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THE PROXY SEASON FIELD GUIDE

SECOND EDITION

Morrison & Foerster LLP
Public Companies and Corporate Governance Practice

THE PROXY SEASON FIELD GUIDE

Second Edition

THE PROXY SEASON FIELD GUIDE

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EXECUTIVE SUMMARY

The 2012 proxy season occurs in an environment of heightened shareholder activism and an ever-increasing focus on compensation and corporate governance disclosures. This Proxy Season Field Guide provides you with an overview of recent legislative, regulatory and shareholder developments, and provides guidance on how these developments will impact you in the 2012 proxy season.

The Legislative and Regulatory Developments Shaping the 2012 Proxy Season

On July 21, 2010, President Obama signed into law what is being called the most sweeping set of financial reforms since the Great Depression, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). While this legislation focused principally on changes to the financial regulatory system, several corporate governance and compensation provisions of the Dodd-Frank Act target public companies. The corporate governance and compensation provisions include:

- A requirement that public companies solicit an advisory vote on executive compensation ("Say-on-Pay"), an advisory vote on the frequency of Say-on-Pay votes ("Say-on-Frequency") and, in the event of a merger or other extraordinary transaction, an advisory vote on certain "golden parachute" payments ("Say-on-Golden Parachutes");
- Requirements that the Securities and Exchange Commission ("SEC") adopt rules directing the securities exchanges to adopt listing standards with respect to compensation committee independence and the use of consultants;
- Provisions calling for the SEC to adopt expanded disclosure in the annual proxy statement and other filings, particularly in the area of executive compensation, such as disclosure of pay versus performance, the ratio of CEO pay to the pay of a median employee, and policies with regard to hedging transactions conducted by employees and directors; and
- Provisions that will require the adoption or revision of certain other policies, such as compensation recovery policies providing for the recovery of executive compensation in the event of a financial restatement.

The SEC and the stock exchanges are working to adopt a number of new rules and standards in order to implement the requirements of the Dodd-Frank Act discussed above. While many of the provisions of the Dodd-Frank Act will not be in place for the 2012 proxy season, issuers will face their second year of Say-on-Pay votes as investors and proxy advisory services consider the prior year's advisory vote and the steps that issuers and their compensation committees have taken since then.

Say-on-Pay in 2012

The implementation of Say-on-Pay votes was one of the most widely anticipated corporate governance developments in the United States over the past five years. Advocates for Say-on-Pay in the United States hoped that the advisory votes on executive compensation would serve to encourage greater accountability for executive compensation decisions, as well as more focused compensation disclosure in proxy statements and expanded shareholder engagement.

The SEC rules for Say-on-Pay provide:

- Issuers must provide a separate shareholder advisory vote in proxy statements to approve the compensation of executives not less than every three years. Shareholders must vote, on an advisory basis, to approve the compensation of the issuer's named executive officers, as such compensation is disclosed under Item 402 of Regulation S-K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables, and other narrative executive compensation disclosures required by Item 402. The rule does not require issuers to use any specific language or a specific form of resolution; however an Instruction to the Rule provides a non-exclusive example of a form of resolution;
- Issuers must provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the vote on the compensation of executives will occur every 1, 2, or 3 years. This Say-on-Frequency vote is required not less frequently than once every six years;
- Issuers must explain in the proxy statement the general effect of the Say-on-Pay votes (i.e., the vote is non-binding), and also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur;
- Say-on-Pay and Say-on-Frequency votes do not trigger the filing of a preliminary proxy statement with the SEC;
- Issuers will be able to exclude shareholder proposals that would provide a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes in certain circumstances when, in the most recent Say-on-Frequency vote, a single frequency received a majority of votes cast

and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice;

- The CD&A must disclose whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies; and

- Issuers must report, pursuant to Item 5.07 of Form 8-K, the decision as to how frequently the issuer will conduct its Say-on-Pay votes following each Say-on-Frequency vote. If the information is provided by amendment to the Form 8-K, the amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals for the next annual meeting as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred.

During the 2011 proxy season, approximately 40 companies failed to achieve majority shareholder support for mandatory Dodd-Frank Say-on-Pay resolutions. The high level of shareholder support for Say-on-Pay resolutions during the 2011 proxy season was similar to the experience in the recent past with respect to those companies that held Say-on-Pay votes on a voluntary basis, or because the company was required to hold a Say-on-Pay vote because it had outstanding indebtedness under TARP. In the vast majority of those situations, shareholders have provided strong support for Say-on-Pay proposals, absent some significant concerns with the company's executive compensation programs. Even with the likelihood of shareholder support relatively high for Say-on-Pay resolutions, companies paid very close attention to the message communicated through their CD&A and other disclosures, while at the same time seeking to engage with key shareholder constituencies.

A key agenda item for compensation committee meetings has been to consider the outcome of the 2011 Say-on-Pay votes. This is because the SEC adopted a new "mandatory" CD&A item which requires a company to address whether and, if so, how the company has considered the results of the most recent Say-on-Pay vote in determining compensation policies and decisions and, if so, how that consideration has affected the company's executive compensation decisions and policies. While issuers who received majority support in excess of 70-75% for the Say-on-Pay proposal in 2011 may be able to indicate that the vote was considered and no changes were deemed necessary for the issuer's executive compensation programs, an issuer that failed to achieve majority support or that received majority support but less than 70%-75% in support for the Say-on-Pay proposal may need to make substantial new disclosures regarding the engagement efforts that the issuer undertook to understand the reasons for the lack of support, the consideration by the compensation committee of the vote and the results of the engagement efforts, and the specific steps undertaken with the executive compensation program that responded to shareholder's concerns. While the 2011 shareholder engagement efforts were often reactive, the 2012 proxy season has been characterized by much more proactive engagement efforts, utilizing "road show" meetings, conference calls, and perhaps even electronic communications to more effectively engage with shareholders.

When drafting the proxy statement for 2012, the same focus on transparency and communicating an effective message that characterized the 2011 proxy season should carry through to the 2012 proxy statements. While there may not be as many executive compensation changes to highlight in the CD&A in 2012 as compared to 2011, it will remain critically important for the CD&A to reflect the notable aspects of the compensation policies and decisions, while highlighting the pay-for-performance aspects of compensation plans.

Key Disclosure Considerations for Proxy Statements and Annual Reports

The SEC Staff (the "Staff") has come to expect that issuers are aware of the interpretive positions taken by the Staff in comment letters on filings, which often reflect nuanced readings of the rules or require more detailed disclosure than might otherwise be expected. It has become increasingly important that issuers make themselves familiar with Staff comment letters that have been issued to other issuers, so that they can respond to the issues raised in those letters when preparing their own filings.

Over the past several years, the SEC has provided significant guidance with respect to its interpretation of executive compensation disclosure rules, including numerous Staff speeches, interpretations and comments on individual filings. There are a number of significant areas of focus in Staff comments and other interpretive guidance on executive compensation disclosure. For example, the Staff has repeatedly stated that an issuer's CD&A should focus on *how* and *why* the issuer arrived at specific executive compensation decisions and policies and should address why specific compensation decisions were made. Issuers frequently receive comments on this issue during the review process. Other principal areas of Staff comment in the CD&A have related to the disclosure of incentive plan performance targets, individual performance goals and benchmarking practices or processes.

In December 2009, the SEC adopted rule changes that mandated more disclosure in proxy and information statements regarding risk, compensation and corporate governance matters. These rule changes were effective on February 28, 2010, and were first included in proxy statements for annual meetings occurring in 2010. Through the course of the Staff review and interpretive process, we now have a better understanding of what the Staff expects with respect to:

- Disclosure of the relationship of an issuer's compensation policies and practices to risk management when those compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the issuer;
- The background and qualifications of directors, and nominees for director, describing the experience and skills that led the issuer to choose the director or nominee for the board;
- The board of directors' consideration of diversity in the process by which directors are considered for nomination to the board;
- The leadership structure of the board, including whether the issuer has combined or separated the roles of chairman and principal executive officer, and why the issuer believes that its leadership structure is appropriate for the issuer, as well as a discussion, in some circumstances, of whether and why an issuer has a lead independent director; and
- The extent of the board's role in the oversight of risk.

Recent areas of frequent Staff comment in annual reports have addressed disclosure of goodwill impairment charges, loss contingency disclosures, liquidity, debt covenants, disclosure controls and procedures, risk factors and exhibits. The SEC has also provided interpretive guidance outside of the comment process in several key areas relevant to preparing Form 10-Ks and proxy statements for 2011. The Staff has revised its approach to non-GAAP measures in Compliance and Disclosure Interpretations issued in 2010. Also in 2010, the Staff provided interpretive guidance intended to improve the discussion of liquidity and funding risks in the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"). This guidance focuses on disclosures related to liquidity, leverage ratios and the contractual obligations table. In 2011 and 2012, the Staff has issued disclosure guidance regarding cybersecurity risk and European sovereign debt exposures.

