

The SEC's New Compensation Disclosure Rules

On August 11, 2006, the Securities and Exchange Commission released over 400 pages of final rules dealing with executive compensation disclosure. The new rules apply to disclosures in filings under the Securities Exchange Act of 1934, including proxy statements, periodic reports, current reports and registration statements, and to registration statements under the Securities Act of 1933. They become effective on November 7, 2006 and apply to SEC filings as follows:

- Current reports (Form 8-K) for triggering events occurring on or after the effective date.
- Annual reports (Forms 10-K and 10-KSB) for fiscal years ending on or after December 15, 2006.
- Proxy statements (a) filed on or after December 15, 2006 and (b) required to include disclosures under Items 402 and 404 of Regulation S-K or S-B for fiscal years ending on or after December 15, 2006 (limitation (b) not applicable to registered investment companies.)
- Registration statements under the Securities Act (excluding registrants that are registered investment companies) and the Exchange Act (a) filed on or after December 15, 2006 and (b) required to include disclosures under Items 402 and 404 of Regulation S-K or S-B for fiscal years ending on or after December 15, 2006.
- Registration Statements on Forms N-1A, N-2 and N-3 (both initial filings and post-effective amendments that are annual updates to effective registration statements) filed on or after December 15, 2006 (excluding filings by business development companies.)

The new rules adopt the following changes:

- A "Compensation Discussion and Analysis" to be included in annual reports and proxy statements.
- Extensive tabular disclosure of executive and director compensation, accompanied by supplementary narrative and footnote disclosure.
- Enhanced disclosure relating to option grants. The SEC's concern with option-related disclosure is evidenced by the fact that the enhanced disclosure requirements are summarized in ten pages at the beginning of the release promulgating the new rules.

These changes are discussed below.

Compensation Discussion and Analysis (Item 402(b)).

The new principles-based Compensation Discussion and Analysis (CD&A) section replaces the Board Compensation Committee Report on Executive Compensation.^{1,2} Its focus is a discussion and analysis of the material factors underlying a company's executive compensation policies and decisions. The CD&A will appear at the beginning of compensation disclosure, preceding the new executive compensation tables (discussed below). The CD&A, which is analogous to the existing MD&A, is an overview of compensation policy for the named executive officers, and is to deal with the separate elements of executive compensation and with executive compensation as a whole. While the principal emphasis is on compensation in the last fiscal year, compensation actions taken after year-end must be covered. Also, where necessary to give context to the disclosure, it may be appropriate to expand the discussion to cover prior years.

The CD&A should address the following:

- Objectives of compensation programs
- Performance aspects that the program is designed to reward
- Listing of elements of compensation
- Reasons underlying choice to pay each of the listed elements
- Method of determining amount (and formula, where applicable) of each element
- Relationship of each compensation element to overall compensation objectives, and how decisions about each element affect decisions regarding other elements.

More than a dozen examples of issues that may appropriately be addressed are included in the SEC release adopting the new rules.³ The SEC emphasizes that these are non-exclusive, and that each company must address its own compensation policies even if not included in the examples. The CD&A "should reflect ... individual circumstances of a company and should avoid boilerplate disclosure."

The SEC lays particular emphasis on the timing of stock option grants in coordination with the release of non-public information. While it expresses no view as to whether such timing of option grants may be justified, it makes clear that the existence of a plan or program to time option grants should be disclosed and discussed in the CD&A, including all relevant information such as the disclosure that the board of directors or its committee that deals with options may grant options while in possession of material non-public information, and possibly disclosure of how such information is used in determining whether, and in what amounts, to grant options.

¹ Supplementing the CD&A, Annual Reports on Forms 10-K and 10-KSB will include a Compensation Committee Report analogous to the existing Audit Committee Report, required only once annually. In the Report, the Compensation Committee must state whether it has reviewed and discussed the CD&A with management and, based on review and discussion, has recommended to the full board that the CD&A be included in the proxy material or annual report. The Report must identify each Compensation Committee member, and is deemed "furnished" rather than "filed," although the two officers making the certification required under Sarbanes-Oxley may "look to" the Report in making their certifications.

