disclosed within four business days of the applicable triggering event. Because it was not our intent in adopting the expanded Form 8-K requirements to make all elements of compensation for all executive officers potential items of real-time disclosure, but only to capture in this area, as in others, events that are unquestionably or presumptively material to investors, we believe it is appropriate to modify our rules so that only those events must be disclosed on Form 8-K.

We believe that disclosure of executive and director compensation is closely related to disclosure regarding financial transactions and relationships involving companies and their directors, executive officers, significant shareholders and respective immediate family members. These disclosure requirements have historically been interconnected, given that relationships among these persons and the company can include transactions that involve compensation or analogous features. Such disclosure

also represents material information in evaluating the overall relationship with a company's executive officers and directors. Further, this disclosure provides material information regarding the independence of directors. The current related party transaction disclosure requirements were adopted piecemeal over the years and were combined in one disclosure requirement beginning in 1982. In light of the many developments, including the increasing focus on corporate governance and director independence, we believe it is necessary to revise the rule. We propose to replace the current requirement for disclosure about relationships that can affect director independence with a narrative explanation of the independence status of directors under a company's independence policies for the majority of the board and for the nominating, audit and compensation committees. We also propose to consolidate this and other requirements regarding director independence, board committees and other corporate governance matters in a new disclosure Item. In addition, we are also proposing corresponding changes to items in our registration forms and proxy and information statements filed by registered investment companies and business development companies that impose requirements to disclose certain interests, transactions, and relationships of each director or nominee for election as director who is not or would not be an "interested person" of the fund within the meaning of Section 2(a)(19) of the Investment Company Act (and their immediate family members).

To the extent that shares beneficially owned by named executive officers, directors and director nominees are pledged, these shares are subject to risks and contingencies that do not apply to other shares beneficially owned by these persons. These circumstances have the potential to influence management's performance and



decisions, and for this reason, it appears that the existence of these securities pledges could be material to shareholders and should be disclosed under proposed revisions to Item 403 of Regulations S-K and S-B. An exclusion from the beneficial ownership disclosure requirement for directors' qualifying shares is also proposed to be removed.

In order for most of these amended requirements to result in disclosure that is clear, concise and understandable for investors when responsive disclosure is included in Exchange Act reports or incorporated by reference from proxy or information statements, we propose to add Exchange Act rules to require that the disclosure regarding executive and director compensation, beneficial ownership, related person transactions and most corporate governance matters be provided in plain English.

## **B. Objectives**

The overall goal of the rule proposals is to provide investors with a clearer and more complete picture of executive and director compensation, related person transactions and corporate governance matters. We believe that the proposals would:

- confirm our current requirement that all elements of compensation must be disclosed;
- retain the comparability of executive and director compensation while also providing material qualitative information about the context in which compensation is granted, awarded and earned;
- reorganize and modify the type of compensation information that must be disclosed in current reports;
- streamline and modernize the related person transaction disclosure requirements, while making them more principles-based;

- update the disclosure requirements regarding director independence to reflect current listing standards and consolidate all such disclosure under a single disclosure item so that it is easier to locate; and
- facilitate more informed voting decisions in the face of complex information about directors, executive officers and corporate governance, by requiring that most of the information required by these proposals be written in plain English.

### **C. Legal Basis**

We are proposing the amendments pursuant to Sections 3(b), 6, 7, 10 and 19(a) of the Securities Act; Sections 10(b), 12, 13, 14(a), 15(d), and 23(a) of the Exchange Act; Sections 8, 20(a), 24(a), 30, and 38 of the Investment Company Act; and Section 3(a) of the Sarbanes-Oxley Act of 2002.

### **D. Small Entities Subject to the Proposed Amendments**

The proposals would affect small entities, the securities of which are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act. The proposals also would affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn. Securities Act Rule 157<sup>357</sup> and Exchange Act Rule 0-10(a)<sup>358</sup> define an issuer to be a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We believe that the proposals would affect small entities that are operating companies. We estimate that there are approximately 2,500 issuers, other than investment companies, that may be considered small entities. An

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<sup>357</sup> 17 CFR 230.157.

investment company is considered to be a “small business” if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.<sup>359</sup> We believe that the proposals would affect small entities that are investment companies. We estimate that there are approximately 240 investment companies that may be considered small entities.

#### **E. Reporting, Recordkeeping and Other Compliance Requirements**

The proposed amendments to Item 402 of Regulation S-K would expand some existing disclosure requirements, and consolidate or eliminate others. The proposed amendments to Item 402 of Regulation S-B would require less extensive disclosure for small business issuers than would be required for companies complying with Item 402 of Regulation S-K. Under the proposals, the scope and presentation of information in Item 402 of Regulation S-B would differ in a number of significant ways from Item 402 of Regulation S-K. Item 402 of Regulation S-B would:

- limit the named executive officers for whom disclosure would be required to a smaller group, consisting of the principal executive officer and the two other highest paid executive officers;
- require that the Summary Compensation Table disclose the two most recent fiscal years and that narrative disclosure accompany the Summary Compensation Table;
- provide a higher threshold for separate identification of categories of “All Other Compensation” in the Summary Compensation Table;
- require the Outstanding Equity Awards at Fiscal Year-End Table;

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<sup>358</sup> 17 CFR 240.0-10(a).

<sup>359</sup> 17 CFR 270.0-10(a).

- require additional narrative disclosure addressing the material terms of defined benefit and defined contribution plans and other post-termination compensation arrangements; and
- require the Director Compensation Table.

Item 402 of Regulation S-B would not include the following disclosures that would be required by proposed Item 402 of Regulation S-K:

- Compensation Discussion and Analysis;
- information regarding two additional executives;
- the third fiscal year of Summary Compensation Table disclosure; and
- the supplementary Grants of Performance-Based Awards Table and Grants of All Other Equity Awards Table, the Option Exercises and Stock Vested Table, the Retirement Plan Potential Annual Payments and Benefits Table, and the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table and the separate Potential Payments Upon Termination or Change-in-Control narrative section, while providing a general requirement to discuss the material terms of retirement plans and the material terms of contracts providing for payment upon a termination or change in control.

As a result, the proposed amendments to Item 402 of Regulation S-B would not result in the same level of incremental increase in costs or burdens as would the requirements of proposed amendments to Item 402 of Regulation S-K.

The proposed amendments to Item 404 of Regulation S-K and S-B would decrease the existing related person transaction disclosure requirement that companies, including small entities, must comply with in some respects and expand it in other

respects. The proposed amendments to Item 404 of Regulation S-B would potentially decrease the scope of the related person transaction disclosure requirement by changing the \$60,000 threshold for disclosure of related person transactions to the lesser of \$120,000 or one percent of the average of the small business issuers' total assets for the last three completed fiscal years.<sup>360</sup> At the same time, the proposed amendments to Item 404 of Regulation S-B would increase the scope of the related person transaction disclosure requirement by expanding the group of related persons covered to include additional "immediate family members," and in the case of indebtedness relationships, significant shareholders. In addition, the proposals may decrease or increase the scope of the related person transaction disclosure requirement by eliminating or reducing the scope of instructions that provide bright line tests for whether related person transaction disclosure is required.

Unlike the proposed amendments to Item 404 of Regulation S-K, the proposed amendments to Item 404 of Regulations S-B would not impose an additional disclosure requirement for small business issuers, including small entities, regarding their policies and procedures for the review, approval or ratification of relationships with related persons. The proposed amendments to Item 404 of Regulation S-B and proposed Item 407 of Regulation S-B would require, depending upon the particular circumstances of a company, more or less disclosure by changing the disclosure requirement regarding director independence.<sup>361</sup>

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<sup>360</sup> Proposed Item 404(a) of Regulation S-K only includes \$120,000 as the threshold.

<sup>361</sup> As is the case currently, proposed Item 407 of Regulation S-B would not require compensation committee interlocks disclosure as would proposed Item 407 of Regulation S-K. This retains a current difference between Item 402 of Regulation S-B and Item 402 of Regulation S-K.

Similar to proposed Item 404(a) of Regulation S-K, proposed amendments to Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A and to Forms N-1A, N-2, and N-3 would decrease the scope of the requirement imposed on registered investment companies and business development companies to disclose certain interests, transactions, and relationships of each director (and, in the case of Items 22(b)(7), 22(b)(8), and 22(b)(9) of Schedule 14A, each nominee for election as director) who is not or would not be an “interested person” of the fund within the meaning of Section 2(a)(19) of the Investment Company Act (and their immediate family members) by increasing to \$120,000 the current \$60,000 threshold for disclosure of such interests, transactions, and relationships.

The proposed amendments to Item 403 of Regulation S-K and S-B would require footnote disclosure to the beneficial ownership table of the number of shares pledged by named executive officers, directors and director nominees and disclosure of directors’ qualifying shares. This would impose an additional disclosure requirement on companies, including small entities.

The proposed plain English rules applicable to Exchange Act reports and proxy or information statements incorporated by reference into Exchange Act reports would not affect the substance of disclosures that companies must make. The proposed plain English rules would also not impose any new recordkeeping requirements or require reporting of additional information. Other proposed changes to our rules would decrease the scope of the disclosure requirements for Form 8-K, and thereby result in a reduction in the number of current reports on Form 8-K filed each year.

Overall, the proposals are expected to result in increased costs to all subject companies, large or small, as follows:

- incremental increase in costs is expected with proposed changes to executive and director compensation disclosure requirements;
- no incremental increase in costs is expected from the amendments to the related person transaction rules and corporate governance disclosures; and
- decreased costs are expected as a result of the proposed revisions to Form 8-K.

Because the current proxy rules require a subject registrant to collect and disclose information about the independence of its directors who serve on the audit or nominating committee of its board, the proposed disclosure should not impose on companies subject to the proxy rules significant new costs for the collection of information regarding the independence of directors. Thus, the task of complying with the proposed expanded director independence disclosure in Item 407 of Regulation S-K or S-B could be performed by the same person or group of persons responsible for compliance under the current rules at a minimal incremental cost.

Our plain English proposal would require that companies use a clear writing style to present the information about executive and director compensation, related person transactions, beneficial ownership and some corporate governance matters that would be required to be disclosed in Exchange Act reports such as annual reports on Forms 10-K or 10-KSB. We believe the proposed rules, if adopted, would result in a short-term increase in costs for companies as they rewrite the information required to be included in annual reports or incorporated by reference from proxy or information statements, but few additional costs after the first year or two of implementation, as companies become

familiar with the organizational, language, and document structure changes necessary to comply with these proposals. Additional costs, if any, should be one-time or otherwise short-term.

For purposes of the Paperwork Reduction Act, we estimate that with respect to Form 10-KSB, it would take issuers 70 additional hours to prepare the proposed disclosure in year one, 25 additional hours in year two, and 10 additional hours in year three and thereafter, which results in an average of 35 additional hours over the three year period. The same estimates would apply to preparation of information in the proxy or information statement that is then incorporated by reference into the Form 10-KSB. With regard to persons other than small business issuers who would file a Form 10-K, we estimate for purposes of the Paperwork Reduction Act that it would take issuers 120 additional hours to prepare the proposed disclosure in year one, and 55 hours in year two, and 25 hours in year three and thereafter, which results in an average of 67 hours over the three year period. If we assume that a small entity complies with the disclosure provisions of Regulation S-B rather than Regulation S-K and 75% of the burden would be performed by the company internally at a cost of \$175 per hour and 25% of the burden would be carried by outside professionals retained by the company at a cost of \$300 per hour, the average annual cost to comply with the proposed disclosure requirements in periodic reports and/or proxy or information statements would be approximately \$7,219. The extent to which an additional average compliance cost of approximately \$7,219 per small entity over a three year period would constitute a significant economic impact for small entities would depend on the relative revenues, costs and allocation of resources



toward compliance with the Commission's rules for small entities both individually and as a group.

For purposes of the Paperwork Reduction Act, we estimate that with respect to Form N-2, it would take business development companies 100 additional hours to prepare the proposed disclosure in year one, 50 hours in year two and 25 hours in year three and thereafter, which results in an average of 58 hours for each business development company to comply with the proposed compensation disclosures that would be required on Form N-2. If we assume that 25% of the burden would be borne internally at a cost of \$175 per hour and 75% of the burden would be carried by outside professionals retained by the company at a cost of \$300 per hour, the average annual cost for business development companies to comply with the proposed disclosure requirements on Form N-2 would be approximately \$15,588. The extent to which an additional average compliance cost of approximately \$15,588 per small entity over a three year period would constitute a significant economic impact for small entities would depend on the relative assets, income, operating expenses and the allocation of resources toward compliance with the Commission's rules for small entities both individually and as a group.

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed amendments could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

#### **F. Duplicative, Overlapping or Conflicting Federal Rules**

We believe that there are no federal rules that conflict with or completely duplicate the proposed rules.

#### **G. Significant Alternatives**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

1. establishing different compliance or reporting requirements which take into account the resources available to smaller entities;
2. the clarification, consolidation or simplification of disclosure for small entities;
3. use of performance standards rather than design standards; and
4. exempting smaller entities from coverage of the disclosure requirements, or any part thereof.

With regard to Alternative 1, we have proposed some different compliance or reporting requirements for small entities and solicited comments on others. We nevertheless believe improving the clarity and completeness of disclosure regarding executive and director compensation and related person transactions requires a high degree of comparability between all issuers. Regarding Alternative 2, the amendments would clarify, consolidate and simplify the requirements for all public companies, and some especially for small entities. Regarding Alternative 3, we believe that design rather than performance standards are appropriate, because design standards for small entities

would be necessary to promote the goal of relatively uniform presentation of comparable information for the benefit of investors. Finally, although we propose to exempt some information required of larger issuers, a wholesale exemption for small entities would not be appropriate because the proposals are designed to make uniform the application of the disclosure and other requirements that would be amended.

We note that small business issuers,<sup>362</sup> which is a broader category of issuers than small entities, in certain circumstances may provide the executive compensation and relationships with related persons and promoters disclosure specified, respectively, in Items 402 and 404 of Regulation S-B, rather than the corresponding disclosure specified in Items 402 and 404 of Regulation S-K. We have proposed disclosure amendments that would require clear and straightforward disclosure of executive compensation, and relationships with related persons and promoters, respectively. We have proposed what we believe to be appropriate revisions to the small business issuer reporting requirements under Regulation S-B, given that small business issuer compensation structures are likely to be less complex than those of registrants that are not small business issuers. Separate disclosure requirements for small entities that would differ from the proposed reporting requirements of Regulation S-B would not yield the disclosure we believe to be necessary to achieve our disclosure objectives. In particular, we believe the changes that are reflected in the proposed amendments to Regulation S-B would balance the informational

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<sup>362</sup> Item 10 of Regulation S-B (17 CFR 228.10) defines a small business issuer as a registrant that has revenues of less than \$25 million, is a U.S. or Canadian issuer, is not an investment company, and has a public float of less than \$25 million. Also, if it is a majority owned subsidiary, the parent corporation also must be a small business issuer.

needs of investors in smaller companies with the burdens imposed on such companies by the disclosure requirements.

We have used design rather than performance standards in connection with the proposals for two reasons. First, based on our past experience, we believe the proposed disclosure would be more useful to investors if there were specific informational requirements. The proposed mandated disclosures are intended to result in more focused and comprehensive disclosure. Second, the specific disclosure requirements in the proposals would promote more consistent disclosure among public companies because they would provide greater certainty as to the scope of required disclosure. In addition, specific disclosure requirements would improve the Commission's ability to enforce the proposed rules. Therefore, amending the disclosure requirements of Items 402 and 404 of Regulations S-K and Regulation S-B and Exchange Act Form 8-K, and adopting Item 407 of Regulation S-K and S-B, appears to be the most effective method of eliciting the disclosure.

#### **H. Solicitation of Comment**

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding: (i) the number of small entity issuers that may be affected by the proposed revisions; (ii) the existence or nature of the potential impact of the proposed revisions on small entity issuers discussed in the analysis; and (iii) how to quantify the impact of the proposed revisions. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed revisions are

adopted, and will be placed in the same public file as comments on the proposed amendments.

## **XII. Small Business Regulatory Enforcement Fairness Act**

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>363</sup> a rule is “major” if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of \$100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a “major rule” for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on: (a) the potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

## **XIII. Statutory Authority and Text of the Proposed Amendments**

We are proposing new rules and amendments pursuant to Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act, as amended, Sections 10(b), 12, 13, 14, 15(d) and 23(a) of the Exchange Act, as amended, and Sections 8, 20(a), 24(a), 30 and 38 of the Investment Company Act of 1940, as amended.

### **List of Subjects**

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 239, 240, 245 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth above, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

**PART 228 – INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS**

1. The authority citation for part 228 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350.

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2. Amend §228.201 by revising Instruction 2 to paragraph (d) to read as follows:

**§228.201 (Item 201) Market for Common Equity and Related Stockholder Matters.**

\* \* \* \* \*

Instructions to paragraph (d).

1. \* \* \*

2. For purposes of this paragraph, an “individual compensation arrangement” includes, but is not limited to, the following: a written compensation contract within the meaning of “employee benefit plan” under §230.405 of this chapter and a plan (whether

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<sup>363</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

or not set forth in any formal document) applicable to one person as provided under Item 402(a)(5)(ii) of Regulation S-B (§228.402(a)(5)(ii)).

\* \* \* \* \*

3. Remove and reserve §228.306.
4. Amend §228.401 by removing paragraphs (e), (f) and (g).
5. Revise §228.402 to read as follows:

**§228.402 (Item 402) Executive compensation.**

(a) General.

(1) All compensation covered. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(2) of this Item, and directors covered by paragraph (f) of this Item, by any person for all services rendered in all capacities to the small business issuer and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the small business issuer and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(2) Persons covered. Disclosure shall be provided pursuant to this Item for each of the following (the “named executive officers”):

(i) All individuals serving as the small business issuer's principal executive officer or acting in a similar capacity during the last completed fiscal year ("PEO"), regardless of compensation level;

(ii) The small business issuer's two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(2)(ii) of this Item but for the fact that the individual was not serving as an executive officer of the small business issuer at the end of the last completed fiscal year.