Shareholder Activism and Corporate Governance

Continued shareholder concerns over corporate governance and executive compensation issues will shape the outcome of votes in the 2012 proxy season. Issuers will need to continue to focus on voting policies of institutional shareholders and proxy advisory services when making corporate governance and executive compensation decisions. While shareholder activism declined in the 2011 proxy season as compared to 2010, shareholder proposals in 2012 have focused on:

- Compensation-related proposals (i.e., pay-for-performance, clawback compensation consultants, and conflicts of interest);
- Proxy access shareholder proposals;
- Majority voting for directors (particularly at Russell 3000 companies);
- Shareholder ability to call special meetings and take action by written consent;
- Disclosure, limits, board oversight, and shareholder approval or ratification of political contributions;
- Split chairman/CEO proposals; and
- Auditor rotation proposals.

With regard to the 2012 response to proxy access shareholder proposals, many companies are taking a "wait and see" approach with respect to amending their bylaws to permit proxy access in order to allow greater flexibility in responding to a future shareholder proposal. There have been less than twenty proxy access shareholder proposals in the months since these Rule 14a-8 amendments became effective. A number of these proposals have been based on a model proxy access proposal drafted by U.S. Proxy Exchange, an organization of retail investors. These shareholder proposals tend to have lower ownership thresholds and shorter holding period requirements than the SEC rule that was vacated. In this regard, the ownership threshold is usually between 1% and 5% of outstanding shares, the length of ownership is usually between one and three years of continuous ownership.

Institutional Shareholder Services ("ISS"), the leading proxy advisory firm, released 2012 updates to its U.S. proxy voting guidelines. The policy updates include revisions to ISS's pay-for-performance policy and methodology. Other significant updates relate to the responsiveness of boards of directors to prior shareholder advisory votes on executive compensation, or Say-on-Pay votes, and the frequency of such votes, as well as revisions to the policy on proxy access in the wake of revisions to the

SEC shareholder proposal rules. The ISS policy changes are effective for shareholder meetings on or after February 1, 2012.

The proxy advisory service Glass Lewis also recently updated its voting policies in light of the 2011 Say-on-Pay experience and other developments for the 2012 proxy season to address (i) the response to the Say-on-Pay vote; (ii) poison pills and classified boards; (iii) exclusive forum provisions; (iv) political spending shareholder proposals; and (v) proxy access proposals.

The NYSE recently sent out a notice to its members regarding broker discretionary voting on certain corporate governance proposals. The notice relates to the application of NYSE Rule 452 to certain types of corporate governance proxy proposals. NYSE Rule 452 governs when NYSE member organizations may vote customer shares without specific client instructions. Under this new policy, certain proposals, such as proposals to declassify the board of directors, majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides, will now be treated as “Broker May Not Vote” matters.

Revisiting Key Corporate Governance and Disclosure Policies

A number of important regulatory, legislative, and market developments arising since the onset of the financial crisis have made this an ideal time to revisit your key corporate governance and disclosure policies in order to determine whether changes should be made to reflect current law, standards, or best practices, and to determine whether additional policies should be implemented in light of recent events. Many of these key policies are critical to help protect the issuer and its employees from potential securities law violations, and to provide assurance to investors and others that the issuer is maintaining an appropriate “tone at the top” through the implementation of the latest corporate governance best practices. The policies covered include:

- The insider trading policy;
- The Regulation Fair Disclosure (“Regulation FD”) policy;
- Executive compensation policies;
- Emergency succession policies; and
- Related party transactions policies.

Conclusion

The 2012 proxy season will continue to present challenges for issuers as they seek to obtain strong support for their Say-on-Pay votes, while at the same time remaining attentive to ongoing shareholder concerns regarding corporate governance and executive compensation. This 2012 Proxy Season Field Guide will provide you with the resources necessary to successfully navigate the 2012 proxy season.

CHAPTER 1

THE LEGISLATIVE AND REGULATORY DEVELOPMENTS SHAPING THE 2012 PROXY SEASON

THE LEGISLATIVE AND REGULATORY DEVELOPMENTS SHAPING THE 2012 PROXY SEASON

On July 21, 2010, President Obama signed into law what is being called the most sweeping set of financial reforms since the Great Depression, the Dodd-Frank Act. The Dodd-Frank Act focuses principally on changes to the financial regulatory system; however, several corporate governance and compensation provisions of the Dodd-Frank Act target public companies. The corporate governance and compensation provisions include:

- A requirement that public companies solicit a Say-on-Pay vote, a Say-on-Frequency Vote and, in the event of a merger or other extraordinary transaction, a Say-on-Golden Parachute vote;
- Requirements that the SEC adopt rules directing the securities exchanges to adopt listing standards with respect to compensation committee independence and the use of consultants;
- Provisions calling for the SEC to adopt expanded disclosure requirements for the annual proxy statement and other filings, particularly in the area of executive compensation; and
- Provisions that will require the adoption or revision of certain other policies, such as compensation recovery policies providing for the recovery of executive compensation in the event of a financial restatement.

The SEC and the stock exchanges are working to adopt a number of new rules and standards in order to implement the requirements of the Dodd-Frank Act discussed above.

Advisory Votes on Executive Compensation

Say-on-Pay and Say-on-Frequency

For larger public issuers, beginning with shareholder meetings occurring on or after January 21, 2011, Section 951 of the Dodd-Frank Act requires that issuers include a resolution in their proxy statements asking shareholders to approve, in a non-binding vote, the compensation of their executive officers, as disclosed under Item 402 of Regulation S-K. A separate resolution will also be required to determine whether this Say-on-Pay vote takes place every one, two, or three years.

On January 25, 2011, the SEC adopted rules for implementing Say-on-Pay and the related advisory vote on executive compensation provisions. The new rules and amendments to existing rules became effective on April 4, 2011, except that the Say-on-Golden Parachute requirements became effective for filings made on or after April 25, 2011, for all issuers.

A complete description of these rules, rule amendments and applicable SEC and Staff interpretations is provided in Chapter 2.

The applicable new rules and rule amendments are as follows:

- Rule 14a-21(a) requires that issuers must provide a separate shareholder advisory vote in proxy statements to approve the compensation of executives not less than every three years. In accordance with Section 14A(a)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), shareholders must vote, on an advisory basis, to approve the compensation of the issuer's named executive officers, as such compensation is disclosed under Item 402 of Regulation S-K, including the CD&A, the compensation tables and other narrative executive compensation disclosures required by Item 402. The rule does not require issuers to use any specific language or a specific form of resolution; however, an Instruction to the Rule 14a-21 provides a non-exclusive example of a form of resolution. The shareholder vote must relate to all executive compensation disclosure set forth pursuant to Item 402 of Regulation S-K, with the exception of disclosure provided pursuant to paragraph (s) of Item 402 of Regulation S-K and director compensation required by paragraph (k) or (r) of Item 402 of Regulation S-K;

- Rule 14a-21(b) requires that issuers must provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the vote on the compensation of executives required by Section 14A(a)(1) of the Exchange Act "will occur every 1, 2, or 3 years." This Say-on-Frequency vote is required not less frequently than once every six years;

- Item 24 of Schedule 14A requires disclosure that the issuer is providing the vote pursuant to Section 14A of the Exchange Act, as well as an explanation of the general effect of the Say-on-Pay votes (i.e., the vote is non-binding). Issuers also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur;

- Rule 14a-6(a) includes Say-on-Pay and Say-on-Frequency votes in the list of items that do not trigger the filing of a preliminary proxy;

- A Note to Rule 14a-8(i)(10) permits the exclusion of a shareholder proposal that would provide a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes in certain circumstances. Such shareholder proposals could be excluded under the Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. For the purposes of this Note, the SEC notes that an abstention would not count as a vote cast;
- An amendment to Item 402(b) of Regulation S-K requires an issuer to address, in the CD&A, whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation (as required by Exchange Act Section 14A or Exchange Act Rule 14a-20, which is the rule governing Say-on-Pay votes required for recipients of financial assistance under the Troubled Asset Relief Program, or "TARP") in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. This requirement is included among the "mandatory" CD&A disclosure items specified by Item 402(b)(1) of Regulation S-K; and
- An amendment to Item 5.07 of Form 8-K requires that an issuer must disclose its decision as to how frequently the issuer will conduct Say-on-Pay votes following each Say-on-Frequency vote. In order to comply with this requirement, an issuer must file an amendment to its prior Form 8-K filing (or filings) that disclosed the preliminary and final results of the Say-on-Frequency vote. The Form 8-K amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred. Specifically with respect to Say-on-Frequency votes, an issuer must disclose the number of votes cast for each of the choices, as well as the number of abstentions in Item 5.07 of Form 8-K.