² Small business issuers are not required to furnish the CD&A.

³ These examples include:

- Policies for allocating between long-term and currently paid-out compensation.
- Policies for allocating between cash and non-cash compensation, and among various forms of the latter.
- For long-term compensation, the basis for allocation to each different form of award.
- How timing of award grants is determined, including awards of equity-based awards like options.
- Specific items of corporate performance taken into account in setting compensation policies and making compensation decisions.
- How specific compensation elements are structured and implemented to reflect corporate, and individual executive, performance.
- Factors considered when deciding to make material increases or decreases in compensation.
- How compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (e.g., how prior gains from options or stock awards are considered in setting retirement benefits.)
- Impact of accounting and tax treatments of a particular form of compensation.
- Company requirements or guidelines regarding ownership of equity or other securities, and any company policies regarding hedging economic risks of such required or suggested ownership.
- Whether company benchmarked total compensation or any material element thereof, identifying the benchmark and, if applicable, its components (including component companies.)
- Role of executive officers in the compensation process.

Importantly, the CD&A is considered part of proxy material and any other filing in which it is included. It is therefore subject to the proxy rules and to the liability imposed by Section 18 of the Exchange Act. When included (or incorporated by reference) in a periodic report (normally an annual report on Form 10-K), it is covered by the certifications of the chief executive and chief financial officers under the Sarbanes-Oxley Act.

The CD&A is not required to disclose confidential information such as trade secrets, confidential commercial or financial information that would harm the disclosing company competitively, or specific qualitative or quantitative performance factors used in determining compensation. The standard to be applied in determining to omit material of this nature is the same one that applies when confidential treatment is requested for material otherwise required to be filed in a registration statement or report.

Tabular Disclosure of Executive and Director Compensation and Related Narrative Disclosure.

The new rules completely reorganize the tabular presentation of compensation information. The information is to be disclosed for all individuals serving during the last completed fiscal year as (i) the principal executive officer (PEO) (regardless of compensation level), all persons serving during that year as (ii) the principal financial officer (PFO) (regardless of compensation level), (iii) the three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of that year, and (iv) up to two additional individuals for whom disclosure would have been required under clause (iii) but for the fact that their executive officer service ended before the end of the fiscal year.^{4,5}

The compensation tables are organized into three broad categories: (A) “current” compensation (whether paid currently or deferred); (B) holdings of and realizations on equity-related compensation elements; and (C) retirement and other post-employment compensation. The SEC acknowledges that in some cases a single compensation element may need to be disclosed in two different tables, in one as being earned and in the second as being paid out, a situation in which the narrative following the tables can be used to explain the overlap.

- **Summary Compensation Table (“SCT”— Item 402(c)).** For each named executive officer, compensation for the last fiscal year and the two preceding years,^{6,7} including (1) salary, (2) bonus, (3) stock awards, (4) option awards (both stock and option awards are valued at grant-date fair market value determined under FAS 123(R)), (5) non-equity incentive compensation, (6) changes in pension value and nonqualified deferred compensation earnings⁸, and (7) all other compensation.⁹ The final column is (8) the sum of these individual items.
- **Grants of Plan-Based Awards Table (“PBAT”— Item 402(d)).¹⁰** For each named executive officer, for the last-completed fiscal year, (1) grant date, (2) estimated future payouts (in dollars) under non-equity incentive plan awards ((a) threshold, (b) target and (c) maximum amounts), (3) estimated future payouts (in units) under equity incentive plan awards ((a) threshold, (b) target and (c) maximum amounts), (4) all other stock awards (in shares or units), (5) all other option awards (in number of underlying securities), and (6) exercise or base price of option awards.¹¹

⁴ The threshold for inclusion of an executive officer as being highly compensated is \$100,000 of total compensation.

⁵ For small business issuers, the required disclosure covers (i) the PEO, (ii) two, rather than three, most highly compensated executive officers serving at year-end, and (iii) up to two additional individuals for whom disclosure would have been required under clause (ii) but for the fact that their executive officer service ended before the end of the fiscal year. The balance of this advisory deals with the new rules as they apply to non-small business issuers, with notation as to differences applicable to the latter.