Instructions to Item 402(a)(2).

1. Determination of most highly compensated executive officers. The determination as to which executive officers are most highly compensated shall be made by reference to total compensation for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii) of this Item), provided, however, that no disclosure need be provided for any executive officer, other than the PEO, whose total compensation does not exceed \$100,000.

2. Inclusion of executive officer of subsidiary. It may be appropriate for a small business issuer to include as named executive officers one or more executive officers of subsidiaries in the disclosure required by this Item. See Rule 3b-7 under the Exchange Act (17 CFR 240.3b-7).

3. Exclusion of executive officer due to overseas compensation. It may be appropriate in limited circumstances for a small business issuer not to include in the



disclosure required by this Item an individual, other than its PEO, who is one of the small business issuer's most highly compensated executive officers due to the payment of amounts of cash compensation relating to overseas assignments attributed predominantly to such assignments.

(3) Information for full fiscal year. If the PEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the PEO) served as an executive officer of the small business issuer (whether or not in the same position) during any part of the fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(4) Omission of table or column. A table or column may be omitted, if there has been no compensation awarded to, earned by, or paid to any of the named executive officers required to be reported in that table or column in any fiscal year covered by that table.

(5) Definitions. For purposes of this Item:

(i) The term stock appreciation rights (“SARs”) refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the small business issuer or a named executive officer.

(ii) The term plan includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal document, pursuant to which cash, securities, similar instruments or any other property may be received. A plan may be applicable to one person. Small business issuers may omit

information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the small business issuer and that are available generally to all salaried employees.

(iii) The term incentive plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the small business issuer or an affiliate, the small business issuer's stock price, or any other measure. A non-stock incentive plan is an incentive plan or portion of an incentive plan where the relevant performance measure is not based on the price of the small business issuer's equity securities or the award does not permit settlement by issuance of the small business issuer's equity securities. The term incentive plan award means an award provided under an incentive plan.

(b) Summary compensation table.

(1) General. Provide the information specified in paragraph (b)(2) of this Item, concerning the compensation of the named executive officers for each of the small business issuer's last two completed fiscal years, in a Summary Compensation Table in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and Principal Position	Year	Total (\$)	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
PEO	_____ _____							
A	_____ _____							
B	_____ _____							

(2) The Table shall include:

(i) The name and principal position of the named executive officer (column (a)) ;

(ii) The fiscal year covered (column (b));

(iii) The dollar value of total compensation for the covered fiscal year (column (c)). With respect to each named executive officer, disclose the sum of all amounts reported in columns (d) through (i);

(iv) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d));

(v) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (e));

Instructions to Item 402(b)(2)(iv) and (v). 1. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, a footnote shall be included disclosing that the amount of salary or bonus is not calculable

through the latest practicable date and providing the date that the amount of salary or bonus is expected to be determined, and such amount must be disclosed in a filing under Item 5.02(e) of Form 8-K (17 CFR 249.308).

2. Small business issuers need not include in the salary column (column (d)) or bonus column (column (e)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a small business issuer's program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive officer instead of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation instead of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Table corresponding to that fiscal year (e.g., stock awards (column (f)); option awards (column (g)); all other compensation (column (i))); or if made pursuant to a non-stock incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column so disclosing and referring to the Narrative Disclosure to the Summary Compensation Table (required by paragraph (c) of this Item) where the material terms of the award are reported.

(vi) For awards of stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units and other similar instruments that do not have option-like features, the aggregate grant date fair value computed in accordance with Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment ("FAS 123R"), as modified or supplemented, applying the same valuation model and

assumptions as the small business issuer applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (f));

(vii) For awards of stock options, with or without tandem SARs, freestanding SARs and other similar instruments with option-like features (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R applying the same valuation model and assumptions as the small business issuer applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (g));

Instructions to Item 402(b)(2)(vi) and (vii). 1. For awards reported in columns (f) and (g), include a footnote disclosing all assumptions made in the valuation, by reference to a discussion of those assumptions in the small business issuer's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item 402.

2. If at any time during the last completed fiscal year, the small business issuer has adjusted or amended the exercise price of stock options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the small business issuer shall include, as awards required to be reported in column (g), the total fair value of options or SARs as so repriced or modified, measured as of the repricing or modification date.

3. All earnings on outstanding awards must be identified and quantified in a footnote to column (f) or (g), as applicable, whether the earnings were paid during the

fiscal year, payable during the period but deferred, or payable by their terms at a later date.

(viii) The dollar value of all earnings for services performed during the fiscal year pursuant to non-stock based incentive plans as defined in paragraph (a)(5)(iii) of this Item, and all earnings on any outstanding non-stock incentive plan awards (column (h));

Instructions to Item 402(b)(2)(viii). 1. If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer.

2. All earnings on non-stock incentive plan compensation must be identified and quantified in a footnote to column (h), whether the earnings were paid during the fiscal year, payable during the period but deferred at the election of the named executive officer, or payable by their terms at a later date.

(ix) All other compensation for the covered fiscal year that the small business issuer could not properly report in any other column of the Summary Compensation Table (column (i)). Each compensation item that is not properly reportable in columns (d) - (h) must be reported in this column. Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than \$10,000;

(B) All earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on non-qualified defined contribution plans;

(C) All “gross-ups” or other amounts reimbursed during the fiscal year for the payment of taxes;

(D) For any security of the small business issuer or its subsidiaries purchased from the small business issuer or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the small business issuer, the compensation cost computed in accordance with FAS 123R applying the same valuation model and assumptions as the small business issuer applies for financial statement reporting purposes;

(E) The amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) Any termination, including without limitation through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer’s employment with the small business issuer and its subsidiaries; or

(2) A change in control of the small business issuer;

(F) Small business issuer contributions or other allocations to vested and unvested defined contribution plans;

(G) The aggregate increase in actuarial value to the named executive officer of all defined benefit and actuarial pension plans (including supplemental plans) accrued during the small business issuer’s covered fiscal year; and

(H) The dollar value of any insurance premiums paid by, or on behalf of, the small business issuer during the covered fiscal year with respect to life insurance for the benefit of a named executive officer.

Instructions to Item 402(b)(2)(ix). 1. Incentive plan awards and earnings and earnings on restricted stock, options, SARs and similar awards are required to be reported elsewhere as provided herein. These amounts and amounts received on exercise of options and SARs are not reportable as All Other Compensation in column (i).

2. Benefits paid pursuant to defined benefit and actuarial plans are reportable as All Other Compensation in column (i) if paid to the named executive officer during the period covered by the Table. Otherwise information concerning these plans is reportable pursuant to paragraph (e)(1) of this Item.

3. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included in the columns as tax reimbursements (paragraph (b)(2)(ix)(C) of this Item) even if the associated perquisites or other personal benefits are not required to be included because the aggregate amount of such compensation is less than \$10,000.

4. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the small business issuer and its subsidiaries.

5. Regarding paragraph (b)(2)(ix)(B) of this Item, if the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate. Footnote disclosure may be provided disclosing the portion of any earnings that the registrant considers to be paid at an above-market rate, provided that the footnote explains the small business issuer's criteria for determining the portion considered to be above-market.

6. The disclosure required pursuant to paragraph (b)(2)(ix)(G) of this Item applies to each plan that provides for the payment of retirement benefits, or benefits that



will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental employee retirement plans, but excluding tax-qualified defined contribution plans and nonqualified defined contribution plans.

Instructions to Item 402(b). 1. Information with respect to the fiscal year prior to the last completed fiscal year will not be required if the small business issuer was not a reporting company pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), 78o(d)) at any time during that year, except that the small business issuer will be required to provide information for such year if that information previously was required to be provided in response to a Commission filing requirement.

2. All compensation values reported in the Summary Compensation Table must be reported in dollars. Where compensation was paid to or received by a named executive officer in a different currency, a footnote must be provided to identify that currency and describe the rate and methodology used to convert the payment amounts to dollars.

3. If a named executive officer is also a director who receives compensation for his or her services as a director, reflect that compensation in the Summary Compensation Table and provide a footnote identifying and itemizing such compensation and amounts. Use the categories in the Director Compensation Table required pursuant to paragraph (f) of this Item.

4. Amounts deferred at the election of a named executive officer or at the direction of the small business issuer, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), or otherwise, shall be

included in the appropriate column for the fiscal year in which earned. The amount so deferred must be disclosed in a footnote to the applicable column.

(c) Narrative disclosure to summary compensation table. (1) Provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Table required by paragraph (b) of this Item. Examples of such factors may include, in given cases, among other things:

(i) The material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten.

(ii) If at any time during the last fiscal year, any outstanding option, SAR or other equity-based award was repriced or otherwise materially modified (such as by extension of exercise periods, the change of vesting or forfeiture conditions, the change or elimination of applicable performance criteria, or the change of the bases upon which returns are determined), a description of each such repricing or other material modification.

(iii) The waiver or modification of any specified performance target, goal or condition to payout with respect to any amount included in non-stock incentive plan compensation or payouts reported in column (h) to the Summary Compensation Table required by paragraph (b) of this Item, stating whether the waiver or modification applied to one or more specified named executive officers or to all compensation subject to the target, goal or condition.

(iv) The material terms of each grant, including but not limited to date of exercisability, any conditions to exercisability, any tandem feature, any reload feature,

any tax-reimbursement feature, and any provision that could cause the exercise price to be lowered.

(v) The material terms of any non-option and non-SAR award made to a named executive officer during the last completed fiscal year, including a general description of the formula or criteria to be applied in determining the amounts payable and vesting schedule.

(vi) The assumptions underlying any determination of an increase in the actuarial value of defined benefit and actuarial plans and the method of calculating earnings on deferred compensation plans including defined contribution plans.

(vii) An identification to the extent material of any item included under All Other Compensation (column (i)) in the Summary Compensation Table. Identification of an item shall not be considered material if it does not exceed the greater of \$25,000 or 10% of all items included in the specified category in question set forth in paragraphs (b)(2)(ix) of this Item. All items of compensation are required to be included in the Summary Compensation Table without regard to whether such items are required to be identified.

(2) For up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any named executive officers, disclose each of such employee's total compensation for that year and describe their job positions.

(d) Outstanding equity awards at fiscal year-end table. (1) Provide the information specified in paragraph (d)(2) of this Item, concerning the number and value of unexercised options, SARs and similar instruments and nonvested stock (including

restricted stock, restricted stock units or other similar instruments) and incentive plan awards for each named executive officer outstanding as of the end of the small business issuer's last completed fiscal year on an aggregated basis in the following tabular format:

**OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END**

Name	Number of securities underlying unexercised Options (#) Exercisable/ Unexercisable	In-the-money amount of unexercised Options (\$) Exercisable/ Unexercisable	Number of shares or units of Stock held that have not vested (#)	Market value of shares or units of Stock held that have not vested (\$)	Incentive Plans: Number of nonvested shares, units or other rights held (#)	Incentive Plans: Market or payout value of nonvested shares, units or other rights held (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
A						
B						

(2) The Table shall include:

- (i) The name of the executive officer (column (a));
- (ii) The total number of securities underlying unexercised options, SARs and similar instruments with option-like features held at the end of the last completed fiscal year, including awards that have been transferred, separately identifying the exercisable and unexercisable options, SARs and similar instruments (column (b));
- (iii) The aggregate in-the-money amount of unexercised options, SARs and similar instruments with option-like features held at the end of the fiscal year, including

awards that have been transferred, separately identifying the exercisable and unexercisable options, SARs and similar instruments (column (c));

(iv) The total number of nonvested shares of stock (including restricted stock, restricted stock units or similar instruments that do not have option-like features) held at the end of the fiscal year (column (d));

(v) The aggregate market value of nonvested shares of stock (including restricted stock, restricted stock units or similar instruments that do not have option-like features) held at the end of the fiscal year (column (e));

(vi) The total number of nonvested shares, units or other rights awarded under any incentive plan, and, if applicable the number of shares underlying any such unit or right, held at the end of the fiscal year (column (f)); and

(vii) The aggregate market or payout value of nonvested shares, units or other rights awarded under any incentive plan held at the end of the fiscal year (column (g)).

Instructions to Item 402(d)(2). 1. In the title of the table, specify the applicable fiscal year of the small business issuer.

2. Options, SARs or similar instruments are in-the-money if the market price of the underlying securities exceeds the exercise or base price of the option, SAR or similar instrument. Compute the amounts in column (c) by determining the difference between the market price at fiscal year-end of the securities underlying the options, SARs or similar instruments and the exercise or base price of the options, SARs or similar instruments.

3. The expiration dates of options, SARs and similar instruments held at fiscal year-end, separately identifying the exercisable and unexercisable options, SARs and

similar instruments must be disclosed by footnote to column (b). If the expiration date of an option, SAR or similar instrument held at fiscal year-end subsequently has occurred, state whether it was exercised or expired unexercised. The vesting dates of restricted stock shares and similar instruments and incentive plan awards held at fiscal-year end must be disclosed by footnotes to columns (d) and (f), respectively.

4. Compute the market values of stock (including restricted stock, restricted stock units or similar instruments) holdings reported in column (e) and equity-based incentive plan awards reported in column (g) by multiplying the closing market price of the small business issuer's stock at the end of the last completed fiscal year by the number of restricted stock or incentive plan award holdings, respectively.

(e) Additional narrative disclosure. Provide a narrative description of the following to the extent material:

(1) The material terms of each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans, supplemental employee retirement plans, tax-qualified defined contribution plans and nonqualified defined contribution plans.

(2) The material terms of each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with the resignation, retirement or other termination of a named executive officer, or a change in control of the small business issuer or a change in the named executive officer's responsibilities following a change in control, with respect to each named executive officer.

(f) Compensation of directors.

(1) Provide the information specified in paragraph (f)(2) of this Item, concerning the compensation of the directors for the small business issuer's last completed fiscal year, in the following tabular format:

DIRECTOR COMPENSATION

Name	Total (\$)	Fees earned or paid in cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
A						
B						
C						
D						
E						

(2) The Table shall include:

(i) The name of each director, unless such director is also a named executive officer under Item 402(a) and his or her compensation for service as a director is fully reflected in the Summary Compensation Table pursuant to Item 402(b) and otherwise as required pursuant to Items 402(c) and (e) (column (a));

(ii) The dollar value of total compensation for the covered fiscal year (column (b)). With respect to each director, disclose the sum of all amounts reported in columns (c) through (g);

(iii) 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 (column (c));

(iv) For awards of stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar instruments that do not have option-like features, the aggregate grant date fair value computed in accordance with FAS 123R, applying the same valuation model and assumptions as the small business issuer applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (d));

(v) For awards of stock options, with or without tandem SARs, freestanding SARs and other similar instruments with option-like features (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R applying the same valuation model and assumptions as the small business issuer applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (e));

Instruction to Item 402(f)(2)(iv) and (v). Disclose, for each director, by footnote to the appropriate column, the outstanding equity awards at fiscal year end as would be required if the tabular presentation for named executive officers specified in paragraph (d) of this Item were required for directors.

(vi) The dollar value of all earnings for services performed during the fiscal year pursuant to non-stock-based incentive plans as defined in paragraph (a)(5)(iii) of this Item, and all earnings on any outstanding awards (column (f)); and



(vii) All other compensation for the covered fiscal year that the small business issuer could not properly report in any other column of the Director Compensation Table (column (g)). Each compensation item for the last completed fiscal year that is not properly reportable in columns (c) – (f) must be reported in this column and must be identified and quantified in a footnote if it is deemed material in accordance with paragraph (c)(6) of this Item. Such compensation must include, but is not limited to:

(A) All perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than \$10,000;

(B) All earnings on compensation that is deferred on a basis that is not tax-qualified;

(C) All amounts reimbursed during the fiscal year for the payment of taxes;

(D) For any security of the small business issuer or its subsidiaries purchased from the small business issuer or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the small business issuer, the compensation cost computed in accordance with FAS 123R applying the same valuation model and assumptions as the small business issuer applies for financial statement reporting purposes;

(E) The amount paid or accrued to any director pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such director; or

(2) A change in control of the small business issuer;

(F) The aggregate increase in actuarial value to the director of all defined benefit and actuarial pension plans (including supplemental plans) accrued during the small business issuer's covered fiscal year;

(G) Small business issuer contributions or other allocations to vested and unvested defined contribution plans;

(H) Consulting fees earned from, or paid or payable by the small business issuer and/or its subsidiaries (including joint ventures);

(I) The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs; and

(J) The dollar value of any insurance premiums paid by, or on behalf of, the small business issuer during the covered fiscal year with respect to life insurance for the benefit of a director.

Instruction to Item 402(f)(2)(vii). Programs in which small business issuers agree to make donations to one or more charitable institutions in a director's name, payable by the small business issuer currently or upon a designated event, such as the retirement or death of the director, are charitable awards programs or director legacy programs for purposes of the disclosure required by paragraph (f)(2)(vii)(I) of this Item. Provide footnote disclosure of the total dollar amount and other material terms of each such program for which tabular disclosure is provided.

Instruction to Item 402(f)(2). Two or more directors may be grouped in a single row in the table if all of their elements of compensation are identical. The names of the directors for whom disclosure is presented on a group basis should be clear from the table.

(3) Narrative to director compensation table.

Provide a narrative description of any factors necessary to an understanding of the director compensation disclosed in this Table. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and

(ii) Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.

Instruction to Item 402(f). In addition to the Instruction to paragraph (f)(2)(vii) of this Item, the following apply equally to paragraph (f) of this Item: Instructions 2 and 3 to paragraph (b) of this Item; the Instructions to paragraphs (b)(2)(iv) and (v) of this Item; the Instructions to paragraphs (b)(2)(vi) and (vii) of this Item; the Instructions to paragraph (b)(2)(viii) of this Item; the Instructions to paragraph (b)(2)(ix) of this Item; and paragraph (c)(6) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (f) of this Item that correspond to analogous disclosures provided for in paragraph (b) of this Item to which they refer.