Say-on-Golden Parachutes

Rule 14a-21(c) provides that if a solicitation is made by an issuer for a meeting of shareholders at which the shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the issuer, the issuer must provide a separate shareholder vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K. Consistent with Exchange Act Section 14A(b), any agreements or understandings between an acquiring company and the named executive officers of the issuer, where the issuer is not the acquiring company, are not required to be subject to the separate shareholder advisory vote.

If any of the agreements or understandings contemplated in Rule 14a-21(c) previously have been subject to a shareholder advisory vote or the Say-on-Pay vote, then a separate shareholder vote is not required at the time of the vote on the merger or other similar extraordinary transaction. If there are changes to the arrangements after the date of the annual meeting or if new arrangements are adopted that were not subject to a prior Say-on-Pay vote, then a Say-on-Golden Parachutes vote is still required. In that case, the vote is required only with respect to the amended golden parachute payment arrangements.

The SEC adopted new Item 402(t) of Regulation S-K, which requires disclosure of named executive officers' golden parachute arrangements in a proxy statement for shareholder approval of a merger, sale of a company's assets, or similar transactions. This disclosure is only required in annual meeting proxy statements when an issuer is seeking to rely on the exception from a separate merger proxy shareholder vote by including the proposed Item 402(t) disclosure in the annual meeting proxy statement soliciting a Say-on-Pay vote. The disclosure includes a table labeled "Golden Parachute Compensation," as well as detailed narrative disclosure about the arrangements pursuant to which the compensation is to be paid. The disclosure is also required under a variety of rules and forms; however, the SEC made clear that Item 402(t) disclosure is not required in third-party bidders' tender offer statements, so long as the subject transactions are not also Exchange Act Rule 13e-3 going-private transactions.

Compensation Committees and Compensation Consultants

The Dodd-Frank Act requires that stock exchange listing standards prescribe that a compensation committee may only select compensation consultants, legal counsel, or other advisers after taking into consideration independence standards established by the SEC. The Dodd-Frank Act requires that these independence factors include:

- The provision of other services by the person that employs the adviser;
- The amount of fees received as a percentage of an entity's total revenue;
- Policies and procedures designed to prevent conflicts of interest;

- Any business or personal relationship of the adviser with a member of the compensation committee; and
- Any stock of the company owned by an adviser.

Further, the compensation committee must be vested with direct authority for the appointment, compensation, and oversight of the work of the consultant. As a result, boards will need to revisit the compensation committee charter to reflect these new requirements when they become effective. Companies should also consider adopting specific policies that are designed to reduce or eliminate potential conflicts of interest with their compensation consultants and other advisers.

Enhanced disclosure will also be required by the SEC, addressing whether the compensation committee retained or obtained the advice of a compensation consultant and whether the consultant's work raised any conflicts of interest, the nature of any such conflict, and how it was addressed. In December 2009, the SEC adopted rules requiring disclosure of fees paid to compensation consultants when they provide executive compensation consulting and additional services. Any rules adopted under the Dodd-Frank Act could further expand such disclosure requirements.

Expanded Compensation Disclosure

Several provisions of the Dodd-Frank Act require that the SEC further expand the disclosure requirements applicable for proxy statements and other filings to address several areas of compensation with respect to employees, executive officers, and directors; including:

- <u>Disclosure of Pay versus Performance</u> – Section 953(a) of the Dodd-Frank Act requires that the SEC adopt rules mandating that issuers disclose the relationship of the compensation actually paid to their executive officers versus the issuer's financial performance, taking into account changes in the value of stock and dividends or distributions. This disclosure may be presented graphically or in narrative form.
- <u>Disclosure of CEO Pay versus Median Employee Pay</u> – Section 953(b) of the Dodd-Frank Act requires that the SEC adopt rules mandating disclosure of the median annual total compensation of all employees (except the CEO), the annual total compensation of the CEO, and the ratio of the median employee total compensation to the CEO total compensation. Total compensation is determined by reference to the "total compensation" column of the Summary Compensation Table.

- Disclosure of Employee or Director Hedging Policies – Section 955 of the Dodd-Frank Act directs the SEC to adopt rules mandating disclosure of whether any employee or director (or designee of such persons) is permitted to purchase financial instruments, such as prepaid variable forwards, equity swaps, collars, and exchange funds, that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director.

Additional Governance Requirements

Compensation Recovery

Section 954 of the Dodd-Frank Act requires that stock exchange listing standards be amended to require that issuers adopt a policy providing that, if an issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws, it will recover from any current or former executive officer who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date on which the issuer is required to prepare an accounting restatement, amounts based on the erroneous data, in excess of what would have been paid under the restatement. Additional disclosure will also be required of an issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws.

Other Governance Provisions

The Dodd-Frank Act includes a number of additional corporate governance provisions, including:

- Authorizing the SEC to promulgate "proxy access" rules, allowing specified shareholders to include director nominees in the issuer's proxy materials, but not prescribing specific standards for those rules (Section 971). The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, which were scheduled to become effective on November 15, 2010. However, Rule 14a-11 was vacated by U.S. Court of Appeals for the District of Columbia Circuit in July 2011;

- Directing the SEC to promulgate rules mandating proxy statement disclosure of the reasons why the issuer has chosen to have one person serve as Chairman and CEO, or to have different individuals serve in those roles

(Section 972). The SEC amended its disclosure rules in December 2009 to require a discussion of this topic and it appears that no further SEC rule-making will be completed on this topic; and

- Barring brokers from using discretionary authority to vote proxies in connection with election of directors, executive compensation, or other significant matters, as determined by the SEC (Section 957). Under changes already adopted by Rule 452 of the rules of the New York Stock Exchange, no broker discretionary voting is permitted for the election of directors and executive compensation matters.

The SEC's Rulemaking Schedule

The SEC recently released an updated schedule of upcoming activity with respect to its rulemaking activity under the Dodd-Frank Act. Pursuant to the SEC's schedule, proposed and adopted rules will be released as follows:

- January-June 2012 – Adopt exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence; and adopt disclosure rules regarding compensation consultant conflicts.

- January-June 2012 – Propose rules regarding disclosure of pay-for-performance, pay ratios, and hedging by employees and directors; propose rules regarding compensation recovery policies.

- July-December 2012 – Adopt rules regarding disclosure of pay-for-performance, pay ratios, and hedging by employees and directors; adopt rules regarding compensation recovery policies.

CHAPTER 2

SAY-ON-PAY IN 2012

SAY-ON-PAY IN 2012

Advisory Votes on Executive Compensation – Rules and Guidance

Introduction

Say-on-Pay was one of the most highly anticipated corporate governance developments in the United States. Say-on-Pay has been utilized in other jurisdictions, such as in the United Kingdom, where Say-on-Pay has encouraged greater engagement between issuers and institutional investors over compensation and governance issues. Advocates of Say-on-Pay in the United States hoped that the advisory votes will encourage greater accountability for executive compensation decisions through a direct shareholder referendum, more focused disclosure in proxy statements and significantly expanded shareholder engagement.

The Say-on-Pay and Say-on-Frequency requirements were effective for larger public companies for annual meetings on or after January 21, 2011. The SEC's implementing rules, adopted on January 25, 2011, became effective on April 4, 2011 (with the exception of golden parachute requirements, which became effective for filings made on or after April 25, 2011). Smaller reporting companies are exempt from the Say-on-Pay and Say-on-Frequency vote requirements until the first annual meeting or other meeting of shareholders occurring on or after January 21, 2013.

The Dodd-frank Act Requirements

Section 951 of the Dodd-Frank Act, which added new Section 14A to the Exchange Act, requires that issuers include a resolution in their proxy statements (at least once every three years) asking that shareholders approve, in a nonbinding vote, the compensation of the executive officers, as disclosed under Item 402 of Regulation S-K, the Say-on-Pay vote.

A separate resolution is required (at least once every six years) to determine whether the Say-on-Pay vote takes place every one, two, or three years—the Say-on-Frequency vote.

If golden parachute compensation has not been approved as part of a Say-on-Pay vote, then issuers must solicit shareholder approval of golden parachute compensation through a separate nonbinding vote at the meeting where the shareholders are asked to approve a merger or similar extraordinary transaction that would trigger payments under the "golden parachute" provisions, the Say-on-Golden Parachute vote.