⁶ One preceding year for small business issuers.

⁷ The table data is “phased in.” In the first year (2007 for most companies), only the 2006 data will be required; data for prior years will be in the current format. The next year, the table would present two years’ data in the new tabular format and one, the oldest year, in current format. After that the new tabular format would be used exclusively. The phase-in for small business issuers will be complete after two, rather than three, fiscal years.

⁸ Changes in pension value and deferred compensation earnings do not count in determining which are the highest-paid officers.

⁹ Examples of “other compensation”: Perquisites if aggregate exceeds \$10,000 annually; compensation cost (determined under FAS 123R) of securities purchased at a discount; amounts paid in connection with termination of employment or a change in control; company contributions to vested and unvested defined contribution plans; life insurance premiums paid by company. Several pages of guidance as to factors determining whether something is a “perquisite” are included in the SEC release.

¹⁰ Small business issuers are not required to furnish the PBAT or the related narrative discussion.

¹¹ If the exercise or base price is less than the closing market price of the underlying security on date of grant, or if the grant date differs from the date of board or committee action granting an option, extra columns must be included as appropriate, disclosing the closing market price and/or the date of board or committee action.

- **Narrative Disclosure for SCT and PBAT (Item 402(e)).** Narrative description of material factors needed to understand information in SCT and PBAT, such as: employment agreement terms; repricing or other material modification of equity based award during year; material terms of PBAT awards like vesting schedule and formula used to determine amounts payable; performance based conditions applicable to awards; explanation of salary and bonus in proportion to total compensation; identification (to the extent material¹²) of any item included under “All Other Compensation” in the SCT.
- **Outstanding Equity Awards at Fiscal Year-End Table (Item 402(f)).** For each named executive officer, as at the end of the last fiscal year, (1) for outstanding option awards, *on an award-by-award basis*, number of securities underlying exercisable but unexercised options, number underlying unexercisable options, number of securities underlying unexercised unearned options under equity incentive plan awards, and for each award, the exercise or base price and expiration date; (2) for outstanding stock awards, total shares not vested, market value of unvested shares, number of unearned shares under any equity incentive plan awards that have not vested, and market or payout value of the latter.¹³
- **Option Exercises and Stock Vested Table (Item 402(g)).**¹⁴ For each named executive officer, for each option exercise and each vesting of restricted or other stock during the last fiscal year, (1) for option awards, the number of shares acquired on exercise and the value realized on exercise; and (2) for stock awards, the number of shares acquired on vesting and the value realized on vesting. Dollar amounts realized on option exercises are the difference between exercise price and market price on exercise date, disregarding any other amounts paid by the company on the executive’s behalf, such as taxes (such payments would be reported in the SCT.) Dollar amounts realized on stock vesting are the number of shares vested multiplied by the market price on vesting date.
- **Pension Benefits Table (“PBT” —Item 402(h)).**¹⁵ For each named executive officer, for each plan that provides retirement benefits for the last fiscal year, (1) the plan name, (2) the number of years credited service¹⁶ and the actuarial present value of the officer’s accumulated benefit under the plan (both computed as of the measurement date used for the company’s financial statement reporting purposes), and (3) the dollar amount of any plan payments and benefits received. Plans covered include those providing specified payments and benefits provided entirely or primarily after retirement, excluding tax-qualified and non-qualified defined contribution plans. The valuation method and all material assumptions applied in quantifying the present value of the accumulated benefit must be disclosed in a narrative that accompanies the table.¹⁷
- **Narrative Disclosure for PBT (Item 402(h)(3)).** Succinct narrative description of any material factors necessary to an understanding of each plan in the PBT. Examples of material factors: (1) Terms and conditions of payments and benefits; (2) amount of payment at normal retirement (meaning normal retirement age specified in plan or, if none, earliest age at which retirement is allowed without age-related loss of benefits); (3) eligibility standards; (4) effect of benefit form election (e.g. participant only or participant and surviving spouse) on annual benefits; (5) identification of any named executive officers eligible for early retirement and early retirement benefits and standards; (6) specific compensation elements (salary, bonus, etc.) used when applying payment/benefit formula; (7) if named executive officers participate in multiple plans, the different purposes of each plan; and (8) company policy regarding such matters as granting extra years of service.
- **Nonqualified Deferred Compensation Table (Item 402(i)).**¹⁸ For each named executive officer, for the last fiscal year, for each defined contribution or other plan participated in that provides for non-tax-qualified deferred compensation, (1) the dollar amount of contributions by the plan participant and those by the company, (2) dollar amount of aggregate interest or other earnings accrued during the year, (3) aggregate dollar amount of withdrawals by and