6. Amend §228.403 by revising paragraph (b) to read as follows:

**§228.403 (Item 403) Security Ownership of Certain Beneficial Owners and Management.**

(a) \* \* \*

(b) Security ownership of management. Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the small business issuer or any of its parents or subsidiaries, including directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(2) (§228.402(a)(2)), and directors and executive officers of the small business issuer as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of the class so owned. Of the number of shares shown in column (3), indicate, by footnote the amount of shares that are pledged as security and the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in §240.13d-3(d)(1) of this chapter.

(1) Title of class	(2) Name of beneficial owner	(3) Amount of shares and nature of beneficial ownership	(4) Percent of class

\* \* \* \* \*

7. Revise §228.404 to read as follows:

**§228.404 (Item 404) Transactions with related persons and promoters.**

(a) Transactions with related persons. Describe any transaction during the last two years, or any currently proposed transaction, in which the small business issuer was, or is to be, a participant and the amount involved exceeds the lesser of \$120,000 or one percent of the average of the small business issuer's total assets for the last three completed fiscal years and in which any related person had, or will have, a direct or indirect material interest. Disclose the following information regarding the transaction:

(1) The name of the related person and the basis on which the person is a related person.

(2) The related person's interest in the transaction with the small business issuer, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.

(3) The approximate dollar value of the amount involved in each transaction and of the amount of the related person's interest in each transaction each of which shall be computed without regard to the amount of profit or loss.

(4) In the case of indebtedness, disclosure of the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the last two years, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.

(5) Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Instructions to Item 404(a).

1. For the purposes of paragraph (a) of this Item, the term related person means:
  - a. Any person who was in any of the following categories at any time during the specified period for which disclosure under paragraph (a) of this Item is required:
    - i. Any director or executive officer of the small business issuer;

ii. Any nominee for director, when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director; or

iii. Any immediate family member of any of the foregoing persons, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and any person (other than a tenant or employee) sharing the household of a related person identified in paragraph 1.a.i. or 1.a.ii. of this instruction; and

b. Any person who was in any of the following categories when a transaction in which such person had a direct or indirect material interest occurred or existed:

- i. A security holder covered by Item 403(a) (§228.403(a)); or
- ii. Any immediate family member of any such security holder, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, of such security holder and any person (other than a tenant or employee) sharing the household of such security holder.

2. For purposes of paragraph (a) of this Item, a transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships.

3. The amount involved in the transaction shall be computed by determining the dollar value of the amount involved in the transaction in question, which shall include:

- a. In the case of any lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments due on or

after the beginning of the small business issuer's last fiscal year, including any required or optional payments due during or at the conclusion of the lease.

b. In the case of indebtedness, the largest aggregate amount of all indebtedness outstanding at any time since the beginning of the small business issuer's last fiscal year and all amounts of interest payable on it during the last fiscal year.

4. In the case of transactions involving indebtedness, the following items of indebtedness may be excluded from the calculation of the amount of indebtedness and need not be disclosed: amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business.

5. Disclosure of an employment relationship or transaction involving an executive officer and any related compensation solely resulting from that employment relationship or transaction need not be provided pursuant to paragraph (a) of this Item if:

a. The compensation arising from the relationship or transaction is reported pursuant to Item 402 (§228.402); or

b. The executive officer is not an immediate family member of a related person (as specified in Instruction 1. to paragraph (a) of this Item) and such compensation would have been reported under Item 402 (§228.402) as compensation earned for services to the small business issuer if the executive officer was a named executive officer as that term is defined in Item 402(a)(2) (§228.402(a)(2)), and such compensation had been approved as such by the compensation committee of the board of directors (or group of independent directors performing a similar function) of the small business issuer.

6. Disclosure of compensation to a director need not be provided pursuant to paragraph (a) of this Item if the compensation is reportable pursuant to Item 402(f) (§228.402(f)).

7. In the case of a transaction involving indebtedness, if the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T (12 CFR part 220) and the loans are not disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C.1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies (17 CFR 229.802(c))), disclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:

- a. Were made in the ordinary course of business;
- b. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and
- c. Did not involve more than the normal risk of collectibility or present other unfavorable features.

8. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the small business issuer shall not be deemed to have an indirect “material” interest within the meaning of paragraph (a) of this Item where:

- a. The interest arises only:
  - i. From such person’s position as a director of another corporation or organization which is a party to the transaction; or



ii. From the direct or indirect ownership by such person and all other persons specified in Instruction 1 to paragraph (a) of this Item, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or

iii. From both such position and ownership; or

b. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in Instruction 1 to paragraph (a) of this Item, have an interest of less than ten percent, and the person is not a general partner of and does not hold another position in the partnership.

9. Include information for any material underwriting discounts and commissions upon the sale of securities by the small business issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principal underwriter.

(b) Parents. List all parents of the small business issuer showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent, if any.

(c) Promoters. (1) Small business issuers that had a promoter at any time during the past five fiscal years shall:

(i) State the names of the promoter(s), the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the small business issuer and the nature and amount of any assets, services or other consideration therefor received or to be received by the small business issuer; and

(ii) As to any assets acquired or to be acquired by the small business issuer from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount, and identify the persons making the determination and their relationship, if any, with the small business issuer or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the small business issuer, also state the cost thereof to the promoter.

(2) Small business issuers shall provide the disclosure required by paragraphs (c)(1)(i) and (c)(1)(ii) of this Item as to any person who acquired control of a small business issuer that is a shell company, or any person that is part of a group, consisting of two or more persons that agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of a small business issuer, that acquired control of a small business issuer that is a shell company.

8. Add §228.407 to read as follows:

**§228.407 (Item 407) Corporate governance.**

(a) Director independence. Identify each director and, when the disclosure called for by this paragraph is being presented in a proxy or information statement relating to the election of directors, each nominee for director, that is independent under the independence standards applicable to the small business issuer under paragraph (a)(1) of this Item. In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such committee independence standards. If the small business issuer does not have

a separately designated audit, nominating or compensation committee or committee performing similar functions, the small business issuer must provide the disclosure of directors that are not independent with respect to all members of the board of directors applying such committee independence standards.

(1) In determining whether or not the director or nominee for director is independent for the purposes of paragraph (a) of this Item, the small business issuer shall use the applicable definition of independence, as follows:

(i) If the small business issuer is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the small business issuer's definition of independence that it uses for determining if a majority of the board of directors is independent in compliance with the listing standards applicable to the small business issuer. When determining whether the members of a committee of the board of directors are independent, the small business issuer's definition of independence that it uses for determining if the members of that specific committee are independent in compliance with the independence standards applicable for the members of the specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the small business issuer uses for determining if a majority of the board of directors are independent. If the small business issuer does not have independence standards for a committee, the independence standards for that specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the small business issuer uses for determining if a majority of the board of directors are independent.

(ii) If the small business issuer is not a listed issuer, a definition of independence of a national securities exchange or of a national securities association which has requirements that a majority of the board of directors be independent, and state which definition is used. Whatever such definition the small business issuer chooses, it must use the same definition with respect to all directors and nominees for director. When determining whether the members of a specific committee of the board of directors are independent, if the national securities exchange or national securities association whose standards are used has independence standards for the member of a specific committee, use those committee specific standards.

(iii) If the information called for by paragraph (a) of this Item is being presented in a registration statement on Form S-1 (§239.11 of this chapter) or Form SB-2 (§239.10 of this chapter) under the Securities Act or on a Form 10 or Form 10-SB (§249.210 or §249.210b of this chapter) under the Exchange Act where the small business issuer has applied for listing with a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the definition of independence that the small business issuer uses for determining if a majority of the board of directors is independent, and the definition of independence that the small business issuer uses for determining if members of the specific committee of the board of directors are independent, that is in compliance with the independence listing standards of the national securities exchange or inter-dealer quotation system on which it has applied for listing, or if the small business issuer has not adopted such definitions, the independence standards for determining if the majority of the board of directors is

independent and if members of the committee of the board of directors are independent of that national securities exchange or inter-dealer quotation system.

(2) If the small business issuer uses its own definitions for determining whether its directors and nominees for director, and members of specific committees of the board of directors, are independent, disclose whether these definitions are available to security holders on the small business issuer's Web site. If so, provide the small business issuer's Web site address. If not, include a copy of these policies in an appendix to the small business issuer's proxy statement that is provided to security holders at least once every three fiscal years or if the policies have been materially amended since the beginning of the small business issuer's last fiscal year. If a current copy of the policies is not available to security holders on the small business issuer's Web site, and is not included as an appendix to the small business issuer's proxy statement, identify the most recent fiscal years in which the policies were so included in satisfaction of this requirement.

(3) For each director and nominee for director that is identified as independent, describe any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) (§228.404(a)) that were considered by the board of directors under the applicable independence definitions in determining that the director is independent.

Instruction to Item 407(a). No information called for by paragraph (a) of this Item need be given in a registration statement filed at a time when the small business issuer is not subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), or 78o(d)) respecting any director who is no longer a director at the time of effectiveness of the registration statement.

(b) Board meetings and committees.

(1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

(i) The total number of meetings of the board of directors (held during the period for which he has been a director); and

(ii) The total number of meetings held by all committees of the board on which he served (during the periods that he served).

(2) Describe the small business issuer's policy, if any, with regard to board members' attendance at annual meetings of security holders and state the number of board members who attended the prior year's annual meeting.

Instruction to Item 407(b)(2). In lieu of providing the information required by paragraph (b)(2) of this Item in the proxy statement, the small business issuer may instead provide the small business issuer's Web site address where such information appears.

(3) State whether or not the small business issuer has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions. If the small business issuer has such committees, however designated, identify each committee member, state the number of committee meetings held by each such committee during the last fiscal year and describe briefly the functions performed by each such committee. Such disclosure need not be provided to the extent it is duplicative of disclosure provided in accordance with paragraph (d)(4) of this Item.

(c) Nominating committee. (1) If the small business issuer does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a committee and identify each director who participates in the consideration of director nominees.

(2) Provide the following information regarding the small business issuer's director nomination process:

(i) State whether or not the nominating committee has a charter. If the nominating committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the nominating committee charter;

(ii) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

(iii) If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, state that fact and state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a policy;

(iv) If the nominating committee will consider candidates recommended by security holders, describe the procedures to be followed by security holders in submitting such recommendations;

(v) Describe any specific minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the small business issuer's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the small business issuer's directors to possess;

(vi) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;

(vii) With regard to each nominee approved by the nominating committee for inclusion on the small business issuer's proxy card (other than nominees who are executive officers or who are directors standing for re-election), state which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other specified source;

(viii) If the small business issuer pays a fee to any third party or parties to identify or evaluate or assist in identifying or evaluating potential nominees, disclose the function performed by each such third party; and

(ix) If the small business issuer's nominating committee received, by a date not later than the 120th calendar day before the date of the small business issuer's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the small business issuer's voting common stock for at least one year as of the



date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the small business issuer's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identify the candidate and the security holder or security holder group that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

Instructions to Item 407(c)(2)(ix).

1. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a nominating security holder may be determined using information set forth in the small business issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the party relying on such report knows or has reason to believe that the information contained therein is inaccurate.

2. For purposes of the small business issuer's obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, where the date of the annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the obligation under that Item will arise where the small business issuer receives the security holder recommendation a reasonable time before the small business issuer begins to print and mail its proxy materials.

3. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a recommending security holder, as well as the holding period of those securities,

may be determined by the small business issuer if the security holder is the registered holder of the securities. If the security holder is not the registered owner of the securities, he or she can submit one of the following to the small business issuer to evidence the required ownership percentage and holding period:

a. A written statement from the “record” holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

b. If the security holder has filed a Schedule 13D (§240.13d-101 of this chapter), Schedule 13G (§240.13d-102 of this chapter), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter), and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the securities for the one-year period as of the date of the recommendation.

4. For purposes of the small business issuer’s obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, the security holder or group must have provided to the small business issuer, at the time of the recommendation, the written consent of all parties to be identified and, where the security holder or group members are not registered holders, proof that the security holder or group satisfied the required ownership percentage and holding period as of the date of the recommendation.

Instruction to Item 407(c)(2). For purposes of paragraph (c)(2) of this Item, the term “nominating committee” refers not only to nominating committees and committees

performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

(3) Describe any material changes to the procedures by which security holders may recommend nominees to the small business issuer's board of directors, where those changes were implemented after the small business issuer last provided disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item.

Instructions to Item 407(c)(3).

1. The disclosure required in paragraph (c)(3) of this Item need only be provided in a small business issuer's quarterly or annual reports.

2. For purposes of paragraph (c)(3) of this Item, adoption of procedures by which security holders may recommend nominees to the small business issuer's board of directors, where the small business issuer's most recent disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item, indicated that the small business issuer did not have in place such procedures, will constitute a material change.

(d) Audit committee.

(1) State whether or not the audit committee has a charter. If the audit committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the audit committee charter.

(2) If a listed issuer's board of directors determines, in accordance with the listing standards applicable to the issuer, to appoint a director to the audit committee who is not independent (apart from the requirements in §240.10A-3 of this chapter), including

as a result of exceptional or limited or similar circumstances, disclose the nature of the relationship that makes that individual not independent and the reasons for the board of directors' determination.

(3)(i) The audit committee must state whether:

(A) The audit committee has reviewed and discussed the audited financial statements with management;

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the statement on Auditing Standards No. 61, as amended (AICPA, Professional Standards, Vol. 1, AU section 380), as adopted by the Public Company Accounting Oversight Board in Rule 3200T;

(C) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, Independence Discussions with Audit Committees), as adopted by the Public Company Accounting Oversight Board in Rule 3600T, and has discussed with the independent accountant the independent accountant's independence; and

(D) Based on the review and discussions referred to in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this Item, the audit committee recommended to the board of directors that the audited financial statements be included in the small business issuer's Annual Report on Form 10-K (17 CFR 249.310) for the last fiscal year for filing with the Commission.

(ii) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or

the entire board of directors) must appear below the disclosure required by paragraph (d)(3)(i) of this Item.

(4)(i) If you meet the following requirements, provide the disclosure in paragraph (d)(4)(ii) of this Item:

(A) You are a listed issuer, as defined in §240.10A-3 of this chapter;

(B) You are filing either an annual report on Form 10-K or 10-KSB (17 CFR 249.310 or 17 CFR 249.310b), or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a et seq.) if action is to be taken with respect to the election of directors; and

(C) You are neither:

(1) A subsidiary of another listed issuer that is relying on the exemption in §240.10A-3(c)(2) of this chapter; nor

(2) Relying on any of the exemptions in §240.10A-3(c)(4) through (c)(7) of this chapter.

(ii)(A) State whether or not the small business issuer has a separately-designated standing audit committee established in accordance with section 3(a)(58)(A) of the Exchange Act (15 U.S.C. 78c(a)(58)(A)), or a committee performing similar functions. If the small business issuer has such a committee, however designated, identify each committee member. If the entire board of directors is acting as the small business issuer's audit committee as specified in section 3(a)(58)(B) of the Exchange Act (15 U.S.C. 78c(a)(58)(B)), so state.

(B) If applicable, provide the disclosure required by §240.10A-3(d) of this chapter regarding an exemption from the listing standards for audit committees.

(5) Audit committee financial expert.

(i)(A) Disclose that the small business issuer's board of directors has determined that the small business issuer either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the small business issuer provides the disclosure required by paragraph (d)(5)(i)(A)(1) of this Item, it must disclose the name of the audit committee financial expert and whether that person is independent, as independence for audit committee members is defined in the listing standards applicable to the listed issuer.

(C) If the small business issuer provides the disclosure required by paragraph (d)(5)(i)(A)(2) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to Item 407(d)(5)(i). If the small business issuer's board of directors has determined that the small business issuer has more than one audit committee financial expert serving on its audit committee, the small business issuer may, but is not required to, disclose the names of those additional persons. A small business issuer choosing to identify such persons must indicate whether they are independent pursuant to paragraph (d)(5)(i)(B) of this Item.

(ii) For purposes of this Item, an audit committee financial expert means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the small business issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal control over financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements;

or

(D) Other relevant experience.

(iv) Safe harbor.

(A) A person who is determined to be an audit committee financial expert will not be deemed an expert for any purpose, including without limitation for purposes of section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 407(d)(5).

1. The disclosure under paragraph (d)(5) of this Item is required only in a small business issuer's annual report. The small business issuer need not provide the disclosure required by paragraph (d)(5) of this Item in a proxy or information statement unless that small business issuer is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to General Instruction E(3) to Form 10-KSB (17 CFR 249.310b).

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (d)(5)(iii)(D) of this Item, the small business issuer



shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under Item 401(a)(4) (§228.401(a)(4)).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of paragraph (d)(5) of this Item, the term board of directors means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term generally accepted accounting principles in paragraph (d)(5)(ii)(A) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. Following the effective date of the first registration statement filed under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C.78a et seq.) by a small business issuer, the small business issuer or successor issuer need not make the disclosures required by this Item in its first annual report filed pursuant to section 13(a) or 15(d) (15 U.S.C. 78m(a) or 78o(d)) of the Exchange Act after effectiveness.

Instructions to Item 407(d).

1. The information required by paragraphs (d)(1) - (3) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 through 240.14b-2 or 240.14c-1 through 240.14c-101), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the small business issuer specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act. Such information will not be deemed to be incorporated by reference into

any filing under the Securities Act or the Exchange Act, except to the extent that the small business issuer specifically incorporates it by reference.

2. The disclosure required by paragraphs (d)(1) - (3) of this Item need only be provided one time during any fiscal year.

3. The disclosure required by paragraph (d)(3) of this Item need not be provided in any filings other than a small business issuer's proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting).

(e) Compensation committee.

(1) If the small business issuer does not have a standing compensation committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.

(2) State whether or not the compensation committee has a charter. If the compensation committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the compensation committee charter.

(3) Provide a narrative description of the small business issuer's processes and procedures for the consideration and determination of executive and director compensation, including:

(i) (A) The scope of authority of each of the compensation committee (or persons performing the equivalent functions); and

(B) The extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority described in paragraph (e)(3)(i)(A) of this Item to other persons, specifying what authority may be so delegated and to whom;

(ii) Any role of executive officers in determining or recommending the amount or form of executive and director compensation; and

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement and identifying the executive officer within the small business issuer the consultants contacted in carrying out their assignment.