Section 14A also requires that any proxy statement used for soliciting the Say-on-Golden Parachute vote must include "clear and simple" disclosure of the golden parachute arrangements or understandings and the amounts payable.

In order to implement these requirements, the SEC adopted, in Release No. 33-9178 (January 25, 2011) (the "Adopting Release"), new Exchange Act Rule 14a-21, which governs advisory votes on executive compensation going forward (with the exception of those issuers that have indebtedness outstanding under the TARP program, who must solicit annual Say-on-Pay votes under the Emergency Economic Stabilization Act, as amended ("EESA"), and Exchange Act Rule 14a-20). The SEC also adopted a number of additional rule, form and schedule changes to accommodate the new Say-on-Pay, Say-on-Frequency and Say-on-Golden Parachute votes.

Say-on-Pay Votes

Rule 14a-21(a) provides that if a solicitation is made by an issuer relating to an annual or other meeting of shareholders at which directors will be elected and for which the SEC's rules require executive compensation disclosure pursuant to Item 402 of Regulation S-K, then the issuer must conduct a Say-on-Pay vote, and a Say-on-Pay vote must occur thereafter no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding Say-on-Pay vote. The Say-on-Pay vote relates to the executive compensation disclosure required to be included in the proxy statement, which generally includes the CD&A, the compensation tables, and the narrative disclosure on executive compensation.

The SEC states in footnote 18 of the Adopting Release that it views Section 951 of the Dodd-Frank Act as requiring a separate shareholder vote on executive compensation only with respect to "an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting." Accordingly, Rules 14a-21(a) and 14a-21(b) (governing the Say-on-Frequency vote, as discussed below) are intended to apply in connection with the election of directors when the related proxy materials must include executive compensation disclosure.

The key Say-on-Pay rules and interpretations are as follows:

- Director Compensation and Risk Disclosure Not Covered. Instruction 1 to Rule 14a-21 provides that the Say-on-Pay vote does not cover director compensation disclosed pursuant to paragraphs (k) and (r) of Item 402 of

Regulation S-K, as well as any disclosure pursuant to Item 402(s) of Regulation S-K about the issuer's compensation policies and practices as they relate to risk management and risk-taking incentives. However, if risk considerations are a material aspect of the issuer's compensation policies or decisions for named executive officers, then the Instruction indicates that the company must discuss these considerations as part of the CD&A, and such disclosure will then be subject to the Say-on-Pay vote.

- Wording of the Say-on-Pay Resolution. Rule 14a-21(a) does not require that issuers use a specific form of resolution. However, the Instruction to Rule 14a-21(a) provides the following nonexclusive example that would satisfy the requirements of the rule: "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including Compensation Discussion and Analysis, compensation tables, and narrative discussion, is hereby APPROVED."

  While the SEC has provided this nonexclusive example of a form of resolution, the SEC states in the Adopting Release that issuers "should retain the flexibility to craft the resolution language." It is likely that issuers will adopt differing language in order to present their Say-on-Pay vote, including perhaps language that is not presented as a resolution to be adopted by shareholders.

  In Exchange Act Rules Compliance and Disclosure Interpretations Question 169.05, the SEC Staff has indicated that it is permissible for the Say-on-Pay vote to omit the words, "pursuant to Item 402 of Regulation S-K," and to replace those words with a plain English equivalent, such as "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement."

- Wording of the Description of the Say-on-Pay Proposal on the Proxy Card. In Exchange Act Rules Compliance and Disclosure Interpretation 169.07, the SEC Staff notes that an issuer's proxy card and voting instruction form should not describe the advisory vote to approve executive compensation with the language "to hold an advisory vote on executive compensation," and should rather use formulations such as: "to approve the company's executive compensation;" "advisory approval of the company's executive compensation;" "advisory resolution to approve executive compensation;" or "advisory vote to approve named executive officer compensation." The SEC Staff states that impermissible example referenced above would not be consistent with Rule 14a-21 because it is not clear from the description as to what shareholders are being asked to vote on.

Say-on-Frequency Votes

Rule 14a-21(b) provides that if a solicitation is made by an issuer relating to an annual or other meeting of shareholders at which directors will be elected, and for which the SEC's rules require executive compensation disclosure pursuant to Item 402 of Regulation S-K, then that issuer must conduct a Say-on-Frequency vote for its first annual or other meeting of shareholders occurring on or after January 21, 2011, and that such Say-on-Frequency vote must occur thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding Say-on-Frequency vote. An issuer could hold a Say-on-Frequency vote more frequently than every six years if it elects to do so.

The key Say-on-Frequency rules and interpretations are as follows:

- Say-on-Frequency Choices. Under Rule 14a-21(b), the required Say-on-Frequency resolution must ask shareholders to indicate whether future Say-on-Pay votes should occur every one, two or three years. As a result, shareholders are given four choices on the proxy card: whether the Say-on-Pay vote will take place every one, two, or three years, or to abstain from voting on the resolution. In order to implement the voting choices for the Say-on-Frequency vote, the SEC amended Exchange Act Rule 14a-4 to specifically allow proxy cards to reflect the choices of one, two, or three years, or abstain.

- Wording of the Say-on-Frequency Resolution. Rule 14a-21(b) does not require that issuers use a specific form of resolution. Unlike the Say-on-Pay vote requirement in Rule 14a-21(a), the SEC does not provide a nonexclusive example of a Say-on-Frequency resolution. Exchange Act Rules Compliance and Disclosure Interpretations Question 169.04 indicates that the Say-on-Frequency vote need not be set forth as a resolution. Separately, the Staff has informally cautioned that the Say-on-Frequency vote must be clearly stated, and that in this regard it must be clear that shareholders can vote on the options of every one, two or three years (or abstain from voting), rather than solely following management's recommendation (if any is provided). Issuers relied on this Staff guidance to provide more Say-on-Frequency votes in a "proposal" format, such as by simply referencing the four choices that are available on the proxy card. The Staff also indicates in Compliance and Disclosure Interpretations Question 169.06 that it is permissible for the Say-on-Frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years, or abstain."

- Recommendations. Neither Rule 14a-21(b) nor the SEC's other proxy rules require that an issuer make a recommendation with respect to the

Say-on-Frequency vote; however, the SEC notes that proxy holders may vote uninstructed proxy cards in accordance with management's recommendation only if the company follows the existing requirements of Rule 14a-4, which include specifying how proxies will be voted (i.e., in accordance with management's recommendations) in the absence of instruction from the shareholder. Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes annually.

ADDITIONAL REQUIREMENTS

The SEC has adopted other changes to rules and forms relating to Say-on-Pay and Say-on-Frequency, including:

- No Preliminary Proxy Statement. The SEC amended Exchange Act Rule 14a-6(a) to add any shareholder advisory votes on executive compensation, including the Say-on-Pay or Say-on-Frequency votes, to the list of items that will not trigger the requirement to file a preliminary proxy statement with the SEC. This amendment contemplates an advisory vote on executive compensation that is not required by Section 14A of the Exchange Act.

- Proxy Statement Disclosures. Item 24 to Schedule 14A requires disclosure, in the proxy statement in which the issuer is providing a Say-on-Pay, Say-on-Frequency or Say-on-Golden Parachute vote, that the issuer is providing such vote as required pursuant to Section 14A of the Exchange Act. Further, the issuer must explain the general effect of such vote, such as that the vote is non-binding. Issuers also must disclose, when applicable, the current frequency of Say-on-Pay votes and when the next Say-on-Pay vote will occur.

- CD&A Disclosure. Amended Item 402(b)(1) of Regulation S-K requires an issuer to address in its CD&A whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation (as required by Section 14A of the Exchange Act or Exchange Act Rule 14a-20, which is the rule governing Say-on-Pay votes required for recipients of financial assistance under TARP) in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. This requirement is included among the "mandatory" CD&A disclosure items specified by Item 402(b)(1) of Regulation S-K.

- Item 5.07 Form 8-K. Item 5.07 of Form 8-K, as amended, requires that an issuer must disclose its decision as to how frequently the issuer will conduct Say-on-Pay votes following each Say-on-Frequency vote. If an issuer does not disclose the issuer's frequency determination in its initial Item 5.07 Form 8-K, then the issuer must file an amendment to its prior Form 8-K filing (or filings) that disclose the preliminary and final results of the Say-on-Frequency vote. The Form 8-K amendment is due no later than 150 calendar days after the date of the end of the annual meeting in which the Say-on-Frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals as disclosed in the proxy materials for the meeting at which the Say-on-Frequency vote occurred. An issuer must disclose in Item 5.07 of Form 8-K the number of votes cast for each of the choices of every one, two or three years, as well as the number of abstentions.