¹² Items not exceeding the greater of \$25,000 and 10% of all items in the specified category are not considered material.

¹³ There is no overlap between these categories. Shares reported as unearned and unvested under an equity incentive plan are not also to be reported as “total shares unvested.” There will be some overlap between this table and the PBAT as to equity awards in the last fiscal year (which will presumably also be outstanding at year-end.)

¹⁴ Small business issuers are not required to furnish the Option Exercises and Stock Vested Table.

¹⁵ Small business issuers are not required to furnish the PBT or the related narrative disclosure.

¹⁶ If the number of years credited service differs from the years of actual service, a footnote must be added to show the difference and any resulting increase in benefits.

¹⁷ If the relevant assumptions are discussed in financial statement footnotes or the MD&A, the narrative disclosure requirement can be satisfied by a cross-reference.

¹⁸ Small business issuers are not required to furnish the Nonqualified Deferred Compensation Table.

distributions to the participant, and (4) participant's total dollar balance as at the end of the year. Additional required disclosure:

- (a) To avoid "double counting," a footnote quantifying extent to which (i) amounts reported as participant and company contributions, and as earnings accrued during the year, are reported as last-year compensation in the SCT, and (ii) the amount reported as aggregate year-end balance was previously reported in the SCT for years prior to the last fiscal year; and
 - (b) A succinct narrative description of any material factors necessary to an understanding of each plan. Examples of material factors: types of compensation permitted to be deferred; limits on deferrals; measures used to calculate interest or other plan earnings and whether those measures are selected by the participant or the company and the frequency and manner of allowed changes to those measures; and material terms applicable to payouts, withdrawals and other distributions.
- **Potential Payments on Termination or Change-in-Control ("CIC"—Item 402(j)).**¹⁹ For each named executive officer, for each contract, agreement, plan or arrangement (written or unwritten) that provides for payments to the officer at, following or in connection with any termination (such as resignation, severance, retirement, constructive termination), or a CIC or change in the named officer's responsibilities, the following information in narrative form:
 - (a) The circumstances that would trigger payments or provision of benefits (including perquisites and health care benefits);
 - (b) the nature and amount of benefits provided in each covered circumstance, including tax gross-ups, and whether the benefits are lump-sum or annual and by whom and for how long they would be provided;
 - (c) how the appropriate payment or benefit levels are determined for each triggering circumstance;
 - (d) any material conditions or obligations applicable to receipt of payments or benefits, such as non-compete, non-disparagement and confidentiality agreements, including their duration and any provisions regarding waiver of their breach; and
 - (e) any other material factors.

The information, including quantitative disclosure, is to be provided using the assumptions that the triggering event occurred on the last business day of the last fiscal year, and that the price per share of the company's securities is their closing market price on that date. If uncertainties exist as to payments or benefits or their amount, reasonable estimates should be used and assumptions underlying the estimates should be disclosed, including required forward-looking information as appropriate

Perquisites can be excluded if their aggregate amount would be less than \$10,000, otherwise individual "perks" must be identified and quantified in the same manner as required for the SCT. Health care benefits must be quantified using the assumptions used for GAAP financial reporting.

If a termination-related payment or benefit is fully disclosed in connection with the PBT or the Nonqualified Deferred Compensation Table, cross-reference may be made to that disclosure, provided that if the form or amount of any payment thus referenced would be enhanced or its vesting or other provisions accelerated in connection with a triggering event, the enhancement or acceleration must be disclosed here.