(f) Shareholder communications and annual meeting attendance.

(1) State whether or not the small business issuer's board of directors provides a process for security holders to send communications to the board of directors and, if the small business issuer does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a process.

(2) If the small business issuer has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the small business issuer's process for determining which communications will be relayed to board members.

Instructions to Item 407(f).

1. In lieu of providing the information required by paragraph (f)(2) of this Item in the proxy statement, the small business issuer may instead provide the small business issuer's Web site address where such information appears.

2. For purposes of the disclosure required by paragraph (f)(2)(ii) of this Item, a small business issuer's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the small business issuer's process is approved by a majority of the independent directors.

3. For purposes of this paragraph, communications from an officer or director of the small business issuer will not be viewed as "security holder communications." Communications from an employee or agent of the small business issuer will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

4. For purposes of this paragraph, security holder proposals submitted pursuant to §240.14a-8 of this chapter, and communications made in connection with such proposals, will not be viewed as "security holder communications."

Instructions to Item 407.

1. For purposes of this Item:

- a. Listed issuer means a listed issuer as defined in §240.10A-3 of this chapter;
- b. National securities exchange means a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a));
- c. Inter-dealer quotation system means an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)); and
- d. National securities association means a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that has been approved by the Commission (as that definition may be modified or supplemented).

2. With respect to paragraphs (c)(2)(i), (d)(1) and (e)(2) of this Item, disclose whether a current copy of the applicable committee charter is available to security holders on the small business issuer's Web site, and if so, provide the small business issuer's Web site address. If a current copy of the charter is not available to security holders on the small business issuer's Web site, include a copy of the charter in an appendix to the small business issuer's proxy statement that is provided to security holders at least once every three fiscal years, or if the charter has been materially amended since the beginning of the small business issuer's last fiscal year. If a current copy of the charter is not available to security holders on the small business issuer's Web site, and is not included as an appendix to the small business issuer's proxy statement, identify in which of the prior fiscal years the charter was so included in satisfaction of this requirement.

**PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER  
SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND  
ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K**

9. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 79e, 79j, 79n, 79t, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

10. Amend §229.201 by revising Instruction 2 to paragraph (d) to read as follows:

**§229.201 (Item 201) Market price of and dividends on the registrant’s common equity and related stockholder matters.**

\* \* \* \* \*

Instructions to paragraph (d).

1. \* \* \*

2. For purposes of this paragraph, an “individual compensation arrangement” includes, but is not limited to, the following: a written compensation contract within the meaning of “employee benefit plan” under §230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(6)(ii) of Regulation S-K (§229.402(a)(6)(ii)).

\* \* \* \* \*

11. Remove and reserve §229.306.

12. Amend §229.401 by removing paragraphs (h), (i) and (j) and by revising paragraph (g)(1) to read as follows:

**§229.401 (Item 401) Directors, executive officers, promoters and control persons.**

\* \* \* \* \*

(g) Promoters and control persons. (1) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), 78o(d)) for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which had a promoter at any time during the past five fiscal years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this Item that occurred during the past five years and that are material to a voting or investment decision.

\* \* \* \* \*

13. Revise §229.402 to read as follows:

**§229.402 (Item 402) Executive compensation.**

(a) General.

(1) Treatment of foreign private issuers. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Items 6.B and 6.E.2 of Form 20-F (17 CFR 249.220f), with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded.

(2) All compensation covered. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this Item, and directors covered by paragraph (1) of this Item, by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise

specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the registrant and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(3) Persons covered. Disclosure shall be provided pursuant to this Item for each of the following (the “named executive officers”):

(i) All individuals serving as the registrant’s principal executive officer or acting in a similar capacity during the last completed fiscal year (“PEO”), regardless of compensation level;

(ii) All individuals serving as the registrant’s principal financial officer or acting in a similar capacity during the last completed fiscal year (“PFO”), regardless of compensation level;

(iii) The registrant’s three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year; and

(iv) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(3)(iii) of this Item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.



Instructions to Item 402(a)(3).

1. Determination of most highly compensated executive officers. The determination as to which executive officers are most highly compensated shall be made by reference to total compensation for the last completed fiscal year (as required to be disclosed pursuant to paragraph (c)(2)(iii) of this Item), provided, however, that no disclosure need be provided for any executive officer, other than the PEO and PFO, whose total compensation does not exceed \$100,000.

2. Inclusion of executive officer of subsidiary. It may be appropriate for a registrant to include as named executive officers one or more executive officers of subsidiaries in the disclosure required by this Item. See Rule 3b-7 under the Exchange Act (17 CFR 240.3b-7).

3. Exclusion of executive officer due to overseas compensation. It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this Item an individual, other than its PEO or PFO, who is one of the registrant's most highly compensated executive officers due to the payment of amounts of cash compensation relating to overseas assignments attributed predominantly to such assignments.

4. Information for full fiscal year. If the PEO or PFO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the PEO or PFO) served as an executive officer of the registrant (whether or not in the same position) during any part of the fiscal year with

respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(5) Omission of table or column. A table or column may be omitted, if there has been no compensation awarded to, earned by, or paid to any of the named executive officers required to be reported in that table or column in any fiscal year covered by that table.

(6) Definitions. For purposes of this Item:

(i) The term stock appreciation rights (“SARs”) refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer.

(ii) The term plan includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which cash, securities, similar instruments, or any other property may be received. A plan may be applicable to one person. Registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term incentive plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant’s stock price, or any other performance measure. A non-stock incentive plan is an incentive plan or portion of an incentive plan where the relevant performance measure is not based on the price of the registrant’s equity securities or the

award does not permit settlement by issuance of registrant equity securities. The term incentive plan award means an award provided under an incentive plan.

(b) Compensation discussion and analysis.

(1) Discuss the compensation awarded to, earned by, or paid to the named executive officers. The discussion shall explain all elements of the registrant's compensation of the named executive officers. The discussion shall describe the following:

- (i) The objectives of the registrant's compensation programs;
- (ii) What the compensation program is designed to reward and not reward;
- (iii) Each element of compensation;
- (iv) Why the registrant chooses to pay each element;
- (v) How the registrant determines the amount (and, where applicable, the formula) for each element to pay; and
- (vi) How each compensation element and the registrant's decisions regarding that element fit into the registrant's overall compensation objectives and affect decisions regarding other elements.

(2) While the material information to be disclosed under Compensation Discussion and Analysis will vary depending upon the facts and circumstances, examples of such information may include, in a given case, among other things, the following:

- (i) The policies for allocating between long-term and currently paid out compensation;
- (ii) The policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation;

(iii) For long-term compensation, the basis for allocating compensation to each different form of award (such as relationship of the award to the achievement of the registrant's long-term goals, management's exposure to downside equity performance risk, correlation between cost to registrant and expected benefits to the registrant);

(iv) For equity-based compensation, how the determination is made as to when awards are granted;

(v) What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;

(vi) How specific forms of compensation are structured to reflect the named executive officer's individual performance and/or individual contribution to these items of the registrant's performance, describing the elements of individual performance and/or contribution that are taken into account;

(vii) How specific forms of compensation are structured to reflect these items of the registrant's performance, including whether discretion can be exercised (either to award compensation absent attainment of the relevant performance goal(s) or to reduce or increase the size of an award);

(viii) The factors considered in decisions to increase or decrease compensation materially;

(ix) How compensation or amounts realizable from prior compensation (e.g., gains from prior option or stock awards) are considered in setting other elements of compensation (e.g., how gains from prior option or stock awards are considered in setting retirement benefits);

(x) The impact of the accounting and tax treatments of the particular form of compensation;

(xi) The registrant's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership), and any registrant policies regarding hedging the economic risk of such ownership;

(xii) Whether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies); and

(xiii) The role of executive officers in determining executive compensation.

Instructions to Item 402(b).

1. The purpose of the Compensation Discussion and Analysis is to provide to investors material information that is necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers.

2. The Compensation Discussion and Analysis should be of the information contained in the tables and otherwise disclosed pursuant to this Item.

3. The Compensation Discussion and Analysis should focus on the material principles underlying the registrant's executive compensation policies and decisions and the most important factors relevant to analysis of those policies and decisions, and shall not use boilerplate language or repeat the more detailed information set forth in the tables and narrative disclosures that follow.

4. Registrants are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any factors or criteria involving confidential

commercial or business information, the disclosure of which would have an adverse effect on the registrant.

(c) Summary compensation table.

(1) General. Provide the information specified in paragraph (c)(2) of this Item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, in a Summary Compensation Table in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and Principal Position	Year	Total (\$)	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
PEO	_____ _____ _____							
PFO	_____ _____ _____							
A	_____ _____ _____							
B	_____ _____ _____							
C	_____ _____ _____							

(2) The Table shall include:

- (i) The name and principal position the named executive officer (column (a)) ;
- (ii) The fiscal year covered (column (b));
- (iii) The dollar value of total compensation for the covered fiscal year (column (c)). With respect to each named executive officer, disclose the sum of all amounts reported in columns (d) through (i);
- (iv) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d));
- (v) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (e));

Instructions to Item 402(c)(2)(iv) and (v). 1. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, a footnote shall be included disclosing that the amount of salary or bonus is not calculable through the latest practicable date and providing the date that the amount of salary or bonus is expected to be determined, and such amount must be disclosed in a filing under Item 5.02(e) of Form 8-K (17 CFR 249.308).

2. Registrants need not include in the salary column (column (d)) or bonus column (column (e)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a registrant's program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive officer instead of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation instead of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Summary Compensation Table corresponding to that fiscal year (e.g., stock awards (column (f)));

option awards (column (g)); all other compensation (column (i)); or if made pursuant to a non-stock incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column so disclosing and referring to the Grants of Performance-Based Awards Table (required by paragraph (d) of this Item) where the award is reported.

(vi) For awards of stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units and other similar instruments that do not have option-like features, the aggregate grant date fair value computed in accordance with Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (“FAS 123R”), as modified or supplemented, applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (f));

(vii) For awards of stock options, with or without tandem SARs, freestanding SARs and other similar instruments with option-like features (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (g));

Instructions to Item 402(c)(2)(vi) and (vii). 1. For awards reported in columns (f) and (g), include a footnote disclosing all assumptions made in the valuation, by reference to a discussion of those assumptions in the registrant’s financial statements, footnotes to the financial statements, or discussion in the Management’s Discussion and Analysis.



The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

2. If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of stock options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means (“repriced”), or otherwise has materially modified such awards, the registrant shall include, as awards required to be reported in column (g), the total fair value of options or SARs as so repriced or modified, measured as of the repricing or modification date.

3. All earnings on outstanding awards must be identified and quantified in a footnote to column (f) or (g), as applicable, whether the earnings were paid during the fiscal year, payable during the period but deferred, or payable by their terms at a later date.

(viii) The dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-stock incentive plans as defined in paragraph (a)(6)(iii) of this Item, and all earnings on any outstanding awards (column (h)); and

Instructions to Item 402(c)(2)(viii). 1. If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer.

2. All earnings on non-stock incentive plan compensation must be identified and quantified in a footnote to column (h), whether the earnings were paid during the fiscal

year, payable during the period but deferred at the election of the named executive officer, or payable by their terms at a later date.

(ix) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Each compensation item that is not properly reportable in columns (d) - (h) must be reported in this column and must be identified and quantified in a footnote if the amount of the item exceeds \$10,000 (or in the case of any perquisite or personal benefit, must be identified unless the aggregate value of perquisites and personal benefits is less than \$10,000, and must be quantified if it is valued at the greater of \$25,000 or 10% of total perquisites and other personal benefits as specified in Instruction 3 to this paragraph).

Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than \$10,000;

(B) All earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on non-qualified defined contribution plans;

(C) All “gross-ups” or other amounts reimbursed during the fiscal year for the payment of taxes;

(D) For any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant, the compensation cost computed in accordance with FAS 123R applying

the same valuation model and assumptions as the registrant applies for financial statement reporting purposes;

(E) The amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) Any termination, including without limitation through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer's employment with the registrant and its subsidiaries; or

(2) A change in control of the registrant;

(F) Registrant contributions or other allocations to vested and unvested defined contribution plans;

(G) The aggregate increase in actuarial value to the named executive officer of all defined benefit and actuarial pension plans (including supplemental plans) accrued during the registrant's covered fiscal year; and

(H) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer.

Instructions to Item 402(c)(2)(ix). 1. Incentive plan awards and earnings; earnings on restricted stock, options, SARs and similar awards; and amounts received on exercise of options and SARs are required to be reported elsewhere as provided in this Item and are not reportable as All Other Compensation in column (i).

2. Benefits paid pursuant to defined benefit and actuarial plans are reportable as All Other Compensation in column (i) if paid to the named executive officer during the

period covered by the Table. Otherwise information concerning these plans is reportable pursuant to paragraph (i) of this Item.

3. Each perquisite or personal benefit must be identified by type unless the aggregate value of perquisites and personal benefits is less than \$10,000 and each perquisite or personal benefit that exceeds the greater of \$25,000 or 10% of the total amount of perquisites and personal benefits must be quantified for a named executive officer pursuant to paragraph (c)(2)(ix)(A) of this Item, and each item reported for a named executive officer pursuant to paragraph (c)(2)(ix) of this Item that exceeds \$10,000 must be identified by type and amount in a footnote to column (i). All items of compensation are required to be included in the Summary Compensation Table without regard to whether such items are required to be so identified. Reimbursements of taxes owed with respect to perquisites or other personal benefits are subject to inclusion in column (i) and to separate quantification and identification as tax reimbursements (paragraph (c)(2)(ix)(C) of this Item) even if the associated perquisites or other personal benefits are not required to be separately quantified or the perquisite or other personal benefit is not required to be included because the aggregate amount of such compensation is less than \$10,000.

4. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant and its subsidiaries.

5. Regarding paragraph (c)(2)(ix)(B) of this Item, if the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate. Footnote disclosure may be provided disclosing the portion of

any earnings that the registrant considers to be paid at an above-market rate, provided that the footnote explains the registrant's criteria for determining the portion considered to be above-market.

6. The disclosure required pursuant to paragraph (c)(2)(ix)(G) of this Item applies to each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental employee retirement plans, but excluding tax-qualified defined contribution plans and nonqualified defined contribution plans.

Instructions to Item 402(c). 1. Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), 78o(d)) at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

2. All compensation values reported in the Summary Compensation Table must be reported in dollars. Where compensation was paid to or received by a named executive officer in a different currency, a footnote must be provided to identify that currency and describe the rate and methodology used to convert the payment amounts to dollars.

3. If a named executive officer is also a director who receives compensation for his or her services as a director, reflect that compensation in the Summary Compensation Table and provide a footnote identifying and itemizing such compensation and amounts.

Use the categories in the Director Compensation Table required pursuant to paragraph (1) of this Item.

4. Amounts deferred at the election of a named executive officer or at the direction of the registrant, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), or otherwise, shall be included in the appropriate column for the fiscal year in which earned. The amount so deferred must be disclosed in a footnote to the applicable column.

(d) Grants of performance-based awards table. (1) Provide the information specified in paragraph (d)(2) of this Item, concerning each grant of an award made to a named executive officer in the last completed fiscal year under any performance-based plan (including a performance-based portion of any plan), including awards that subsequently have been transferred, in the following tabular format:

GRANTS OF PERFORMANCE-BASED AWARDS

Name	Performance-Based Stock and Stock-based Incentive Plans: number of shares, units or other rights (#)	Performance-Based Options: number of securities underlying Options (#)	Non-Stock Incentive Plan Awards: number of units or other rights (#)	Dollar amount of consideration paid for award, if any (\$)	Grant Date for Stock or Option Awards	Performance or other period until vesting or payout and Option Expiration Date	Estimated future payouts		
							Threshold (\$ or #)	Target (\$ or #)	Maximum (\$ or #)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) The number of shares of performance-based stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or similar instruments that do not have option-like features granted under an award, and the number of shares, units or other rights granted under an award under any stock-based incentive plan (and if applicable, the number of shares underlying any such unit or right) (column (b));

(iii) The number of performance-based options, SARs, and similar instruments with option-like features (column (c)) granted under an award under any such plan;

(iv) The number of units or other rights granted under an award under any non-stock incentive plan (column (d));

(v) The dollar amount of consideration, if any, paid by the executive officer for the award (column (e));

(vi) The grant date for stock, option or similar awards reported in columns (b) and (c) (column (f));

(vii) The performance or other time period until earning, payout or maturation of the award, and the option/SAR expiration date (column (g)); and

(viii) The dollar value of the estimated future payout or the number of shares to be awarded in the future as the payout on satisfaction of the conditions in question, or the applicable range of estimated payouts denominated in dollars or number of shares under the award (threshold, target and maximum amount) (columns (h) through (j)).

Instructions to Item 402(d).

1. Separate disclosure shall be provided in the Table for each grant of an award made to a named executive officer, accompanied by the information specified in Instruction 2 to this paragraph. If grants of awards were made to a named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such grant was made.

2. For column (h), threshold refers to the minimum amount payable for a certain level of performance under the plan. For column (i), target refers to the amount payable if the specified performance target(s) are reached. For column (j), maximum refers to the



maximum payout possible under the plan. If the award provides only for a single estimated payout, that amount should be reported as the target in column (i). In column (i), registrants must provide a representative amount based on the previous fiscal year's performance if the target amount is not determinable.

3. A tandem grant of two instruments, only one of which is performance-based, such as an option granted in tandem with a performance share, need be reported only in the table applicable to the other instrument. For example, an option granted in tandem with a performance share would be reported only as an option grant, with the tandem feature noted.

4. Options, SARs and similar option-like instruments granted in connection with a repricing transaction shall be reported in this table. See Instruction 2 to paragraphs (c)(2)(vi) and (vii) of this item.