- Substantially Implemented Shareholder Proposals. The SEC added a Note to Exchange Act Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal as "substantially implemented" if the proposal would provide for a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes. Such shareholder proposals may be excluded under the new Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of the votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. The Staff has noted that this Note will also apply to shareholder proposals seeking votes on matters that are already "subsumed" within the Say-on-Pay or Say-on-Frequency vote, not just a Section 14A-compliant Say-on-Pay/ Say-on-Frequency proposal.

Say-on-Golden Parachute Vote

Rule 14a-21(c) provides that if a solicitation is made by the issuer for a meeting of shareholders at which the shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the issuer, then the issuer must provide a separate shareholder vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K. However, if such agreements or understandings have been subject to a shareholder advisory vote under Rule 14a-21(a) (the Say-on-Pay vote), then a separate shareholder vote is not required. Consistent with Exchange Act Section 14A(b), any agreements or understandings between an acquiring company and the named executive officers of the issuer, where the issuer is not the acquiring company, are not required to be subject to the separate shareholder advisory vote. The SEC did not adopt any specific form of the Say-on-Golden Parachute resolution and has clarified the advisory nature of the Say-on-Golden Parachute vote.

The rule provides as follows:

- New Item 402(t) of Regulation S-K requires disclosure of named executive officers' golden parachute arrangements in a proxy statement for shareholder approval of a merger, sale of a company's assets or similar transactions. This Item 402(t) disclosure is only required in annual meeting proxy statements when an issuer is seeking to rely on the exception from a separate merger proxy shareholder vote by including the proposed Item 402(t) disclosure in the annual meeting proxy statement soliciting a Say-on-Pay vote.
- Golden parachute compensation must be disclosed in a table along with accompanying footnotes and narrative disclosure. This new table is set forth below:

Golden Parachute Compensation

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ Benefits ($) (e)	Tax Reimburse-ment ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

- The table requires quantification of:
  - cash severance payments;
  - the value of equity awards that are accelerated or cashed out;
  - pension and nonqualified deferred compensation enhancements;
  - perquisites and other personal benefits;

- tax reimbursements; and
- in the "Other" column, any additional compensation that is not included in any other column.

- Separate footnote identification is required for amounts attributable to "single-trigger" and "double-trigger" arrangements.
- The table requires quantification with respect to any type of compensation, whether present, deferred or contingent, that is based on or relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets.
- Item 402(t) of Regulation S-K also requires issuers to describe any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach.
- Disclosure of the specific circumstances that would trigger payment, whether the payments would be lump sum, or annual, and their duration, and by whom the payments would be provided, and other material factors regarding each agreement is also required.
- Separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table (unless such benefits are enhanced in connection with the transaction), previously vested equity awards and compensation from bona fide post-transaction employment agreements entered into in connection with the merger or acquisition is not required.

In Regulation S-K Compliance and Disclosure Interpretations Question 128B.01, the Staff provides the following guidance regarding the application of Item 402(t):

> **Question:** Instruction 1 to Item 402(t)(2) provides that Item 402(t) disclosure will be required for those executive officers who were included in the most recently filed Summary Compensation Table. If a company files its annual meeting proxy statement in March 2011 (including the 2010 Summary Compensation Table), hires a new principal executive officer in May 2011 and prepares a merger proxy in September 2011, may the

company rely on this instruction to exclude the new principal executive officer from the merger proxy's say-on-golden parachute vote and Item 402(t) disclosure?

Answer: No. Instruction 1 to Item 402(t) specifies that Item 402(t) information must be provided for the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of Regulation S-K. Instruction 1 to Item 402(t)(2) applies only to those executive officers who are included in the Summary Compensation Table under Item 402(a)(3)(iii), because they are the three most highly compensated executive officers other than the principal executive officer and the principal financial officer. Under Items 402(a)(3)(i) and (ii), the principal executive officer and the principal financial officer are, per se, named executive officers, regardless of compensation level. Consequently, Instruction 1 to Item 402(t)(2) is not instructive as to whether the principal executive officer or principal financial officer is a named executive officer. This position also applies to Instruction 2 to Item 1011(b), which is the corresponding instruction in Regulation M-A.

Additional forms, schedules and disclosure requirements have been amended in order to address golden parachute compensation, such as Schedule 14A, Schedule 14C, Forms S-4 and F-4, Schedule 14D-9, Schedule 13E-3 and Item 1011 of Regulation M-A. The SEC adopted an amendment to Schedule TO in order to clarify that Item 402(t) disclosure is not required in a third-party bidders' tender offer statement, so long as the subject transaction is not also Rule 13e-3 going private transaction. Issuers filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide the disclosure required by Item 402(t) of Regulation S-K.

Exemption for Smaller Reporting Companies

"Smaller reporting companies," as defined in SEC rules, will not be subject to the Say-on-Pay or Say-on-Frequency requirements and the SEC's related rules until the first annual meeting or other meeting of shareholders at which directors will be elected, and for which executive compensation disclosure is required, occurring on or after January 21, 2013.

The temporary exemption does not apply to the Say-on-Golden Parachute vote requirement under Exchange Act Section 14A and the SEC's rules.

Background Regarding Smaller Reporting Company Rules

A "smaller reporting company" is generally defined for the purposes of its initial testing as an issuer that has a public float of less than $75 million or, in the case of an issuer that has no public float, has annual revenues of less than $50 million. A reporting issuer with a public float determines eligibility as a smaller reporting company as of the last business day of its most recently completed second fiscal quarter, calculating its float by multiplying (i) the aggregate worldwide number of shares of its (voting and non-voting) common equity held by non-affiliates by (ii) the price at which the common equity was last sold, or the average of the bid and asked prices, in the principal market. With respect to any issuer that is above the smaller reporting company threshold at the time of its initial testing, when that issuer subsequently tests annually for smaller reporting company status, the applicable thresholds are: (i) less than $50 million public float or, in the case of an issuer that has no public float; and (ii) annual consolidated revenues of less than $40 million during its previous fiscal year. The rules contemplate an annual testing of smaller reporting company status, consistent with the annual testing for non-accelerated filer, accelerated filer and large accelerated filer status.

In general, smaller reporting companies are not required to provide as much executive compensation disclosure as is required for companies that do not qualify for the smaller reporting company reporting regime. The following differences exist between the smaller reporting company requirements and the requirements applicable to larger issuers in Items 402 and 407 of Regulation S-K:

- The number of named executive officers that is required to be disclosed is reduced, in that smaller reporting companies only have to report in the Summary Compensation Table the compensation for the principal executive officer and the two most highly compensated executive officers other than the principal executive officer who are serving at the end of the last completed fiscal year and whose total compensation exceeds $100,000, as well as two additional individuals for whom disclosure would have been provided, except for the fact that they were not serving as executive officers at the end of the fiscal year;

- The smaller reporting company requirements require information in the Summary Compensation Table for the last two completed fiscal years, rather than the last three completed fiscal years as required for larger issuers; in addition, the Summary Compensation Table under the smaller reporting company requirements does not require the inclusion of the change in actuarial pension plan value;

- The smaller reporting company requirement mandates additional narrative requirements with regard to the Summary Compensation Table to explain some of the items of compensation;
- The Outstanding Equity Awards at Fiscal Year-End Table is required under the smaller reporting company rules, and some additional narrative disclosure is required about items such as retirement benefits and the material terms of contracts that would provide for benefits upon termination and change of control;
- The CD&A, the Grants of Plan-Based Awards Table, the Option Exercises and Stock Vested Table, the Non-Qualified Deferred Compensation Table, the Pension Benefits Table and the Compensation Committee Report are not required under the smaller reporting company rules;
- The disclosure required by Item 402(s) regarding the relationship of compensation and risk is not required for smaller reporting companies; and
- The Director Compensation Table is required under both the rules applicable to smaller reporting companies and the rules applicable to larger issuers.

No changes were made to the scaled disclosure requirements as a result of the Say-on-Pay and Say-on-Frequency votes, and thus smaller reporting companies will not be required to include a CD&A in order to comply with Rule 14a-21 when it is applicable to them. Pursuant to Item 402(o) of Regulation S-K, however, smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information in the Summary Compensation Table; therefore, if consideration of prior Say-on-Pay votes is such a factor, disclosure would be required.