Where a triggering event has actually occurred for a named executive officer who, as a result, was not serving as such as at the end of the last fiscal year, the only disclosure required here is that which relates to the actual triggering event.

No disclosure is required as to contracts, agreements, plans or arrangements that are available generally to all salaried employees and do not discriminate in favor of executive officers.

- **Director Compensation Table (Item 402(k)).** For each director (except those who are also named executive officers and whose compensation for services as a director is fully disclosed in the SCT and the other tables and narrative disclosures discussed above), for the company's last fiscal year:
 - (1) Aggregate cash fees paid for director-related services;
 - (2) Aggregate grant-date fair value of stock awards and stock option awards (both determined in accordance with FAS 123R);

¹⁹ Small business issuers are not required to furnish the Potential Payments on Termination or Change-in-Control Table.

- (3) Dollar value of all earnings for services under non-equity incentive plans, and all earnings on any outstanding awards;
 - (4) Total pension and deferred compensation benefits as follows: (A) aggregate change in actuarial present value of each director's accumulated benefit under all defined benefit and actuarial pension plans, for the period beginning on the measurement date used for financial reporting purposes in the second preceding fiscal year and ending on the same measurement date in the last fiscal year, plus (B) amount of above-market or preferential earnings on compensation deferred on a non-tax-qualified basis, including nonqualified deferred compensation plans;
 - (5) All other director compensation items that do not fit under any other category in the table, including (a) perquisites (unless aggregate amount for the year is less than \$10,000), (b) all "gross-ups" or other reimbursements for tax payments, (c) the compensation cost of company securities purchased at a discount (computed under FAS 123R), unless the discount is generally available to stockholders or salaried employees, (d) any amounts paid to a director under a plan or arrangement in connection with termination of service as a director or a CIC, (e) company contributions to defined contribution plans for directors (vested or unvested), (f) consulting fees, (g) annual cost of director legacy and charitable award programs, (h) premiums paid by the company on director life insurance policies, and (i) dividends and other earnings on stock and option awards that were not factored into grant date fair value of those awards; and
 - (6) The total value of items (1)–(5).
- Footnote disclosure of director stock and option awards outstanding as at the end of the last fiscal year is also required.
 - **Narrative Disclosure for Director Compensation Table.** Narrative description of any material factors necessary to an understanding of the director compensation disclosed in the table. Examples of material factors: (a) Description of standard compensation arrangements (retainer, committee service fees, committee chairmanship fees, meeting attendance fees); (b) identification of any directors having non-standard compensation and the nature of the non-standard terms.

Additional disclosure regarding shares pledged by named executive officers and directors (Item 403).

Item 403, the tabular disclosures of beneficial ownership of securities by management and holders of more than 5%, is amended to require disclosure, by footnote to the "Amount and Nature of Beneficial Ownership" column in the table or otherwise, of the numbers of shares that are pledged by named executive officers, directors and director nominees as collateral security.

Transactions with Related Persons, Promoters and Certain Control Persons (Item 404).

Item 404 has been revised substantially to make the disclosure more principles-based. There are three aspects to the amendments.

Item 404(a), dealing with related person transactions, has been simplified by eliminating the detailed instructions that formerly defined which transactions were disclosable and which were not. The new disclosure requirement covers all transactions since the beginning of the last fiscal year²⁰ and any currently proposed transactions, in which the company was or is to be a participant,²¹ involving an amount exceeding \$120,000,²² and in which a related person has or will have a direct or indirect material interest. "Transaction" is broadly defined and specifically includes indebtedness and guarantees of indebtedness, as well as a series of related transactions. "Related person" includes directors and executive officers and their immediate family members; if disclosure is being made in a proxy statement, it also includes director nominees and their immediate families; and if a known greater-than-5% security holder has an interest in the transaction, that person and

²⁰ And the preceding two fiscal years for disclosures in '33 and '34 Act registration statements filed by others than small business issuers, with certain exceptions, as was the case prior to the new amendments. See Instruction 1 to Item 404 of Regulation S-K.