(e) Grants of all other equity awards table. (1) Provide the information specified in paragraph (e)(2) of this Item, concerning each grant of an equity-based award that is not performance-based (including awards that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers in the following tabular format:

GRANTS OF ALL OTHER EQUITY AWARDS

Name	Number of Securities Underlying Options Granted (#)	Exercise or Base Price (\$/Sh)	Expiration Date	Number of Shares of Stock or Units Granted (#)	Vesting Date	Grant Date
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

(2) The Table shall include, with respect to each grant:

(i) The name of the executive officer (column (a));

(ii) The number of securities underlying options, SARs and similar option-like instruments granted that are not performance-based (column (b));

(iii) The per-share exercise or base price of the options, SARs and similar option-like instruments granted (column (c)). If such exercise or base price is less than the market price of the underlying security on the date of the grant, a separate, adjoining column shall be added showing market price on the date of the grant;

(iv) The expiration date of the options, SARs and similar option-like instruments (column (d));

(v) The number of shares of stock, including restricted stock, units and similar instruments that are not option-like, granted that are not performance-based (column (e));

(vi) The vesting date of the restricted shares, units and similar instruments (column (f)); and

(vii) The grant date of any options, stock or similar instruments reported in columns (b) and (e) (column (g)).

Instructions to Item 402(e). 1. The awards reportable in this Table are share-based awards that are not subject to a performance condition or a market condition, as those terms are defined in FAS 123R.

2. If more than one award was made to a named executive officer during the last completed fiscal year, a separate line should be used to disclose each such award.

However, multiple option grants during a single fiscal year may be aggregated where each grant was made at the same exercise and/or base price and has the same expiration date. A single grant consisting of options, SARs and/or similar option-like instruments shall be reported as separate grants with respect to each tranche with a different exercise and/or base price or expiration date.

3. Options, SARs and similar option-like instruments granted in connection with a repricing transaction shall be reported in this Table. See Instruction 2 to paragraphs (c)(2)(vi) and (vii) of this Item.

4. Any material term of the grant or award, including but not limited to the date of exercisability, the number and nature of any tandem instruments, a reload feature, or a tax-reimbursement feature, must be described in a footnote.

5. If any provision of a grant or award (other than an antidilution provision) could cause the exercise price to be lowered, registrants must disclose that provision and its potential consequences either by a footnote or accompanying textual narrative.

6. In determining if the exercise or base price of the options, SARs and similar option-like instruments is less than the market price of the underlying security on the date of the grant, the registrant may use either the closing price per share of the security on an established public trading market on the date of the grant, or if no such market exists, any other formula prescribed for the security.

(f) Narrative disclosure to summary compensation table and subsidiary tables.

(1) Provide a narrative description of any material factors necessary to an understanding of the information disclosed in the tables required by paragraphs (c), (d) and (e) of this Item. Examples of such factors may include, in given cases, among other things:

(i) The material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten.

(ii) If at any time during the last fiscal year, any outstanding option, SAR or other equity-based award was repriced or otherwise materially modified (such as by extension of exercise periods, the change of vesting or forfeiture conditions, the change or elimination of applicable performance criteria, or the change of the bases upon which returns are determined), a description of each such repricing or other material modification.

(iii) The material terms of any award reported in response to paragraph (d) of this Item, including a general description of the formula or criteria to be applied in determining the amounts payable, and the vesting schedule. For example, state where applicable that dividends will be paid on stock (including restricted stock, restricted stock units or other similar instruments), and if so, the applicable dividend rate and whether

that rate is preferential. Describe the performance-based conditions, and any other material conditions, that are applicable to the award. Registrants are not required to disclose any factor, criteria or performance-related or other condition to payout or maturation of a particular award that involves confidential commercial or business information, disclosure of which would adversely affect the registrant's competitive position. For purposes of the Table required by paragraph (d) of this Item and the narrative disclosure required by paragraph (f) of this Item, performance-based conditions include both performance conditions and market conditions, as those terms are defined in FAS 123R.

(iv) The waiver or modification of any specified performance target, goal or condition to payout with respect to any amount included in non-stock incentive plan compensation reported in column (h) to the Summary Compensation Table required by paragraph (c) of this Item, stating whether the waiver or modification applied to one or more specified named executive officers or to all compensation subject to the target, goal or condition.

(v) The assumptions underlying any determination of an increase in the actuarial value of defined benefit and actuarial plans and the method of calculating earnings on deferred compensation plans including defined contribution plans.

Instruction to Item 402(f)(1). 1. Include a discussion of provisions regarding post-termination compensation only to the extent disclosure of such compensation is required in the Summary Compensation Table pursuant to paragraph (c)(2)(ix)(E) of this Item; otherwise disclose these provisions pursuant to paragraph (k) of this Item.

2. The disclosure required by paragraph (f)(2) of this Item would not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

(2) For up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any of the named executive officers, disclose each of such employee's total compensation for that year and describe their job positions.

(g) Outstanding equity awards at fiscal year-end table. (1) Provide the information specified in paragraph (g)(2) of this Item, concerning the number and value of unexercised options, SARs and similar instruments; nonvested stock (including restricted stock, restricted stock units or other similar instruments); and incentive plan awards for each named executive officer outstanding as of the end of the registrant's last completed fiscal year on an aggregated basis in the following tabular format:

OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END

Name	Number of securities underlying unexercised Options (#) Exercisable/ Unexercisable	In-the-money amount of unexercised Options (\$) Exercisable/ Unexercisable	Number of shares or units of Stock held that have not vested (#)	Market value of nonvested shares or units of Stock held that have not vested (\$)	Incentive Plans: Number of nonvested shares, units or other rights held (#)	Incentive Plans: Market or payout value of nonvested shares, units or other rights held (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) The total number of securities underlying unexercised options, SARs and similar instruments with option-like features held at the end of the last completed fiscal year, including awards that have been transferred, separately identifying the exercisable and unexercisable options, SARs and similar instruments (column (b));

(iii) The aggregate in-the-money amount of unexercised options, SARs and similar instruments with option-like features held at the end of the fiscal year, including

awards that have been transferred, separately identifying the exercisable and unexercisable options, SARs and similar instruments (column (c));

(iv) The total number of nonvested shares of stock (including restricted stock, restricted stock units or similar instruments that do not have option-like features) held at the end of the fiscal year (column (d));

(v) The aggregate market value of nonvested shares of stock (including restricted stock, restricted stock units or similar instruments that do not have option-like features) held at the end of the fiscal year (column (e));

(vi) The total number of nonvested shares, units or other rights awarded under any incentive plan, and, if applicable the number of shares underlying any such unit or right, held at the end of the fiscal year (column (f)); and

(vii) The aggregate market or payout value of nonvested shares, units or other rights awarded under any incentive plan held at the end of the fiscal year (column (g)).

Instructions to Item 402(g)(2). 1. Options, SARs or similar instruments are in-the-money if the market price of the underlying securities exceeds the exercise or base price of the option, SAR or similar instrument. Compute the amounts in column (c) by determining the difference between the market price at fiscal year-end of the securities underlying the options, SARs or similar instruments and the exercise or base price of the options, SARs or similar instruments.

2. The expiration dates of options, SARs and similar instruments held at fiscal year-end, separately identifying the exercisable and unexercisable options, SARs and similar instruments must be disclosed by footnote to column (b). If the expiration date of an option, SAR or similar instrument held at fiscal year-end subsequently has occurred,



state whether it was exercised or expired unexercised. The vesting dates of restricted stock shares and similar instruments and incentive plan awards held at fiscal-year end must be disclosed by footnotes to columns (d) and (f), respectively.

3. Compute the market values of stock (including restricted stock, restricted stock units or similar instruments) holdings reported in column (e) and equity-based incentive plan awards reported in column (g) by multiplying the closing market price of the registrant's stock at the end of the last completed fiscal year by the number of restricted stock or incentive plan award holdings, respectively.

(h) Option exercises and stock vested table. (1) Provide the information specified in paragraph (h)(2) of this Item, concerning each exercise of stock options, SARs and similar instruments, and each vesting of stock, including restricted stock, restricted stock units and similar instruments, during the last completed fiscal year for each of the named executive officers on an aggregated basis in the following tabular format:

OPTION EXERCISES AND STOCK VESTED

Name of Executive Officer	Number of Shares Acquired on Exercise Or Vesting (#)	Value Realized Upon Exercise Or Vesting (\$)	Grant Date Fair Value Previously Reported in Summary Compensation Table (\$)
(a)	(b)	(c)	(d)
PEO - Options			
Stock			
PFO - Options			
Stock			
A - Options			
Stock			
B - Options			
Stock			
C - Options			
Stock			

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of securities for which the options, SARs and similar instruments were exercised, and the number of shares of stock, including restricted stock, restricted stock units and similar instruments that vested (column (b));

(iii) The aggregate dollar value realized upon exercise and vesting (column (c));

and

(iv) The grant date fair value previously reported in the Summary Compensation Table for the same options, SARs, and similar instruments, and the same shares of stock, including restricted stock, restricted stock units or similar instruments (column (d)).

Instructions to Item 402(h)(2). 1. Report in column (c), line 1, the aggregate dollar amount realized by the named executive officer upon exercise of the options, SARs and similar instruments. Compute the dollar amount realized upon exercise by determining the difference between the market price of the underlying securities at exercise and the exercise or base price of the options, SARs or similar instruments. Do not include the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes. (Any such payment or other consideration provided by the registration is required to be disclosed in accordance with paragraph (c)(2)(ix) of this item.) Report in column (c), line 2, the aggregate dollar amount realized by the named executive officer upon the vesting of stock, including restricted stock, restricted stock units and similar instruments. Compute the aggregate dollar amount realized upon vesting by multiplying the number of shares of stock or units by the market value of the underlying shares on the vesting date.

2. Report in column (d), line 1, the aggregate grant date fair value previously reported in the registrant's Summary Compensation Table for the fiscal year of the grant for the options, SARs and similar instruments that were exercised by the named executive officer during the last completed fiscal year. Report in column (d), line 2, the aggregate grant date fair value previously reported in the registrant's Summary Compensation Table for the fiscal year of the grant for the shares of stock or units, including restricted stock, restricted stock units and similar instruments held by the named executive officer that vested during the last completed fiscal year. If the named executive officer was not

previously a named executive officer during the fiscal year of the grant, report in column (d) the grant date fair value of the award valued in accordance with FAS 123R.

(i) Retirement plan potential annual payments and benefits.

(1) Provide the information specified in paragraph (i)(2) of this Item with respect to each plan that provides for payments or other benefits at, following, or in connection with retirement, in the following tabular format:

**RETIREMENT PLAN POTENTIAL ANNUAL PAYMENTS AND BENEFITS**

Name	Plan name	Number of years credited service (#)	Normal retirement age (#)	Estimated normal retirement annual benefit (\$)	Early retirement age (#)	Estimated early retirement annual benefit (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
PEO						
PFO						
A						
B						
C						

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The name of the plan (column (b));

(iii) The number of years of service credited to the named executive officer under the plan (column (c));

(iv) The normal retirement age under the plan (column (d));

(v) The estimated dollar amount of annual payments and benefits that the named executive officer would be entitled to receive upon attaining normal retirement age, or, if the named executive officer currently is eligible to retire, the dollar amount of annual payments and benefits that the named executive officer would be entitled to receive, if he or she had retired at the end of the registrant's last completed fiscal year (column (e));

(vi) The early retirement age, if applicable, under the plan (column (f)); and

(vii) The estimated dollar amount of annual payments and benefits that the named executive officer would be entitled to receive upon attaining early retirement age, or, if the named executive officer currently is eligible for early retirement under the plan, the dollar amount of annual payments and benefits that the named executive officer would be entitled to receive if he or she had so retired at the end of the registrant's last completed fiscal year (column (g)).

Instructions to Item 402(i)(2). 1. The disclosure required pursuant to this Table applies to each plan that provides for specified retirement payments and benefits, or payments and benefits that will be provided primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental employee retirement plans, but excluding tax-qualified defined contribution plans and nonqualified defined contribution plans. Provide a separate row for each such plan in which the named executive officer participates.

2. If a named executive officer's number of years of credited service with respect to any plan is different from the named executive officer's number of actual years of service with the registrant, provide footnote disclosure quantifying the difference and any resulting benefit augmentation.

3. Normal retirement age means normal retirement age as defined in the plan, or if not so defined, the earliest time at which a participant may retire under the plan without any benefit reduction due to age. Early retirement age means early retirement age as defined in the plan, or otherwise available to the executive.

4. Quantification of payments and benefits should reflect the form of benefit currently elected by the executive, such as joint and survivor annuity or single life annuity, specifying that form in a footnote. Where the named executive officer is not yet eligible to retire, the dollar amount of annual payments and benefits that the named executive officer would be entitled to receive upon becoming eligible shall be computed assuming that the named executive officer will continue to earn the same amount of compensation as reported for the registrant's last fiscal year.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each plan covered by the tabular disclosure required by this paragraph. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) The material terms and conditions of payments and benefits available under the plan, including the plan's normal retirement payment and benefit formula and eligibility standards, and (if applicable) early retirement payment and benefit formula and eligibility standards. If the plan permits a lump sum distribution at the election of the executive or the registrant, quantify the amount of such distribution that would be available on such election as of the end of the registrant's last fiscal year, and disclose the valuation method and all material assumptions applied in quantifying such amount;

(ii) The specific elements of compensation (e.g., salary, bonus, etc.) included in applying the payment and benefit formula, identifying each such element;

(iii) With respect to named executive officers' participation in multiple plans, the reasons for each plan; and

(iv) Registrant policies with regard to such matters as granting extra years of credited service.

(j) Nonqualified defined contribution and other deferred compensation plans.

(1) Provide the information specified in paragraph (j)(2) of this Item with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified in the following tabular format:

**NONQUALIFIED DEFINED CONTRIBUTION  
AND OTHER DEFERRED COMPENSATION PLANS**

Name	Executive contributions in last FY (\$)	Registrant contributions in last FY (\$)	Aggregate earnings in last FY (\$)	Aggregate withdrawals/distributions (\$)	Aggregate balance at last FYE (\$)
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The dollar amount of aggregate executive contributions during the registrant's last fiscal year (column (b));

(iii) The dollar amount of aggregate registrant contributions during the registrant's last fiscal year (column (c));

(iv) The dollar amount of aggregate interest or other earnings accrued during the registrant's last fiscal year (column (d));

(v) The aggregate dollar amount of all withdrawals by and distributions to the executive during the registrant's last fiscal year (column (e)); and

(vi) The dollar amount of total balance of the executive's account as of the end of the registrant's last fiscal year (column (f)).

Instruction to Item 402(j)(2). Provide a footnote quantifying the extent to which amounts reported in the contributions and earnings columns are reported as compensation in the last completed fiscal year in the registrant's Summary Compensation Table and amounts reported in the aggregate balance at last fiscal year end (column (f)) previously were reported as compensation to the named executive officer in the registrant's Summary Compensation Table for previous years.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each plan covered by tabular disclosure required by this paragraph. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) 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;



(ii) The measures for calculating interest or other plan earnings (including whether such measure(s) are selected by the executive or the registrant and the frequency and manner in which selections may be changed), quantifying interest rates and other earnings measures applicable during the registrant's last fiscal year; and

(iii) Material terms with respect to payouts, withdrawals and other distributions.

(k) Potential payments upon termination or change-in-control.

Regarding each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer's responsibilities, with respect to each named executive officer:

(1) Describe and explain the specific circumstances that would trigger payment(s) or the provision of other benefits, including perquisites;

(2) Describe and quantify the estimated annual payments and benefits that would be provided in each covered circumstance, whether they would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided;

(3) Describe and explain the specific factors used to determine the appropriate payment and benefit levels under the various circumstances that trigger payments or provision of benefits;

(4) Describe and explain any material conditions or obligations applicable to the receipt of payments or benefits, including but not limited to non-compete, non-

solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver of breach of such agreements; and

(5) Describe any other material factors regarding each such contract, agreement, plan or arrangement.

Instruction to Item 402(k). The registrant must provide quantitative disclosure under these requirements even where uncertainties exist as to amounts in given circumstances payable under these plans and arrangements. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make reasonable estimates and disclose material assumptions underlying such estimates in its disclosure. In such event the disclosure would require forward-looking information as appropriate. Perquisites and other personal benefits or property may be excluded only if the aggregate amount of such compensation will be less than \$10,000. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 3 to paragraph (c)(2)(ix) of this Item.

(1) Compensation of directors.

(1) Provide the information specified in paragraph (1)(2) of this Item, concerning the compensation of the directors for the registrant's last completed fiscal year, in the following tabular format:

## DIRECTOR COMPENSATION

Name	Total (\$)	Fees earned or paid in cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Stock Incentive Plan Compensation (\$)	All Other Compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
A						
B						
C						
D						
E						

(2) The Table shall include:

(i) The name of each director unless such director is also a named executive officer under paragraph (a) of this Item and his or her compensation for service as a director is fully reflected in the Summary Compensation Table pursuant to paragraph (c) of this Item and otherwise as required pursuant to paragraphs 402(d) - (k) (column (a)) of this Item;

(ii) The dollar value of total compensation for the covered fiscal year (column (b)). With respect to each director, disclose the sum of all amounts reported in columns (c) through (g);

(iii) 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 (column (c));

(iv) For awards of stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar instruments that do not have option-like features, the aggregate grant date fair value computed in accordance with FAS 123R, applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (d));

(v) For awards of stock options, with or without tandem SARs, freestanding SARs and other similar instruments with option-like features (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards (column (e));

Instruction to Item 402(l)(2)(iv) and (v). Disclose, for each director, by footnote to the appropriate column, the outstanding equity awards at fiscal year end as would be required if the tabular presentation for named executive officers specified in paragraph (g) of this Item were required for directors.