Transition Issues for Smaller Reporting Companies

When a non-smaller reporting company first drops below the applicable threshold, the issuer may immediately transition to smaller reporting company scaled disclosure discussed above beginning with the Form 10-Q covering that second fiscal quarter-end measurement date establishing the issuer's status as a smaller reporting company, although the smaller reporting company status does not begin until the beginning of the next fiscal year. If the issuer decides to immediately transition to smaller reporting company status, then the issuer would begin checking the smaller reporting company box on the cover page of the second quarter Form 10-Q. The rules provide that, when a smaller reporting company's annual testing determines that it is no longer a smaller reporting company, the issuer must transition to the regular reporting system, beginning with the Form 10-Q for the first fiscal quarter of the next fiscal year after the determination date.

In Question 104.13 of the Exchange Act Forms Compliance and Disclosure Interpretations, the Staff presents a scenario where an issuer files its 2008 Form 10-K using the disclosure permitted for smaller reporting companies under Regulation S-K, and the cover page of the Form 10-K indicates that the issuer will no longer qualify to use the smaller reporting company disclosure for 2009, because its public float exceeded $75 million at the end of its second fiscal quarter in 2008. The issuer proposes to rely on General Instruction G(3) to incorporate by reference executive compensation and other disclosure required by Part III of Form 10-K into the 2008 Form 10-K from its definitive proxy statement to be filed not later than 120 days after its 2008 fiscal year end. The Staff indicates that, in these circumstances, the issuer may use smaller reporting company disclosure in this proxy statement, even though it does not qualify to use smaller reporting company disclosure for 2009. In the Staff's view, this is because the issuer could have used the smaller reporting company disclosure for Part III of its 2008 Form 10-K if it had not used General Instruction G(3) to incorporate that information by reference from the definitive proxy statement.

On February 11, 2011, the Staff of the SEC's Division of Corporation Finance issued a number of Compliance and Disclosure Interpretations to explain how the Say-on-Pay/Say-on-Frequency exemption for smaller reporting companies will apply. The interpretations are as follows:

- **Exchange Act Rules Compliance and Disclosure Interpretations Question 169.01:**
  Question: Based on its $30 million public float as of the last business day of the second quarter in 2010, an issuer with a December 31 fiscal year end is permitted to begin filing reports as a smaller reporting company with its Form 10-Q for the second quarter in 2010. The issuer has opted to continue complying with the reporting requirements for larger companies until its Form 10-Q for the first quarter in 2011 and therefore will not

check the “Smaller Reporting Company” box on the cover of any periodic report until that Form 10-Q. Is the issuer entitled to rely on the delayed phase-in period for smaller reporting companies for compliance with Rule 14a-21, even though it has not indicated its status as a smaller reporting company by checking the “Smaller Reporting Company” box on a periodic report before January 21, 2011 (the date provided in the Commission release for eligibility for the smaller reporting company delayed phase-in period)?

Answer: Yes. An issuer that is a smaller reporting company as of January 21, 2011 is entitled to rely on the delayed phase-in period for smaller reporting companies. Each issuer determines its eligibility for smaller reporting company status for 2011 on the basis of its public float or annual revenue as of the last business day of the second fiscal quarter of 2010. Although an issuer is permitted to early adopt its status as a smaller reporting company, it takes that status on the first day of 2011. Accordingly, in this example, on January 1, 2011, the issuer is a smaller reporting company, even though it is not required to indicate as such until its Form 10-Q for the first quarter of 2011.

- **Exchange Act Rules Compliance and Disclosure Interpretations Question 169.02:**
  Question: Based on its $100 million public float as of the last business day of the second quarter in 2010, an issuer with a December 31 fiscal year end will be required to report under non-smaller reporting company disclosure provisions beginning with the Form 10-Q for the first quarter in 2011. Does this issuer qualify as a smaller reporting company as of January 21, 2011, thus entitling it to rely on the delayed phase-in period for smaller reporting companies for compliance with Rule 14a-21?

  Answer: No. Each issuer determines its eligibility for smaller reporting company status for 2011 on the basis of its public float or annual revenue as of the last business day of the second fiscal quarter of 2010. If an issuer with a December 31 fiscal year end is no longer eligible to be a smaller reporting company, it loses that status on the first day of 2011, even though it is permitted to file its Form 10-K for 2010 in 2011 as a smaller reporting company. Accordingly, in this example, on January 1, 2011, the issuer is no longer a smaller reporting company, even though it can check the "Smaller Reporting Company" box on the cover of its Form 10-K for fiscal year 2010. The issuer will not be permitted to check the "Smaller Reporting Company" box on the cover of its Form 10-Q for the first quarter of 2011.

- **Exchange Act Rules Compliance and Disclosure Interpretations Question 169.03:**
  Question: Based on its $100 million public float as of September 30, 2010, which is the last business day of its second fiscal quarter in 2010, an issuer with a March 31 fiscal year end that has been reporting as a smaller reporting company will be required to report under non-smaller reporting company disclosure provisions beginning with the Form 10-Q for its first fiscal quarter in 2011, which begins on April 1, 2011. Does this issuer qualify as a smaller reporting company as of January 21, 2011, thus entitling it to rely on the delayed phase-in period for smaller reporting companies for compliance with Rule 14a-21?

  Answer: Yes. This issuer would continue to qualify as a smaller reporting company until April 1, 2011 (the first day of its next fiscal year). As of January 21, 2011, this issuer would be a smaller reporting company eligible for the delayed phase-in period.

Interaction with the TARP Say-on-Pay Requirements

For those issuers that have received financial assistance under the TARP and who have indebtedness outstanding under TARP, the vote to approve executive compensation under Rule 14a-20 would satisfy the Say-on-Pay vote requirement. Once these issuers have repaid all outstanding indebtedness under TARP, they would have to include a Say-on-Pay vote under Exchange Act Section 14A and Rule 14a-21(a) for the first annual meeting after the issuer has repaid all outstanding indebtedness. These issuers would not have to provide for a Say-on-Frequency vote as long as they still have indebtedness outstanding under TARP, given that the EESA already requires an annual Say-on-Pay vote for TARP recipients.

The Say-on-Pay Experience in 2011

The implementation of Say-on-Pay votes was one of the most widely-anticipated corporate governance developments in the United States over the past five years. Advocates for Say-on-Pay in the United States hoped that the advisory votes on executive compensation would serve to encourage greater accountability for executive compensation decisions, as well as more focused compensation disclosure in proxy statements and expanded shareholder engagement.

During the 2011 proxy season, approximately forty companies failed to achieve majority shareholder support for mandatory Dodd-Frank Say-on-Pay resolutions. The high level of shareholder support for Say-on-Pay resolutions during the 2011 proxy season was similar to the experience in the recent past with respect to those companies who held Say-on-Pay votes on a voluntary basis, or because the company was required to hold a Say-on-Pay vote because it had outstanding indebtedness under TARP. In the vast majority of those situations, shareholders have provided strong support for Say-on-Pay proposals, absent some significant concerns with the company's executive compensation programs. Even with the likelihood of shareholder support relatively high for Say-on-Pay resolutions, companies paid very close attention to the message communicated through their CD&A and other disclosures, while at the same time seeking to engage with key shareholder constituencies.

Disclosure for Say-on-Pay

In many ways, the disclosure that is provided in the proxy statement remains the key point of engagement with shareholders on executive compensation issues. The Say-on-Pay vote caused many companies to streamline and clarify their CD&A disclosure to facilitate utilizing the CD&A to explain why shareholders should support the Say-on-Pay vote. In addition, companies have sought to emphasize the overall "pay for performance" message in the CD&A and throughout the executive compensation disclosure in the proxy statement. To this end, many companies began the CD&A with an "Executive Summary" or "Overview" section. The Executive Summary has proven to be an effective way of communicating the key executive compensation information that shareholders need to make an informed decision on the Say-on-Pay votes. An effective Executive Summary should include:

- A brief description of the company's financial and business results for the last completed fiscal year, focusing in particular on measures of performance that are relevant to determining the compensation for the named executive officers, while complying with any applicable requirements with respect to the use of non-GAAP measures (see Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 108.01);
- A discussion of how the issuer's results have impacted executive compensation decisions in the last fiscal year;

- A list of important compensation actions during the last completed fiscal year, including the actions with respect to the CEO and the other named executive officers; and
- A discussion of significant compensation policies and practices implemented or revised, as well as any pre-existing governance and compensation-setting procedures, which demonstrate the issuer's "pay for performance" philosophy and commitment to compensation and corporate governance best practices.

Companies have also been utilizing graphic presentations in the Executive Summary and in the rest of the CD&A as a means of effectively highlighting the issuer's business results and relating those results to the compensation decisions.