²¹ Item 404(a) formerly referred to "party." "Participant" is a broader standard, intended to describe more accurately the nature of the company's involvement in a transaction.

²² For small business issuers, the size-of-transaction standard is the lesser of \$120,000 and 1% of the average fiscal-year-end total assets for the last three completed fiscal years, and the time period for which disclosure is required is the issuer's last fiscal year and the prior fiscal year (instruction 9 to Item 404(a) of Regulation S-B.)

immediate family members. The required disclosure is a description of the transaction, including identification of related persons and nature of the relationship, description of their interests, and approximate dollar value of the transaction and of the related persons' interests.²³

Item 404(b) is a new requirement for disclosure of company policies for review and approval of related-person transactions.²⁴ Material features of those policies must be disclosed, including: Types of transactions covered by the policies and procedures; standards to be applied; persons responsible for application of those policies and procedures; whether they are in written form and, if not, how they are evidenced; specific identification of any transactions required to be reported under Item 404(a) above that were not required to be reviewed and approved under the company's related-party transaction policies and procedures, or were not reviewed and approved because the policies were not followed.

Item 404(c) requires disclosure of the identity of, and transactions with, promoters and persons acquiring control of shell companies. Disclosure is required only in registration statements on Forms S-1 and SB-2 under the Securities Act and Forms 10 and 10-SB under the Exchange Act. The promoter disclosure is required if the company had a promoter at any time during the last 5 fiscal years.²⁵ The required disclosure, which is the same for promoters and persons (and groups) acquiring control of shell companies, consists of: name/s; nature and amount of anything of value received from the company and nature and amount of any consideration received by the company; and as to assets acquired or to be acquired from the promoter or control person, the amount at which they were acquired, the valuation principles applied in determining that amount, identification of the person/s making the determination and their relationship (if any) with the promoter, control person or the company, and (if the promoter or control person acquired the assets within two years of their transfer to the company) the cost to the promoter or control person of the transferred assets.

Corporate Governance Disclosure (Item 407).

New Item 407 addresses five specific areas as follows:

- **Director Independence (Item 407(a)).** Each director (and for proxy statement disclosure, each nominee for director) who is independent under the applicable standard of independence, must be identified. If the applicable standard applies to independence of board committees, each *non*-independent director who is a member of the audit, nominating or compensation must be identified. The "applicable standard" is:
 - For a company listed on a national securities exchange or inter-dealer quotation system requiring a majority of board members to be independent,²⁶ the standards the company uses to determine compliance with that exchange's/quotation system's independence requirement, and similarly for determining independence of board committee members in compliance with exchange/quotation system committee independence requirements. If the exchange requirement of majority independence has exemptions, and the company relies on such an exemption, the nature of the exemption and the basis for the company's reliance must be disclosed.
 - For an unlisted company, a definition it selects (and identifies) used by a national securities exchange or inter-dealer quotation system requiring a majority of board members to be independent; whichever definition is selected must be used for all directors and nominees.

A company that uses its own definition of independence must disclose whether that definition is available on its Web site and must provide the Web address. If not so available, a copy of the independence policy must be included in a

²³ Disclosure is not required for: (A) compensation to an executive officer or director if either (i) disclosed in the tabular presentation under Item 402, or (ii) the executive officer is not an immediate family member and his or her compensation was approved by the board compensation committee and would have been reported under Item 402 were he or she a named executive officer; (B) transactions involving ordinary course of business indebtedness such as normal trade debt, business expense reimbursement, and bank loans made on terms generally available to non-related persons; (C) any transaction where rates or charges are determined by competitive bidding or that involves furnishing common-carrier services; (D) any transaction involving only banking services (funds depository, transfer agent, indenture trustee); (E) related-person interest arising solely from ownership of equity securities where all holders receive the same pro rata benefit (e.g. payment of dividends); or (F) relationship of a person who is a director or less-than-10% equity holder in a corporation, or a less-than-10%-interest limited partner in a partnership, that is a party to a transaction with the company.

²⁴ Item 404(b) is not applicable to small business issuers.