(vi) The dollar value of all earnings for services performed during the fiscal year pursuant to non-stock incentive plans as defined in paragraph (a)(6)(iii) of this Item, and all earnings on any outstanding awards (column (f)); and

(vii) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Director Compensation Table (column (g)). Each compensation item for the last completed fiscal year that is not properly reportable in columns (c) – (f) must be reported in this column and must be identified and

quantified in a footnote if the amount of the item exceeds \$10,000 (or in the case of any perquisites or personal benefits, must be itemized unless the aggregate value of perquisites and personal benefits is less than \$10,000, and must be quantified if it is valued at the greater of \$25,000 or 10% of total perquisites and personal benefits of the director). Such compensation must include, but is not limited to:

(A) All perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than \$10,000;

(B) All earnings on compensation that is deferred on a basis that is not tax-qualified;

(C) All amounts reimbursed during the fiscal year for the payment of taxes;

(D) For any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant, the compensation cost computed in accordance with FAS 123R applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes;

(E) The amount paid or accrued to any director pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such director; or

(2) A change in control of the registrant;

(F) The aggregate increase in actuarial value to the director of all defined benefit and actuarial pension plans (including supplemental plans) accrued during the registrant's covered fiscal year;

(G) Registrant contributions or other allocations to vested and unvested defined contribution plans;

(H) Consulting fees earned from, or paid or payable by the registrant and/or its subsidiaries (including joint ventures);

(I) The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs; and

(J) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a director.

Instruction to Item 402(1)(2)(vii). Programs in which registrants agree to make donations to one or more charitable institutions in a director's name, payable by the registrant currently or upon a designated event, such as the retirement or death of the director, are charitable awards programs or director legacy programs for purposes of the disclosure required by paragraph (1)(2)(vii)(I) of this Item. Provide footnote disclosure of the total dollar amount and other material terms of each such program for which tabular disclosure is provided.

Instruction to Item 402(1)(2). Two or more directors may be grouped in a single row in the table if all of their elements of compensation are identical. The names of the directors for whom disclosure is presented on a group basis should be clear from the Table.

(3) Narrative to director compensation table.

Provide a narrative description of any factors necessary to an understanding of the director compensation disclosed in this Table. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and

(ii) Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.

Instruction to Item 402(1). In addition to the Instruction to paragraph (1)(2)(vii) of this Item, the following apply equally to paragraph (1) of this Item: Instructions 2 and 3 to paragraph (c) of this Item; Instructions to paragraphs (c)(2)(iv) and (v) of this Item; Instructions to paragraphs (c)(2)(vi) and (vii) of this Item; Instructions to paragraph (c)(2)(viii) of this Item and Instructions to paragraph (c)(2)(ix). These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (1) of this Item that correspond to analogous disclosures provided for in paragraph (c) of this Item to which they refer.

Instruction to Item 402. Specify the applicable fiscal year in the title to each table required under this Item which calls for disclosure as of or for a completed fiscal year.

14. Amend §229.403 by revising paragraph (b) to read as follows:

**§229.403 (Item 403) Security ownership of certain beneficial owners and management.**

(a) \* \* \*

(b) Security ownership of management. Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries, including directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(3) (§229.402(a)(3)), and directors and executive officers of the registrant as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote, the amount of shares that are pledged as security and the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in §240.13d-3(d)(1) of this chapter.

(1) Title of class	(2) Name of beneficial owner	(3) Amount and nature of beneficial ownership	(4) Percent of class

\* \* \* \* \*

15. Revise §229.404 to read as follows:

**§229.404 (Item 404) Transactions with related persons and promoters.**

(a) Transactions with related persons. Describe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the registrant was or is to be a participant and the amount involved exceeds



\$120,000, and in which any related person had, or will have, a direct or indirect material interest. Disclose the following information regarding the transaction:

(1) The name of the related person and the basis on which the person is a related person.

(2) The related person's interest in the transaction with the registrant, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.

(3) The approximate dollar value of the amount involved in each transaction and of the amount of the related person's interest in each transaction, each of which shall be computed without regard to the amount of profit or loss.

(4) In the case of indebtedness, disclosure of the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.

(5) Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Instructions to Item 404(a).

1. For the purposes of paragraph (a) of this Item, the term related person means:
  - a. Any person who was in any of the following categories at any time during the specified period for which disclosure under paragraph (a) of this Item is required:

i. Any director or executive officer of the registrant,

ii. Any nominee for director, when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director; or

iii. Any immediate family member of any of the foregoing persons, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and any person (other than a tenant or employee) sharing the household of a related person identified in paragraph 1.a.i or 1.a.ii. of this instruction; and

b. Any person who was in any of the following categories when a transaction in which such person had a direct or indirect material interest occurred or existed:

i. A security holder covered by Item 403(a) (§229.403(a)); or

ii. Any immediate family member of any such security holder, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, of such security holder and any person (other than a tenant or employee) sharing the household of such security holder.

2. For purposes of paragraph (a) of this Item, a transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships.

3. The amount involved in the transaction shall be computed by determining the dollar value of the amount involved in the transaction in question, which shall include:

a. In the case of any lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments due on or after the beginning of the registrant's last fiscal year, including any required or optional payments due during or at the conclusion of the lease.

b. In the case of indebtedness, the largest aggregate amount of all indebtedness outstanding at any time since the beginning of the registrant's last fiscal year and all amounts of interest payable on it during the last fiscal year.

4. In the case of transactions involving indebtedness, the following items of indebtedness may be excluded from the calculation of the amount of indebtedness and need not be disclosed: amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business.

5. Disclosure of an employment relationship or transaction involving an executive officer and any related compensation solely resulting from that employment relationship or transaction, need not be provided pursuant to paragraph (a) of this Item if:

a. The compensation arising from the relationship or transaction is reported pursuant to Item 402 (§229.402); or

b. The executive officer is not an immediate family member of a related person (as specified in Instruction 1. to paragraph (a) of this Item) and such compensation would have been reported under Item 402 (§229.402) as compensation earned for services to the registrant if the executive officer was a named executive officer as that term is defined in Item 402(a)(3) (§229.402(a)(3)), and such compensation had been approved as such by

the compensation committee of the board of directors (or group of independent directors performing a similar function) of the registrant.

6. Disclosure of compensation to a director need not be provided pursuant to paragraph (a) of this Item if the compensation is reported pursuant to Item 402(1) (§229.402(1)).

7. In the case of a transaction involving indebtedness, if the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T (12 CFR part 220) and the loans are not disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C.1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies (17 CFR 229.802(c))), disclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:

- a. Were made in the ordinary course of business;
- b. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and
- c. Did not involve more than the normal risk of collectibility or present other unfavorable features.

8. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the registrant shall not be deemed to have an indirect “material” interest within the meaning of paragraph (a) of this Item where:

- a. The interest arises only:

i. From such person's position as a director of another corporation or organization which is a party to the transaction; or

ii. From the direct or indirect ownership by such person and all other persons specified in Instruction 1 to paragraph (a) of this Item, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or

iii. From both such position and ownership; or

b. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in Instruction 1 to paragraph (a) of this Item, have an interest of less than ten percent, and the person is not a general partner of and does not hold another position in the partnership.

(b) Review, approval or ratification of transactions with related persons.

(1) Describe the registrant's policies and procedures for the review, approval, or ratification of any transaction required to be reported under paragraph (a) of this Item. While the material features of such policies and procedures will vary depending on the particular circumstances, examples of such features may include, in given cases, among other things:

(i) The types of transactions that are covered by such policies and procedures.

(ii) The standards to be applied pursuant to such policies and procedures.

(iii) The persons or groups of persons on the board of directors or otherwise who are responsible for applying such policies and procedures.

(iv) A statement of whether such policies and procedures are in writing and, if not, how such policies and procedures are evidenced.

(2) Identify any transaction required to be reported under paragraph (a) of this Item since the beginning of the registrant's last fiscal year where such policies and procedures did not require review, approval or ratification or where such policies and procedures were not followed.

(c) Promoters. (1) Registrants that are filing a registration statement on Form S-1 or Form SB-2 under the Securities Act (§239.11 or §239.10 of this chapter) or on Form 10 or Form 10-SB under the Exchange Act (§249.210 or §249.210b of this chapter) and that had a promoter at any time during the past five fiscal years shall:

(i) State the names of the promoter(s), the nature and amount of anything of value (including money, property, contracts, options or rights or any kind) received or to be received by each promoter, directly or indirectly, from the registrant and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(ii) As to any assets acquired or to be acquired by the registrant from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount, and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the registrant, also state the cost thereof to the promoter.

(2) Registrants shall provide the disclosure required by paragraphs (c)(1)(i) and (c)(1)(ii) of this Item as to any person who acquired control of an issuer that is a shell company, or any person that is part of a group, consisting of two or more persons that

agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, that acquired control of an issuer that is a shell company.

Instructions to Item 404.

1. If the information called for by this Item is being presented in a registration statement filed pursuant to the Securities Act or the Exchange Act, information shall be given for the periods specified in the Item and, in addition, for the two fiscal years preceding the registrant's last fiscal year, unless the information is being incorporated by reference into a registration statement on Form S-4 (17 CFR 239.25), in which case, information shall be given for the periods specified in the Item.

2. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Item 7.B. of Form 20-F (17 CFR 249.220f) with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded.

16. Add §229.407 to read as follows:

**§229.407 (Item 407) Corporate governance.**

(a) Director independence. Identify each director and, when the disclosure called for by this paragraph is being presented in a proxy or information statement relating to the election of directors, each nominee for director, that is independent under the independence standards applicable to the registrant under paragraph (a)(1) of this Item. In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such

committee independence standards. If the registrant does not have a separately designated audit, nominating or compensation committee or committee performing similar functions, the registrant must provide the disclosure of directors that are not independent with respect to all members of the board of directors applying such committee independence standards.

(1) In determining whether or not the director or nominee for director is independent for the purposes of paragraph (a) of this Item, the registrant shall use the applicable definition of independence, as follows:

(i) If the registrant is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the registrant's definition of independence that it uses for determining if a majority of the board of directors is independent in compliance with the listing standards applicable to the registrant. When determining whether the members of a committee of the board of directors are independent, the registrant's definition of independence that it uses for determining if the members of that specific committee are independent in compliance with the independence standards applicable for the members of the specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent. If the registrant does not have independence standards for a committee, the independence standards for that specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent.



(ii) If the registrant is not a listed issuer, a definition of independence of a national securities exchange or of a national securities association which has requirements that a majority of the board of directors be independent, and state which definition is used. Whatever such definition the registrant chooses, it must use the same definition with respect to all directors and nominees for director. When determining whether the members of a specific committee of the board of directors are independent, if the national securities exchange or national securities association whose standards are used has independence standards for the member of a specific committee, use those committee specific standards.

(iii) If the information called for by paragraph (a) of this Item is being presented in a registration statement on Form S-1 (§239.11 of this chapter) or Form SB-2 (§239.10 of this chapter) under the Securities Act or on a Form 10 or Form 10-SB (§249.210 or §249.210b of this chapter) under the Exchange Act where the registrant has applied for listing with a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the definition of independence that the registrant uses for determining if a majority of the board of directors is independent, and the definition of independence that the registrant uses for determining if members of the specific committee of the board of directors are independent, that is in compliance with the independence listing standards of the national securities exchange or inter-dealer quotation system on which it has applied for listing, or if the registrant has not adopted such definitions, the independence standards for determining if the majority of the board of directors is independent and if members of the

committee of the board of directors are independent of that national securities exchange or inter-dealer quotation system.

(2) If the registrant uses its own definitions for determining whether its directors and nominees for director, and members of specific committees of the board of directors, are independent, disclose whether these definitions are available to security holders on the registrant's Web site. If so, provide the registrant's Web site address. If not, include a copy of these policies in an appendix to the registrant's proxy statement that is provided to security holders at least once every three fiscal years or if the policies have been materially amended since the beginning of the registrant's last fiscal year. If a current copy of the policies is not available to security holders on the registrant's Web site, and is not included as an appendix to the registrant's proxy statement, identify the most recent fiscal years in which the policies were so included in satisfaction of this requirement.

(3) For each director and nominee for director that is identified as independent, describe any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) (§229.404(a)), or for investment companies, Item 22(b) of Schedule 14 (§240.14a-101 of this chapter), that were considered by the board of directors under the applicable independence definitions in determining that the director is independent.

Instruction to Item 407(a). No information called for by paragraph (a) of this Item need be given in a registration statement filed at a time when the registrant is not subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), 78o(d)) respecting any director who is no longer a director at the time of effectiveness of the registration statement.

(b) Board meetings and committees.

(1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

(i) The total number of meetings of the board of directors (held during the period for which he has been a director); and

(ii) The total number of meetings held by all committees of the board on which he served (during the periods that he served).

(2) Describe the registrant's policy, if any, with regard to board members' attendance at annual meetings of security holders and state the number of board members who attended the prior year's annual meeting.

Instruction to Item 407(b)(2). In lieu of providing the information required by paragraph (b)(2) of this Item in the proxy statement, the registrant may instead provide the registrant's Web site address where such information appears.

(3) State whether or not the registrant has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions. If the registrant has such committees, however designated, identify each committee member, state the number of committee meetings held by each such committee during the last fiscal year and describe briefly the functions performed by each such committee. Such disclosure need not be provided to the extent it is duplicative of disclosure provided in accordance with paragraph (d)(4) of this Item.

(c) Nominating committee. (1) If the registrant does not have a standing nominating committee or committee performing similar functions, state the basis for the

view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of director nominees.

(2) Provide the following information regarding the registrant's director nomination process:

(i) State whether or not the nominating committee has a charter. If the nominating committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the nominating committee charter;

(ii) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

(iii) If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, state that fact and state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a policy;

(iv) If the nominating committee will consider candidates recommended by security holders, describe the procedures to be followed by security holders in submitting such recommendations;

(v) Describe any specific minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the registrant's board of directors, and describe any specific qualities or skills that the

nominating committee believes are necessary for one or more of the registrant's directors to possess;

(vi) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;

(vii) With regard to each nominee approved by the nominating committee for inclusion on the registrant's proxy card (other than nominees who are executive officers or who are directors standing for re-election), state which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other specified source. With regard to each such nominee approved by a nominating committee of an investment company, state which one or more of the following additional categories of persons or entities recommended that nominee: security holder, director, chief executive officer, other executive officer, or employee of the investment company's investment adviser, principal underwriter, or any affiliated person of the investment adviser or principal underwriter;

(viii) If the registrant pays a fee to any third party or parties to identify or evaluate or assist in identifying or evaluating potential nominees, disclose the function performed by each such third party; and

(ix) If the registrant's nominating committee received, by a date not later than the 120th calendar day before the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee

from a security holder that beneficially owned more than 5% of the registrant's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the registrant's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identify the candidate and the security holder or security holder group that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

Instructions to Item 407(c)(2)(ix).

1. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a nominating security holder may be determined using information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act (or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, the registrant's most recent report on Form N-CSR (§§249.331 and 274.128 of this chapter)), unless the party relying on such report knows or has reason to believe that the information contained therein is inaccurate.

2. For purposes of the registrant's obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, where the date of the annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the obligation under that Item will arise where the registrant receives the security holder

recommendation a reasonable time before the registrant begins to print and mail its proxy materials.

3. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a recommending security holder, as well as the holding period of those securities, may be determined by the registrant if the security holder is the registered holder of the securities. If the security holder is not the registered owner of the securities, he or she can submit one of the following to the registrant to evidence the required ownership percentage and holding period:

a. A written statement from the “record” holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

b. If the security holder has filed a Schedule 13D (§240.13d-101 of this chapter), Schedule 13G (§240.13d-102 of this chapter), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter), and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the securities for the one-year period as of the date of the recommendation.

4. For purposes of the registrant’s obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, the security holder or group must have provided to the registrant, at the time of the recommendation, the written consent of all parties to be identified and, where the security holder or group members are not registered holders,

proof that the security holder or group satisfied the required ownership percentage and holding period as of the date of the recommendation.

Instruction to Item 407(c)(2). For purposes of paragraph (c)(2) of this Item, the term nominating committee refers not only to nominating committees and committees performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

(3) Describe any material changes to the procedures by which security holders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item.

Instructions to Item 407(c)(3).

1. The disclosure required in paragraph (c)(3) of this Item need only be provided in a registrant's quarterly or annual reports.

2. For purposes of paragraph (c)(3) of this Item, adoption of procedures by which security holders may recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

(d) Audit committee.

(1) State whether or not the audit committee has a charter. If the audit committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the audit committee charter.



(2) If a listed issuer's board of directors determines, in accordance with the listing standards applicable to the issuer, to appoint a director to the audit committee who is not independent (apart from the requirements in §240.10A-3 of this chapter), including as a result of exceptional or limited or similar circumstances, disclose the nature of the relationship that makes that individual not independent and the reasons for the board of directors' determination.

(3)(i) The audit committee must state whether:

(A) The audit committee has reviewed and discussed the audited financial statements with management;

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the statement on Auditing Standards No. 61, as amended (AICPA, Professional Standards, Vol. 1. AU section 380), as adopted by the Public Company Accounting Oversight Board in Rule 3200T;

(C) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, Independence Discussions with Audit Committees), as adopted by the Public Company Accounting Oversight Board in Rule 3600T, and has discussed with the independent accountant the independent accountant's independence; and

(D) Based on the review and discussions referred to in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this Item, the audit committee recommended to the board of directors that the audited financial statements be included in the company's Annual Report on Form 10-K (17 CFR 249.310) (or, for closed-end investment companies

registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the annual report to shareholders required by section 30(e) of the Investment Company Act of 1940 (15 U.S.C. 80a-29(e)) and Rule 30d-1 (17 CFR 270.30d-1) thereunder) for the last fiscal year for filing with the Commission.

(ii) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by paragraph (d)(3)(i) of this Item.

(4)(i) If you meet the following requirements, provide the disclosure in paragraph (d)(4)(ii) of this Item:

(A) You are a listed issuer, as defined in §240.10A-3 of this chapter;

(B) You are filing either an annual report on Form 10-K or 10-KSB (17 CFR 249.310 or 17 CFR 249.310b), or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a et seq.) if action is to be taken with respect to the election of directors; and

(C) You are neither:

(1) A subsidiary of another listed issuer that is relying on the exemption in §240.10A-3(c)(2) of this chapter; nor

(2) Relying on any of the exemptions in §240.10A-3(c)(4) through (c)(7) of this chapter.