An overriding theme has been the relationship between pay and performance. As a result, the Executive Summary and the remainder of the CD&A often focused on how the compensation programs have aligned pay and performance, which necessitated fulsome disclosure about the performance target measures used to determine the level of performance, as well as more detailed disclosure concerning the individual achievements of the named executive officers when such performance is an element pursuant to which compensation is determined.

Disclosures in the 2011 proxy season also included more discussion of how the compensation committee considered the relationship between compensation programs and risks arising for the company in the course of making decisions and taking actions with respect to compensation. This area of focus will likely continue to drive more detailed disclosure in proxy statements about the relationship between compensation and risk.

Many companies addressed the adoption or revision of some key compensation policies, including stock ownership and equity holding policies, compensation recovery policies, policies limiting perquisites and other personal benefits and policies with respect to limiting severance and post-retirement benefits.

Say-on-Pay Engagement

Active engagement with shareholders on executive compensation and corporate governance issues is one of the expected results of a Say-on-Pay vote. Companies have explored a variety of approaches to accomplish effective engagement with shareholders.

Direct Interaction with Shareholders

Some companies elected to conduct a “road show” focused on (or including as a component) executive compensation and corporate governance matters. These road shows typically took place in advance of the filing of the proxy statement (*e.g.*, 30-60 days before the proxy statement filing) and were conducted in person or via teleconference, typically involving both portfolio managers and voting analysts at institutional investors and senior level management, and in some cases, a director from the company. The road shows are largely designed to be informational, rather than serving to actively solicit any vote on expected proposals for the annual meeting, which could present solicitation issues under the SEC’s proxy rules. Participants in these engagement activities usually address publicly-disclosed corporate governance and executive compensation initiatives demonstrating the company’s responsiveness to shareholders, pay-for-performance considerations and the issuer’s continuing attention to shareholder concerns (if any) on corporate governance and executive compensation issues. Participants typically avoid discussing material non-public information about the issuer’s performance or plans for corporate governance and executive compensation program changes.

In the 2011 proxy season, a group of large institutional investors requested that some large companies hold a “fifth analyst call” to focus on executive compensation and corporate governance issues. The fifth analyst call would take place after a company mailed its proxy statement, but before the annual meeting. The institutional investor proposal for a fifth analyst call sought board member involvement in the call, such as the chairman of the board or the lead independent director.

The Use of Additional Soliciting Material

In a number of situations during the proxy season, Say-on-Pay voting led to the filing of additional soliciting material (filed as under the submission type “DEFA14A” on the SEC’s EDGAR filing system) by companies during the period of time between the mailing of the proxy statement and the annual meeting. In many of these situations, the additional soliciting material responded to an adverse Say-on-Pay recommendation made by a proxy adviser, either ISS or Glass, Lewis & Co. Companies used the additional soliciting material to identify errors or flaws in the analysis underlying the proxy adviser’s recommendation, while at the same time providing arguments as to why the Say-on-Pay proposal should be supported. The use of the additional soliciting material, along with active engagement efforts, most often led to a successful Say-on-Pay vote –

approximately 12-13% of recommendations made by proxy advisers were against the Say-on-Pay proposal, while fewer than 2% of companies failed to obtain majority support in the Say-on-Pay vote during the 2011 proxy season.

A significant proportion of the additional soliciting material filed by companies related to a Say-on-Pay vote responded to an adverse Say-on-Pay recommendation driven in whole or in part by a CEO "pay-for-performance disconnect," as determined under an analytical framework developed by ISS. The ISS CEO pay-for-performance policy is applicable to Russell 3000 companies, and in 2011, ISS generally screened for a company which has total shareholder returns (as determined by adding stock price appreciation and dividends) over the past 1- and 3- fiscal years below the median level of similar returns for the company's industry "peers," as determined by the issuer's 4-digit GICS grouping. If both the 1- and 3-year returns are below the industry median, then ISS looks to the CEO's "Total Direct Compensation" ("TDC"), as determined by ISS by computing the sum of the salary, bonus, non-equity incentive plan compensation, change in pension and above-market non-qualified deferred compensation earnings and all other compensation directly from the Summary Compensation Table, plus the value of equity awards as calculated by Equilar using their own assumptions. If CEO TDC has not significantly decreased in the last year, then ISS does further analysis, looking at, among other things, the alignment between shareholder returns and CEO TDC over the past five years. Companies complained in additional soliciting material about the limitations of the ISS pay-for-performance analysis, in particular that the GICS peer groups did not match with the issuer's actual peers, the Equilar option valuation was significantly different than the company's determination of grant date fair value as reported in the Summary Compensation Table, TSR represents too narrow of a performance measure, the evaluation time horizon (one and three years) was too short, the analytical approach didn't factor in more recent performance or pay changes, and the ISS approach otherwise failed to capture aspects of a company's compensation program that warranted special attention. Some companies specifically pointed out errors in the ISS or Glass Lewis reports, such as how the proxy adviser may have mistakenly interpreted gross-up provisions or performance-based equity awards, calling into question the basis for the recommendation and providing shareholders with more accurate information on which to base a voting decision. In some situations, the additional soliciting material provided additional information relevant to supporting a vote for Say-on-Pay, rather than specifically addressing the recommendation of a proxy adviser.

Say-on-Frequency Recommendations and Voting

Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes every year. In approximately half of those cases where issuers recommended a once every three years frequency, shareholders supported an annual Say-on-Pay vote, notwithstanding the once every three years recommendation. In the relatively few situations where the board recommended a Say-on-Pay vote once every two years, an annual frequency for Say-on-Pay voting was favored in approximately 65 percent of those cases. In the few circumstances where no recommendation from the board was provided, shareholders mostly supported an annual Say-on-Pay vote.

Proxy advisory firms ISS and Glass Lewis will only recommend voting for an annual Say-on-Pay vote frequency. Some institutional investors that do not follow ISS or Glass Lewis recommendations also adopted policies supporting annual Say-on-Pay votes. However, a few institutional investors adopted policies providing support for Say-on-Pay votes that occur once every three years. Given these circumstances, obtaining the plurality or majority support of shareholders for an “every three years” or an “every two years” Say-on-Pay voting interval became increasingly difficult as the 2011 proxy season unfolded.

Considerations for the Frequency of the Say-on-Pay Vote

The following summarizes some of the key considerations for determining what Say-on-Pay voting frequency to recommend to shareholders.

A Vote of Once Every Year – Positive Considerations:

- A vote that occurs every year could make the Say-on-Pay vote less of a significant event from a shareholder’s perspective, which could make it more routine, similar to the ratification of auditors.
- With a Say-on-Pay vote occurring once every year, shareholders are able to express their views on an annual basis, which may mean that they will be less concerned with the issuer’s compensation policies, practices and decisions than if they were only able to vote once every two or three years.
- In 2010, ISS implemented a policy that it will continue to follow in 2012 (commonly referred to as the “yellow card/red card approach”) which

provides that, for those issuers submitting a Say-on-Pay vote to shareholders, ISS will first recommend against the Say-on-Pay resolution if there is an issue with executive compensation, and then if the issue is not addressed by the next meeting, ISS will then recommend against the election of compensation committee members. This approach is discussed in more detail in "Chapter 4: Shareholder Activism and Corporate Governance."

- ISS and Glass Lewis will only recommend for an annual Say-on-Pay vote frequency.
- Proxy advisers such as ISS, certain investors and commentators view an annual vote on executive compensation as a good corporate governance practice and may therefore be less likely to target issuers which provide for an annual Say-on-Pay vote.

A Vote of Once Every Year – Negative Considerations:

- Certain institutional investors have sought a Say-on-Pay vote once every two or three years, in recognition of the fact that it may be very difficult for investors to deal with the volume of work necessary to make an informed decision on a Say-on-Pay vote.
- Engagement with institutional investors on compensation issues may be difficult to do on an annual basis, given that so many issuers will likely be seeking to engage with institutional investors in advance of a Say-on-Pay vote.
- In the event that an issuer gets a negative vote, it will have to very quickly adjust its compensation policies and practices in order to have the changes take effect and be considered in advance of the next Say-on-Pay vote.

A Vote of Once Every Two or Three Years – Positive Considerations:

- A Say-on-Pay vote occurring once every two or three years allows proxy advisers and institutional investors more time to review and analyze the executive compensation program and practices between votes, so that those parties can better formulate their views on an issuer's executive compensation.
- The frequency of once every two or three years could potentially provide the issuer with more time to address compensation concerns through the engagement process with shareholders and through changes to compensation policies and practices.