²⁵ Prior to the amendment of this Item, promoter disclosure was not required for companies organized more than 5 years before the filing of the registration statement, even if they had had promoters within the last five years.

²⁶ This is also the applicable standard for use in Forms S-1 and SB-2, Form 10 and Form 10-SB registrations by companies that have applied for listing on such an exchange.

proxy statement appendix furnished at least once every three fiscal years and each time the policy has been materially amended, and in “off” years when no appendix is included, the proxy statement must identify the most recent year in which the appendix was included.

For each director and nominee classified as independent, any related-party transactions not identified in response to Item 404(a) (above) that were considered by the board in determining independence must be disclosed.

Board meetings and committees; annual meeting attendance (Item 407(b)). This item includes the disclosure requirements formerly specified in Item 7, paragraphs (d)(1), (f) and (h)(3) of Schedule 14A (board and stockholder meeting attendance, major committees and their members.)

- **Nominating Committee (Item 407(c)), Audit Committee (Item 407(d)), Compensation Committee (Item 407(e)).**

If the company does not have one or more of these committees, the basis for the board’s decision not to have the “missing” committee must be explained, and each director who participates in consideration of matters that normally would be considered by the “missing” committee must be identified.

The company must state whether each of these committees has a charter, and disclose whether a current copy is available on its Web site (and the Web address if so available.) If not so available, a copy must be included in a proxy statement appendix furnished at least once every three fiscal years and each time the charter has been materially amended, and in “off” years when no appendix is included, the proxy statement must identify the most recent year in which the appendix was included.

The company is required to describe process for compensation committee consideration of executive and director compensation, including any role of executive officers in making compensation recommendations or determinations, and any role of consultants in determining or recommending compensation. Consultants must be identified, with disclosure of whether engaged by the compensation committee or another person, disclosure of the scope of engagement, and disclosure of instructions given to consultants regarding performance of duties under the engagement.²⁷

- **Shareholder communications (Item 407(f)).**

This item includes the disclosure requirements formerly specified in Item 7, paragraph (h) of Schedule 14A (process for security holders to communicate with board.)

Form 8-K and Miscellaneous.

Amendments to Form 8-K. Item 1.01 of Form 8-K is amended to remove the cross-references to management compensation and compensatory plans. In its release, the SEC notes that responses to Item 1.01 (“Entry into a Material Definitive Agreement”) have in many cases reported entry into compensation arrangements that “do not appear always to be unquestionably or presumptively material.”

Item 5.02 of Form 8-K now becomes the single Item dealing with those matters, covering named executive officers as well as persons previously covered by Item 5.02, and contains expanded disclosure requirements in this area. Item 5.02(b) (executive officer terminations) is expanded to include named executive officers.²⁸ Paragraph 3 of Item 5.02(c) (appointment of new principal officer) is expanded to include any material contract or arrangement entered into, or materially amended, in connection with the new employment. Item 5.02(e) (adoption and material modification of material executive compensation plans) is new and applies to contracts and plans that cover the CEO, CFO or a named executive officer.²⁸ The SEC has extended the existing safe harbors regarding liability under Section 10(b) and Rule 10b-5, and eligibility to use Form S-3, to cover failure to file timely reports required by Item 5.02(e).

²⁷ In addition, there are specific disclosure requirements relating to each of these committees, for which reference should be made to subsections (c) through (e) of Item 407. A detailed discussion of these requirements is beyond the scope of this alert.

²⁸ As identified in the company’s most recent filing that contained Regulation S-K, Item 402(c) disclosure.

Plain English Requirement. Most of the disclosures required by Items 402, 403, 404 and 407 are required to be in plain English. The plain English requirement applies when information responsive to those items is included, or incorporated by reference, in periodic and other reports filed under Sections 13(a) or 15(d) of the Exchange Act.

“Katie Couric” Disclosure. The SEC did not adopt its proposed disclosure requirement for up to three employees who were not executive officers but whose compensation was greater than that of any of the named executive officers. Instead, it submitted revised proposals for further comment.

We Can Help

For additional information about The SEC’s New Compensation Disclosure Rules, contact one of the following Katten Muchin Rosenman LLP attorneys:

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