(ii)(A) State whether or not the registrant has a separately-designated standing audit committee established in accordance with section 3(a)(58)(A) of the Exchange Act (15 U.S.C. 78c(a)(58)(A)), or a committee performing similar functions. If the registrant

has such a committee, however designated, identify each committee member. If the entire board of directors is acting as the registrant's audit committee as specified in section 3(a)(58)(B) of the Exchange Act (15 U.S.C. 78c(a)(58)(B)), so state.

(B) If applicable, provide the disclosure required by §240.10A-3(d) of this chapter regarding an exemption from the listing standards for audit committees.

(5) Audit committee financial expert.

(i)(A) Disclose that the registrant's board of directors has determined that the registrant either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(1) of this Item, it must disclose the name of the audit committee financial expert and whether that person is independent, as independence for audit committee members is defined in the listing standards applicable to the listed issuer.

(C) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(2) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to Item 407(d)(5)(i). If the registrant's board of directors has determined that the registrant has more than one audit committee financial expert serving on its audit committee, the registrant may, but is not required to, disclose the names of those additional persons. A registrant choosing to identify such persons must indicate whether they are independent pursuant to paragraph (d)(5)(i)(B) of this Item.

(ii) For purposes of this Item, an audit committee financial expert means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal control over financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements;

or

(D) Other relevant experience.

(iv) Safe harbor.

(A) A person who is determined to be an audit committee financial expert will not be deemed an expert for any purpose, including without limitation for purposes of section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item 407 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 407(d)(5).

1. The disclosure under paragraph (d)(5) of this Item is required only in a registrant's annual report. The registrant need not provide the disclosure required by paragraph (d)(5) of this Item in a proxy or information statement unless that registrant is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to General Instruction G(3) to Form 10-K (17 CFR 249.310).

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (d)(5)(iii)(D) of this Item, the registrant shall

provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under Item 401(e) (§229.401(e)).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of paragraph (d)(5) of this Item, the term board of directors means the supervisory or non-management board. In the case of a foreign private issuer meeting the requirements of §240.10A-3(c)(3) of this chapter, for purposes of paragraph (d)(5) of this Item, the term board of directors means the issuer's board of auditors (or similar body) or statutory auditors, as applicable. Also, in the case of a foreign private issuer, the term generally accepted accounting principles in paragraph (d)(5)(ii)(A) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A registrant that is an Asset-Backed Issuer (as defined in §229.1101) is not required to disclose the information required by paragraph (d)(5) of this Item.

Instructions to Item 407(d).

1. The information required by paragraphs (d)(1) - (3) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 through 240.14b-2 or 240.14c-1 through 240.14c-101), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act. Such information will not be deemed to be incorporated by reference into any filing under the

Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

2. The disclosure required by paragraphs (d)(1) - (3) of this Item need only be provided one time during any fiscal year.

3. The disclosure required by paragraph (d)(3) of this Item need not be provided in any filings other than a registrant's proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting).

(e) Compensation committee.

(1) If the registrant does not have a standing compensation committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.

(2) State whether or not the compensation committee has a charter. If the compensation committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the compensation committee charter.

(3) Provide a narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation, including:

(i)(A) The scope of authority of each of the compensation committee (or persons performing the equivalent functions); and

(B) The extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority described in paragraph (e)(3)(i)(A) of this Item to other persons, specifying what authority may be so delegated and to whom;

(ii) Any role of executive officers in determining or recommending the amount or form of executive and director compensation; and

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement and identifying any executive officer within the registrant the consultants contacted in carrying out their assignment.

(4) Under the caption “Compensation Committee Interlocks and Insider Participation”:

(i) The registrant shall identify each person who served as a member of the compensation committee of the registrant’s board of directors (or board committee performing equivalent functions) during the last completed fiscal year, indicating each committee member who:

(A) Was, during the fiscal year, an officer or employee of the registrant;

(B) Was formerly an officer of the registrant; or



(C) Had any relationship requiring disclosure by the registrant under any paragraph of Item 404 (§229.404). In this event, the disclosure required by Item 404 (§229.404) shall accompany such identification.

(ii) If the registrant has no compensation committee (or other board committee performing equivalent functions), the registrant shall identify each officer and employee of the registrant, and any former officer of the registrant, who, during the last completed fiscal year, participated in deliberations of the registrant's board of directors concerning executive officer compensation.

(iii) The registrant shall describe any of the following relationships that existed during the last completed fiscal year:

(A) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant;

(B) An executive officer of the registrant served as a director of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant; and

(C) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or,

in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served a director of the registrant.

(iv) Disclosure required under paragraph (e)(4)(iii) of this Item regarding a compensation committee member or other director of the registrant who also served as an executive officer of another entity shall be accompanied by the disclosure called for by Item 404 with respect to that person.

Instruction to Item 407(e)(4). For purposes of paragraph (e)(4) of this Item, the term entity shall not include an entity exempt from tax under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

(f) Shareholder communications and annual meeting attendance.

(1) State whether or not the registrant's board of directors provides a process for security holders to send communications to the board of directors and, if the registrant does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a process.

(2) If the registrant has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the registrant's process for determining which communications will be relayed to board members.

Instructions to Item 407(f).

1. In lieu of providing the information required by paragraph (f)(2) of this Item in the proxy statement, the registrant may instead provide the registrant's Web site address where such information appears.

2. For purposes of the disclosure required by paragraph (f)(2)(ii) of this Item, a registrant's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the registrant's process is approved by a majority of the independent directors or, in the case of a registrant that is an investment company, a majority of the directors who are not "interested persons" of the investment company as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)).

3. For purposes of this paragraph, communications from an officer or director of the registrant will not be viewed as "security holder communications." Communications from an employee or agent of the registrant will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

4. For purposes of this paragraph, security holder proposals submitted pursuant to §240.14a-8 of this chapter, and communications made in connection with such proposals, will not be viewed as "security holder communications."

Instructions to Item 407.

1. For purposes of this Item:

a. Listed issuer means a listed issuer as defined in §240.10A-3 of this chapter;

b. National securities exchange means a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a));

c. Inter-dealer quotation system means an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)); and

d. National securities association means a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that has been approved by the Commission (as that definition may be modified or supplemented).

2. With respect to paragraphs (c)(2)(i), (d)(1) and (e)(2) of this Item, disclose whether a current copy of the applicable committee charter is available to security holders on the registrant's Web site, and if so, provide the registrant's Web site address. If a current copy of the charter is not available to security holders on the registrant's Web site, include a copy of the charter in an appendix to the registrant's proxy statement that is provided to security holders at least once every three fiscal years, or if the charter has been materially amended since the beginning of the registrant's last fiscal year. If a current copy of the charter is not available to security holders on the registrant's Web site, and is not included as an appendix to the registrant's proxy statement, identify in which of the prior fiscal years the charter was so included in satisfaction of this requirement.

17. Amend §229.601 to revise paragraph (b)(10)(iii)(C)(5) to read as follows:

**§229.601 (Item 601) Exhibits**

\* \* \* \* \*

(b) \* \* \*

(10) \* \* \*

(iii) \* \* \*

(C) \* \* \*

(5) Any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information under Item 402(a)(1) (§229.402(a)(1)) and the public filing of the plan, contract or arrangement, or portion thereof, is not required in the registrant's home country and is not otherwise publicly disclosed by the registrant.

\* \* \* \* \*

18. Amend §229.1107 by revising paragraph (e) to read as follows:

**§229.1107 (Item 1107) Issuing Entities.**

\* \* \* \* \*

(e) If the issuing entity has executive officers, a board of directors or persons performing similar functions, provide the information required by Items 401, 402, 403 404 and 407(a), (c)(3), (d)(4), (d)(5) and (e)(4) of Regulation S-K (§§229.401, 229.402, 229.403, 229.404 and 229.407(a), (c)(3), (d)(4), (d)(5) and (e)(4)) for the issuing entity.

\* \* \* \* \*

**PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

19. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll(d), 77mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

20. Amend Form SB-2 (referenced in §239.10) by revising Item 15 to read as follows:

**Note-The text of Form SB-2 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM SB-2**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

Item 15. Organization Within Last Five Years.

Furnish the information required by Item 404 of Regulation S-B and Item 407(a) of Regulation S-B.

\* \* \* \* \*

21. Amend Form S-1 (referenced in §239.11) by revising Item 11, paragraphs (l) and (n) to read as follows:

**Note-The text of Form S-1 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM S-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

Item 11. Information with Respect to the Registrant.

\* \* \* \* \*

(l) Information required by Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and information required by paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter), corporate governance;

\* \* \* \* \*

(n) Information required by Item 404 of Regulation S-K (§229.404 of this chapter), transactions with related persons and promoters, and Item 407(a) of Regulation S-K (§229.407(a) of this chapter), corporate governance.

\* \* \* \* \*

22. Amend Form S-3 (referenced §239.13) by revising General Instruction I.A.3.(b) and the introductory text of General Instruction I.B.4.(c) to read as follows:

**Note-The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.**

### **FORM S-3**

## **REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

### **GENERAL INSTRUCTIONS**

#### **I. Eligibility Requirements for Use of Form S-3 \* \* \***

##### **A. Registrant Requirements. \* \* \***

##### **3. \* \* \***

(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K (§249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b-25(b) (§240.12b-25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a

report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

\* \* \* \* \*

B. Transaction Requirements. \* \* \*

4. \* \* \*

(c) The issuer also must have provided, within the twelve calendar months immediately before the Form S-3 registration statement is filed, the information required by Items 401, 402, 403 and 407(c)(3), (d)(4), (d)(5) and (e)(4) of Regulation S-K (§229.401-§229.403 and §229.407(c)(3),(d)(4), (d)(5) and (e)(4) of this chapter) to:

\* \* \* \* \*

23. Amend Form S-4 (referenced in §239.25) by revising Items 18(a)(7)(ii) and (iii) and 19(a)(7)(ii) and (iii) to read as follows:

**Note-The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM S-4**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

Item 18. Information if Proxies, Consents or Authorizations are to be Solicited.

(a) \* \* \*

(7) \* \* \*

(ii) Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter), corporate governance;



(iii) Item 404 of Regulation S-K (§229.404 of this chapter), transactions with related persons and promoters, and Item 407(a) of Regulation S-K (§229.407(a) of this chapter), corporate governance.

\* \* \* \* \*

Item 19. Information if Proxies, Consents or Authorizations are not to be Solicited or in an Exchange Offer.

(a) \* \* \*

(7) \* \* \*

(ii) Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter), corporate governance;

(iii) Item 404 of Regulation S-K (§229.404), transactions with related persons and promoters, and Item 407(a) of Regulation S-K (§229.407(a)), corporate governance.

\* \* \* \* \*

24. Amend Form S-11 (referenced in §239.18) by revising Items 22 and 23 to read as follows:

**Note-The text of Form S-11 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM S-11**

**FOR REGISTRATION UNDER THE SECURITIES ACT OF 1933 OF  
SECURITIES OF CERTAIN REAL ESTATE COMPANIES**

\* \* \* \* \*

Item 22. Executive Compensation.

Furnish the information required by Item 402 of Regulation S-K (§229.402 of this chapter), and the information required by paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter).

Item 23. Certain Relationships and Related Transactions.

Furnish the information required by Items 404 and 407(a) of Regulation S-K (§§229.404 and 229.407(a) of this chapter). If a transaction involves the purchase or sale of assets by or to the registrant, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within two years prior to the transaction, the cost thereof to the seller. Furthermore, if the assets have been acquired by the seller within five years prior to the transaction, disclose the aggregate depreciation claimed by the seller for federal income tax purposes. Indicate the principle followed in determining the registrant's purchase or sale price and the name of the person making such determination.

\* \* \* \* \*

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

25. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

26. Amend §240.13a-11 by revising paragraph (c) to read as follows:

**§240.13a-11 Current reports on Form 8-K (§249.308 of this chapter).**

\* \* \* \* \*

(c) No failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8-K shall be deemed to be a violation of 15 U.S.C. 78j(b) and §240.10b-5.

\* \* \* \* \*

27. Add §240.13a-20 to read as follows:

**§240.13a-20 Plain English presentation of specified information.**

(a) Any information included or incorporated by reference in a report filed under section 13(a) of the Act (15 U.S.C. 78m(a)) that is required to be disclosed pursuant to Item 402, 403, 404 or 407 of Regulation S-B (§§228.402, 228.403, 228.404 or 228.407 of this chapter) or Item 402, 403, 404 or 407 of Regulation S-K (§§229.402, 229.403, 229.404 or 229.407 of this chapter) must be presented in a clear, concise and understandable manner. You must prepare the disclosure using the following standards:

- (1) Present information in clear, concise sections, paragraphs and sentences;
- (2) Use short sentences;
- (3) Use definite, concrete, everyday words;
- (4) Use the active voice;
- (5) Avoid multiple negatives;
- (6) Use descriptive headings and subheadings;
- (7) Use a tabular presentation or bullet lists for complex material, wherever possible;
- (8) Avoid legal jargon and highly technical business and other terminology;

(9) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure; and

(10) In designing the presentation of the information you may include pictures, logos, charts, graphs and other design elements so long as the design is not misleading and the required information is clear. You are encouraged to use tables, schedules, charts and graphic illustrations that present relevant data in an understandable manner, so long as such presentations are consistent with applicable disclosure requirements and consistent with other information in the document. You must draw graphs and charts to scale. Any information you provide must not be misleading.

(b) Reserved.

Note to §240.13a-20. In drafting the disclosure to comply with this section, you should avoid the following:

1. Legalistic or overly complex presentations that make the substance of the disclosure difficult to understand;
2. Vague “boilerplate” explanations that are imprecise and readily subject to different interpretations;
3. Complex information copied directly from legal documents without any clear and concise explanation of the provision(s); and
4. Disclosure repeated in different sections of the document that increases the size of the document but does not enhance the quality of the information.

28. Amend §240.14a-6 to revise paragraph (a)(4) to read as follows:

**§240.14a-6 Filing requirements.**

(a) \* \* \*

(4) The approval or ratification of a plan as defined in paragraph (a)(6)(ii) of Item 402 of Regulation S-K (§229.402(a)(6)(ii) of this chapter) or amendments to such a plan;

\* \* \* \* \*

29. Amend §240.14a-101 by:

a. Removing paragraphs (f), (g), and (h) of Item 7 and paragraph (b)(13)(iii) of Item 22;

b. Revising “\$60,000” to read “\$120,000” in the introductory text of Items 22(b)(7), (b)(8), and (b)(9); Instruction 2 to Item 22(b)(7); and Instruction 6 to Item 22(b)(9);

c. Revising Note C, Item 7(b), (c), (d), and (e), the introductory text of Item 8, the undesignated paragraph following Item 8(d), Item 10(b)(1)(ii), the Instruction to Item 10(b)(1)(ii), the introductory text of Item 22(b), Item 22(b)(11), the Instruction to paragraph (b)(11) of Item 22, and the introductory text of Item 22(b)(13); and

d. Adding Items 22(b)(15), (b)(16), and (b)(17).

The revisions and additions read as follows:

**§240.14a-101 Schedule 14A. Information required in proxy statement.**

\* \* \* \* \*

**Notes.**

\* \* \* \* \*

C. Except as otherwise specifically provided, where any item calls for information for a specified period with regard to directors, executive officers, officers or other persons holding specified positions or relationships, the information shall be given with regard to any person who held any of the specified positions or relationship at any time during the period. Information, other than information required by Item 404 of Regulation S-B or Item 404 of Regulation S-K, need not be included for any portion of the period during which such person did not hold any such position or relationship, provided a statement to that effect is made.

\* \* \* \* \*

Item 7. Directors and executive officers. \* \* \*

(b) The information required by Items 401, 404(a) and (b), 405 and 407(d)(4) and (d)(5) of Regulation S-K (§229.401, §229.404, §229.405 and §229.407 of this chapter).

(c) The information required by Item 407(a) of Regulation S-K (§229.407 of this chapter).

(d) The information required by Item 407(b), (c)(1), (c)(2), (d)(1), (d)(2), (d)(3), (e)(1), (e)(2), (e)(3) and (f) of Regulation S-K (§229.407 of this chapter).

(e) In lieu of the information required by this Item 7, investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a) must furnish the information required by Item 22(b) of this Schedule 14A.

Item 8. Compensation of directors and executive officers.

Furnish the information required by Item 402 of Regulation S-K (§229.402 of this chapter) and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter) if action is to be taken with regard to:

\* \* \* \* \*

(d) \* \* \*

However, if the solicitation is made on behalf of persons other than the registrant, the information required need be furnished only as to nominees of the persons making the solicitation and associates of such nominees. In the case of investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a), furnish the information required by Item 22(b)(13) of this Schedule.

\* \* \* \* \*

Item 10. Compensation plans. \* \* \*

(b)(1) Additional information regarding specified plans subject to security holder action. \* \* \*

(ii) The estimated annual payment to be made with respect to current services. In the case of a pension or retirement plan, information called for by paragraph (a)(2) of this Item may be furnished in the format specified by paragraph (i)(2) of Item 402 of Regulation S-K (§229.402(i)(2) of this chapter).

Instruction to paragraph (b)(1)(ii).

In the case of investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a), refer to Instruction 4 in Item 22(b)(13)(i) of this Schedule in lieu of paragraph (i)(2) of Item 402 of Regulation S-K (§229.402(i)(2) of this chapter).

\* \* \* \* \*

Item 22. Information required in investment company proxy statement.

(a) \* \* \*

(b) Election of Directors. If action is to be taken with respect to the election of directors of a Fund, furnish the following information in the proxy statement in addition to, in the case of business development companies, the information (and in the format) required by Item 7 and Item 8 of this Schedule 14A.

\* \* \* \* \*

(11) Provide in tabular form, to the extent practicable, the information required by Items 401(f) and (g), 404(a), and 405 of Regulation S-K (§§229.401(f) and (g), 229.404(a), and 229.405 of this chapter).

Instruction to paragraph (b)(11). Information provided under paragraph (b)(8) of this Item 22 is deemed to satisfy the requirements of Item 404(a) of Regulation S-K for information about directors, nominees for election as directors, and Immediate Family Members of directors and nominees, and need not be provided under this paragraph (b)(11).

\* \* \* \* \*

(13) In the case of a Fund that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), for all directors, and for each of the three highest-paid Officers that have aggregate compensation from the Fund for the most recently completed fiscal year in excess of \$60,000 (“Compensated Persons”):

\* \* \* \* \*

(15)(i) Provide the information (and in the format) required by Item 407(b)(1), (b)(2) and (f) of Regulation S-K (§229.407(b)(1), (b)(2) and (f) of this chapter); and

(ii) Provide the following regarding the requirements for the director nomination process:



(A) The information (and in the format) required by Item 407(c)(1) and (c)(2) of Regulation S-K (§229.407(c)(1) and (c)(2) of this chapter); and

(B) If the Fund is a listed issuer (as defined in §240.10A-3 of this chapter) whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3(a)) that has independence requirements for nominating committee members, identify each director that is a member of the nominating committee that is not independent under the independence standards described in this paragraph. In determining whether the nominating committee members are independent, use the Fund's definition of independence that it uses for determining if the members of the nominating committee are independent in compliance with the independence standards applicable for the members of the nominating committee in the listing standards applicable to the Fund. If the Fund does not have independence standards for the nominating committee, use the independence standards for the nominating committee in the listing standards applicable to the Fund.

(16) In the case of a Fund that is a closed-end investment company:

(i) Provide the information (and in the format) required by Item 407(d)(1), (d)(2) and (d)(3) of Regulation S-K (§229.407(d)(1), (d)(2) and (d)(3) of this chapter); and

(ii) Identify each director that is a member of the Fund's audit committee that is not independent under the independence standards described in this paragraph. If the Fund does not have a separately designated audit committee, or committee performing

similar functions, the Fund must provide the disclosure with respect to all members of its board of directors.

(A) If the Fund is a listed issuer (as defined in §240.10A-3 of this chapter) whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3(a)) that has independence requirements for audit committee members, in determining whether the audit committee members are independent, use the Fund's definition of independence that it uses for determining if the members of the audit committee are independent in compliance with the independence standards applicable for the members of the audit committee in the listing standards applicable to the Fund. If the Fund does not have independence standards for the audit committee, use the independence standards for the audit committee in the listing standards applicable to the Fund.

(B) If the Fund is not a listed issuer whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3(a)), in determining whether the audit committee members are independent, use a definition of independence of a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3(a)) which has requirements that a majority of the board of directors be independent and that has been approved by the

Commission, and state which definition is used. Whatever such definition the Fund chooses, it must use the same definition with respect to all directors and nominees for director. If the national securities exchange or national securities association whose standards are used has independence standards for the members of the audit committee, use those specific standards.

(17) In the case of a Fund that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), if a director has resigned or declined to stand for re-election to the board of directors since the date of the last annual meeting of security holders because of a disagreement with the registrant on any matter relating to the registrant's operations, policies or practices, and if the director has furnished the registrant with a letter describing such disagreement and requesting that the matter be disclosed, the registrant shall state the date of resignation or declination to stand for re-election and summarize the director's description of the disagreement.

If the registrant believes that the description provided by the director is incorrect or incomplete, it may include a brief statement presenting its view of the disagreement.

\* \* \* \* \*

30. Amend §240.15d-11 by revising paragraph (c) to read as follows:

**§240.15d-11 Current reports on Form 8-K (§249.308 of this chapter).**

\* \* \* \* \*

(c) No failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8-K shall be deemed to be a violation of 15 U.S.C. 78j(b) and §240.10b-5.

31. Add §240.15d-20 to read as follows:

**§240.15d-20 Plain English presentation of specified information.**

(a) Any information included or incorporated by reference in a report filed under section 15(d) of the Act (15 U.S.C. 78o(d)) that is required to be disclosed pursuant to Items 402, 403, 404 or 407 of Regulation S-B (§§228.402, 228.403, 228.404 or 228.407 of this chapter) or Items 402, 403, 404 or 407 of Regulation S-K (§§229.402, 229.403, 229.404 or 229.407 of this chapter) must be presented in a clear, concise and understandable manner. You must prepare the disclosure using the following standards:

- (1) Present information in clear, concise sections, paragraphs and sentences;
- (2) Use short sentences;
- (3) Use definite, concrete, everyday words;
- (4) Use the active voice;
- (5) Avoid multiple negatives;
- (6) Use descriptive headings and subheadings;
- (7) Use a tabular presentation or bullet lists for complex material, wherever possible;
- (8) Avoid legal jargon and highly technical business and other terminology;
- (9) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure; and
- (10) In designing the presentation of the information you may include pictures, logos, charts, graphs and other design elements so long as the design is not misleading and the required information is clear. You are encouraged to use tables, schedules, charts

and graphic illustrations that present relevant data in an understandable manner, so long as such presentations are consistent with applicable disclosure requirements and consistent with other information in the document. You must draw graphs and charts to scale. Any information you provide must not be misleading.

(b) Reserved.

Note to §240.15d-20. In drafting the disclosure to comply with this section, you should avoid the following:

1. Legalistic or overly complex presentations that make the substance of the disclosure difficult to understand;
2. Vague “boilerplate” explanations that are imprecise and readily subject to different interpretations;
3. Complex information copied directly from legal documents without any clear and concise explanation of the provision(s); and
4. Disclosure repeated in different sections of the document that increases the size of the document but does not enhance the quality of the information.

32. Amend §240.16b-3 by:

- a. Adding “and” at the end of paragraph (b)(3)(i)(B);
- b. Removing “; and” at the end of paragraph (b)(3)(i)(C) and in its place adding a period; and
- c. Removing paragraph (b)(3)(i)(D).

**Part 245 – REGULATION BLACKOUT TRADING RESTRICTION (Regulation BTR – Blackout Trading Restriction)**

33. The authority citation for Part 245 continues to read in part as follows:

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

\* \* \* \* \*

34. Amend §245.100, paragraph (a)(2), by revising the phrase “paragraph (a) or (b) of Item 404” to read “paragraph (a) of Item 404”.

**PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934**

35. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

36. Amend Form 10 (referenced in §249.210) by revising Items 6 and 7 to read as follows:

**Note-The text of Form 10 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10**

**GENERAL FORM FOR REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(b) or (g) OF THE SECURITIES EXCHANGE ACT OF 1934**

\* \* \* \* \*

**Item 6. Executive Compensation.**

Furnish the information required by Item 402 of Regulation S-K (§229.402 of this chapter) and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter).

**Item 7. Certain Relationships and Related Transactions, and Director Independence.**

Furnish the information required by Item 404 of Regulation S-K (§229.404 of this chapter) and Item 407(a) of Regulation S-K (§229.407(a) of this chapter).

\* \* \* \* \*

37. Amend Form 10-SB (referenced in §249.210b), Information Required in Registration Statement, by revising Item 7 to read as follows:

**Note-The text of Form 10-SB does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-SB**

**GENERAL FORM FOR REGISTRATION OF  
SECURITIES OF SMALL BUSINESS ISSUERS**

\* \* \* \* \*

**Information Required in Registration Statement**

\* \* \* \* \*

**Item 7. Certain Relationships and Related Transactions, and Director Independence.**

Furnish the information required by Item 404 of Regulation S-B and Item 407(a) of Regulation S-B.

\* \* \* \* \*

38. Amend Form 20-F (referenced in §249.220f) by revising Instruction 4.(c)(v) to the Instructions as to Exhibits to read as follows:

**Note-The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 20-F**

\* \* \* \* \*

**INSTRUCTIONS AS TO EXHIBITS**

\* \* \* \* \*

4.(a) \* \* \*

(c) \* \* \*

(v) Public filing of the management contract or compensatory plan, contract or arrangement, or portion thereof, is not required in the company's home country and is not otherwise publicly disclosed by the company.

\* \* \* \* \*

39. Form 8-K (referenced in §249.308) is amended by:

- a. Revising General Instruction D;
- b. Revising the last sentence of Instruction 1 to Item 1.01;
- c. Revising the heading of Item 5.02;
- d. Revising Item 5.02(b), the introductory text of Item 5.02(c), Item 5.02(c)(2) and (c)(3);
- e. Adding Item 5.02(d)(5) and (e); and
- f. Adding Instruction 3 to Item 5.02.

The revisions and addition read as follows:

**Note-The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form 8-K  
Current Report**

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

\* \* \* \* \*

**GENERAL INSTRUCTIONS**

\* \* \* \* \*

**D. Preparation of Report.**

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12 (17 CFR 240.12b-12). The report shall contain the number and caption of the applicable



item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b-13 (17 CFR 240.12b-13). To the extent that Item 1.01 and one or more other items of the form are applicable, registrants need not provide the number and caption of Item 1.01 so long as the substantive disclosure required by Item 1.01 is disclosed in the report and the number and caption of the other applicable item(s) are provided. All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

\* \* \* \* \*

**Item 1.01 Entry into a Material Definitive Agreement.**

\* \* \* \* \*

Instructions.

1. \* \* \* An agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) need not be disclosed under this item.

\* \* \* \* \*

**Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

\* \* \* \* \*

(b) If the registrant's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer for the registrant's most recent fiscal year (as defined by Item 402(a)(3) of Regulation S-K (17 CFR 229.402(a)(3)), retires, resigns or is terminated from that position, or if a director retires, resigns, is removed, or

refuses to stand for re-election (except in circumstances described in paragraph (a) of this Item 5.02), disclose the fact that the event has occurred and the date of the event.

(c) If the registrant appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions, disclose the following information with respect to the newly appointed officer:

(1) \* \* \*

(2) the information required by Items 401(b), (d), (e) and Item 404(a) of Regulation S-K (17 CFR 229.401(b), (d), (e) and 229.404(a)), or, in the case of a small business issuer, Items 401(a)(4), (a)(5), (c), and Items 404(a) of Regulation S-B (17 CFR 228.401(a)(4), (a)(5), (c), and 228.404(a), respectively); and

(3) a brief description of any material plan, contract or arrangement (whether or not written) to which a covered officer is a party or in which he or she participates that is entered into or a material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

(d) \* \* \*

(5) a brief description of any material plan, contract or arrangement (whether or not written) to which the director is a party or in which he or she participates that is entered into or material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

(e) If the registrant enters into, adopts, or otherwise commences a material compensatory plan, contract or arrangement (whether or not written), as to which the registrant's principal executive officer, principal financial officer, or a named executive officer (as defined by Item 402(a)(3) of Regulation S-K (17 CFR 229.402(a)(3)) for the registrant's most recent fiscal year participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, or a material grant or award under any such plan, contract or arrangement to any such person is made or materially modified, then the registrant shall provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.

Instructions to paragraph (e).

1. Disclosure under this Item 5.02(e) shall be required whether or not the specified event is in connection with events otherwise triggering disclosure pursuant to this Item 5.02.

2. Grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement, that are materially consistent with the original terms of such plan, contract or arrangement, need not be disclosed under this Item 5.02(e), provided the registrant has previously disclosed such original terms and the grant, award or modification is disclosed when Item 402 of Regulation S-K (17 CFR 229.402) requires such disclosure.

3. If the salary and bonus of a named executive officer cannot be calculated as of the most recent practicable date and are omitted from the Summary Compensation Table as specified in Instruction 1 to Item 402(b)(2)(iv) and (v) of Regulation S-B or Instruction 1 to Item 402(c)(2)(iv) and (v) of Regulation S-K, disclose the appropriate

information under this Item 5.02(e) when there is a payment, grant, award, decision or other occurrence as a result of which such amounts become calculable in whole or part. Disclosure is required even where Instruction 2 would permit such information not to be disclosed.

Instructions to Item 5.02.

\* \* \* \* \*

3. The registrant need not provide information with respect to plans, contracts, and arrangements to the extent they do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

\* \* \* \* \*

40. Amend Form 10-Q (referenced in §249.308a) by revising Item 5(b) in Part II to read as follows:

**Note-The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-Q**

\* \* \* \* \*

**PART II—OTHER INFORMATION**

\* \* \* \* \*

**Item 5. Other Information.**

(a) \* \* \*

(b) Furnish the information required by Item 407(c)(3) of Regulation S-K (§229.407).

\* \* \* \* \*

41. Amend Form 10-QSB (referenced in §249.308b) by revising Item 5(b) in Part II to read as follows:

**Note-The text of Form 10-QSB does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-QSB**

\* \* \* \* \*

**PART II—OTHER INFORMATION**

\* \* \* \* \*

**Item 5. Other Information.**

(a) \* \* \*

(b) Furnish the information required by Item 407(c)(3) of Regulation S-B (§228.407).

\* \* \* \* \*

42. Amend Form 10-K (referenced in §249.310) by revising Item 10 before the instruction and Items 11 and 13 in Part III to read as follows:

**Note-The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-K**

\* \* \* \* \*

**PART III**

\* \* \* \* \*

**Item 10. Directors, Executive Officers and Corporate Governance.**

Furnish the information required by Items 401, 405, 406, and 407(c)(3), (d)(4) and (d)(5) of Regulation S-K (§§229.401, 229.405, 229.406, and 229.407(c)(3), (d)(4) and (d)(5) of this chapter).

\* \* \* \* \*

**Item 11. Executive Compensation.**

Furnish the information required by Item 402 of Regulation S-K (§229.402 of this chapter) and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter).

\* \* \* \* \*

**Item 13. Certain Relationships and Related Transactions, and Director Independence.**

Furnish the information required by Item 404 of Regulation S-K (§229.404 of this chapter) and Item 407(a) of Regulation S-K (§229.407(a) of this chapter).

\* \* \* \* \*

43. Amend Form 10-KSB (referenced in §249.310b) by revising Item 9 before the instruction and Item 12 in Part III to read as follows:

**Note-The text of Form 10-KSB does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-KSB**

\* \* \* \* \*

**PART III**

**Item 9. Directors, Executive Officers, Promoters, Control Persons and Corporate Governance; Compliance With Section 16(a) of the Exchange Act.**

Furnish the information required by Items 401, 405, 406, and 407(c)(3), (d)(4) and (d)(5) of Regulation S-B (§§228.401, 228.405, 228.406, and 228.407(c)(3), (d)(4) and (d)(5) of this chapter).

\* \* \* \* \*

**Item 12. Certain Relationships and Related Transactions, and Director Independence.**

Furnish the information required by Item 404 of Regulation S-B (§228.404 of this chapter) and Item 407(a) of Regulation S-B (§228.407(a) of this chapter).

\* \* \* \* \*

**PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

**PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940**

44. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

\* \* \* \* \*

45. Amend Form N-1A (referenced in §§239.15A and 274.11A) by:

a. Revising “\$60,000” to read “\$120,000” in the introductory text of Items 12(b)(6), (b)(7), and (b)(8); Instruction 2 to Item 12(b)(6); and Instruction 5 to Item 12(b)(8); and

b. Removing the word “relocation,” in Instruction 2 to Item 15(b).

**Note-The text of Form N-1A does not, and this amendment will not, appear in the Code of Federal Regulations.**

46. Amend Form N-2 (referenced in §§239.14 and 274.11a-1) by:

a. Removing paragraph 14(c) of Item 18;

b. Redesignating paragraphs 15 and 16 of Item 18 as paragraphs 16 and 17, respectively;

- c. Adding new paragraph 15 of Item 18;
- d. Revising “\$60,000” to read “\$120,000” in the introductory text of paragraphs 9, 10, and 11 of Item 18; Instruction 2 to paragraph 9 of Item 18; and Instruction 5 to paragraph 11 of Item 18;
- e. Revising the introductory text of paragraph 14 of Item 18;
- f. Removing “relocation,” from Instruction 2 to paragraph 2 of Item 21; and
- g. Revising the cite “Item 18.16” to read “Item 18.17” in Instruction 8.a. to Item 24.

The addition and revision read as follows:

**Note-The text of Form N-2 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM N-2**

\* \* \* \* \*

**Item 18. Management.**

\* \* \* \* \*

14. In the case of a Registrant that is not a business development company, provide the following for all directors of the Registrant, all members of the advisory board of the Registrant, and for each of the three highest paid officers or any affiliated person of the Registrant with aggregate compensation from the Registrant for the most recently completed fiscal year in excess of \$60,000 (“Compensated Persons”).

\* \* \* \* \*

15. In the case of a Registrant that is a business development company, provide the information required by Item 402 of Regulation S-K (17 CFR 229.402).

\* \* \* \* \*



47. Amend Form N-3 (referenced in §§239.17a and 274.11b) by:
- a. Revising “\$60,000” to read “\$120,000” in the introductory text of paragraphs (h), (i), and (j) of Item 20; Instruction 2 to paragraph (h) of Item 20; and Instruction 5 to paragraph (j) of Item 20; and
  - b. Removing the word “relocation,” in Instruction 2 to Item 22(b).

**Note-The text of Form N-3 does not, and this amendment will not, appear in the Code of Federal Regulations.**

48. Amend Form N-CSR (referenced in §§249.331 and 274.128) by revising Item 10 to read as follows:

**Note-The text of Form N-CSR does not, and this amendment will not, appear in the Code of Federal Regulations.**

#### **FORM N-CSR**

\* \* \* \* \*

#### **Item 10. Submission of Matters to a Vote of Security Holders.**

Describe any material changes to the procedures by which shareholders may recommend nominees to the registrant’s board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of Item 407(c)(2)(iv) of Regulation S-K (17 CFR 229.407) (as required by Item 22(b)(15) of Schedule 14A (17 CFR 240.14a-101)), or this Item.

Instruction. For purposes of this Item, adoption of procedures by which shareholders may recommend nominees to the registrant’s board of directors, where the registrant’s most recent disclosure in response to the requirements of Item 407(c)(2)(iv) of Regulation S-K (17 CFR 229.407) (as required by Item 22(b)(15) of Schedule 14A (17

CFR 240.14a-101)), or this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

\* \* \* \* \*

By the Commission.

Nancy M. Morris  
Secretary

Dated: January 27, 2006