- A Say-on-Pay vote occurring once every two or three years allows institutional investors to better evaluate the effectiveness of long-term incentive components of compensation, given that the interval between votes more closely aligns with performance cycles and allows a more meaningful comparison between compensation and performance.
- A Say-on-Pay vote occurring once every two or three years allows an issuer the option to bring a Say-on-Pay vote on a more frequent basis if it wants to do so, because the vote on the frequency of voting is non-binding.

A Vote of Once Every Two or Three Years – Negative Considerations:

- A vote of once every two or three years may be portrayed negatively in the press, because it does not provide investors with an annual voice with respect to compensation issues and thereby may be seen as implying that an issuer is attempting to hide something from shareholders.
- A Say-on-Pay vote occurring once every two or three years is less likely to receive institutional investor support.
- ISS and Glass Lewis will only recommend for an annual Say-on-Pay vote frequency.
- A Say-on-Pay vote occurring once every two or three years could expose members of the compensation committee to recommendations against them in a year when no Say-on-Pay vote is on the ballot.
- A vote occurring every two or three years may be viewed by some proxy advisers, investors and commentators as a poor corporate governance practice because it does not provide investors with an annual voice on compensation issues.
- Voting on Say-on-Pay once every two or three years potentially makes the resolution appear to have more significance, because the resolution is not presented on a more frequent basis to shareholders, and there is more time for shareholders and proxy advisers to organize opposition to the issuer's Say-on-Pay vote.

Say-on-Golden Parachute Compensation Disclosure and Voting

A company seeking to avoid an advisory vote on golden parachute compensation in connection with a future vote on a merger or similar extraordinary transaction may voluntarily include the Item 402(t) tabular and narrative disclosures in the proxy statement for an annual meeting at which a Say-on-Pay vote will be held under the Dodd-Frank Act and the SEC's rules. However, if there are changes to the arrangements after the date of the vote or if new arrangements are entered into that were not subject to a prior Say-on-Pay vote, then a separate shareholder advisory vote on the golden parachute compensation is still required. In that case, the Say-on-Golden Parachute vote is required only with respect to the amended golden parachute payment arrangements. Other than changes that result only in a reduction in the amount of golden parachute compensation or that arise because of a change in the stock price, any other change to the golden parachute arrangements after the Say-on-Pay vote will trigger the requirement for a new vote.

During the 2011 proxy season, a relatively small number of companies included the golden parachute compensation disclosure in annual meeting proxy statements where no vote was taking place with respect to a merger or similar transaction. It appears likely that companies will avoid such "advance" votes on golden parachute compensation, given concerns about how the required disclosures concerning golden parachute compensation arrangements could impact the Say-on-Pay vote. In addition, companies may be concerned that providing such disclosures may voluntarily signal to the market that the company could be engaged in a significant transaction in the near future.

Companies have generally adhered closely to the requirements of the Golden Parachute Compensation Table in merger proxies, registration statements and other transactional forms filed since the rules became effective. In some cases, the new disclosure results in an additional page of disclosure in the applicable form or schedule, while in other cases the table and footnotes extend over several pages because of the complexity of various scenarios and triggering events. In addition, many companies that have filed merger proxies or registration statements that require a shareholder advisory vote on golden parachutes have described the relationship of the golden parachute advisory vote to other votes on the transaction, including approval of the merger or other transaction itself. While companies are required to disclose that the golden parachute vote is nonbinding, many have gone further to disclose whether or not the golden parachute vote is a condition of the transaction and whether the results of the advisory vote on golden parachutes would affect the consummation of the merger. Approval of the golden parachute arrangements is typically not a condition of the transaction, and a lack of approval of the golden parachutes will not affect consummation of the transaction.

Many companies have included disclosure regarding the effect of the golden parachute advisory vote on the status of the golden parachute payments. This type of disclosure typically notes that the golden parachute arrangements are contractual obligations of the company, and that even though the company values the input of shareholders as to whether such arrangements are appropriate, the company would nonetheless be required contractually to make, and would make, such payments even if the arrangements are not approved by the shareholders in the advisory vote.

Say-on-Pay Lawsuits

The Say-on-Pay vote is nonbinding, and the Dodd-Frank Act expressly provides that such advisory vote may not be construed as (1) overruling a decision by a company or its board of directors; (2) creating or implying any change to the fiduciary duties of a company or its board of directors; (3) creating or implying any additional fiduciary duties for a company or its board of directors; or (4) restricting or limiting the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation. Nonetheless, plaintiffs have filed derivative actions in state courts against directors of companies that failed to obtain majority support for their Say-on-Pay votes, alleging that the directors of those companies breached their existing fiduciary duties to stockholders in connection with executive compensation decisions.

Several derivative lawsuits have been filed against directors of companies (and in some cases their executive officers and compensation consultants) based on the outcome of a Say-on-Pay vote. Two of the issuers that have been subject to these held Say-on-Pay votes in 2010, prior to the effectiveness of the Dodd-Frank Act's advisory vote requirements. The remaining issuers have faced derivative lawsuits against their directors following a Say-on-Pay vote where, in most cases, less than majority support for the Say-on-Pay proposal was obtained at the annual meeting. These lawsuits have typically alleged that directors breached their fiduciary duties of care and loyalty in one or more of the following ways: (i) directors diverted corporate assets to executive officers, putting the interests of the executive officers ahead of the interests of stockholders; (ii) companies that disclosed "pay-for-performance" compensation policies did not adequately disclose or misrepresented that compensation was nonetheless paid to executive officers in contravention of such policies (*i.e.*, compensation was paid even if performance goals were not met or financial performance was otherwise poor); and (iii) directors are subject to corporate waste claims based on the overall size of executive compensation awards. Further, the lawsuits have alleged that executive officers were unjustly enriched by pay increases, and that in some cases compensation consultants aided and abetted the directors in their breaches of fiduciary duty and/or breached the consulting agreement with the company. In the lawsuits, plaintiffs have alleged that the failed Say-on-Pay vote is probative evidence that the compensation programs are not in the best interests of stockholders and that directors should not be entitled to the protections of the "business judgment rule." In these cases, the plaintiffs seek, among other things, unspecified damages resulting from the executive compensation plans, costs and attorneys' fees, as well as the implementation of internal controls to prevent excessive compensation in the future.

At least one of these lawsuits has survived a motion to dismiss, with the court finding that the plaintiff had made adequate pleadings that the issuer's board of directors was not entitled to the protection of the business judgment rule for decisions with respect to executive pay increases. By contrast, a similar lawsuit involving a different issuer was dismissed in September 2011. A few of the Say-on-Pay lawsuits have settled, and under the terms of these settlements, issuers have agreed to pay legal fees and to implement corporate governance enhancements. The remaining Say-on-Pay lawsuits continue to be litigated.

Say-on-Pay in 2012

A key agenda item for compensation committee meetings has been to consider the outcome of the 2011 Say-on-Pay votes. This is because the SEC adopted a new "mandatory" CD&A item which requires a company to address whether, and if so how, the company has considered the results of the most recent Say-on-Pay vote in determining compensation policies and decisions and, if so, how that consideration has affected the company's executive compensation decisions and policies. While issuers who received majority support in excess of 70-75% for the Say-on-Pay proposal in 2011 may be able to indicate that the vote was considered and no changes were deemed necessary for the issuer's executive compensation programs, an issuer that failed to achieve majority support or that received majority support but 70%-75% or less in support for the Say-on-Pay proposal may need to make substantial new disclosures regarding the engagement efforts that the issuer undertook to understand the reasons for the lack of support, the consideration by the compensation committee of the vote and the results of the engagement efforts, and the specific steps undertaken with the executive compensation program that responded to shareholder's concerns. While the 2011 shareholder engagement efforts were often reactive, the 2012 proxy season has been characterized by much more proactive engagement efforts, utilizing "road show" meetings, conference calls, and perhaps even electronic communications to more effectively engage with shareholders.

When drafting the proxy statement for 2012, the same focus on transparency and communicating an effective message that characterized the 2011 proxy season should carry through to the 2012 proxy statements. While there may not be as many executive compensation changes to highlight in the Compensation Discussion and Analysis in 2012 as compared to 2011, it will remain critically important for the Compensation Discussion and Analysis to reflect the notable aspects of the compensation policies and decisions, while highlighting the pay-for-performance aspects of compensation plans.

Annotated Model Say-on-Pay and Say-on-Frequency Proposals

Annotated Model Say-on-Pay Proposal

PROPOSAL [ ] – ADVISORY VOTE ON EXECUTIVE COMPENSATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 14A to the Securities Exchange Act of 1934, which requires that we provide our shareholders with the opportunity to vote to approve, on a nonbinding, advisory basis, the compensation of our named executives officers as disclosed in this proxy statement in accordance with the compensation disclosure rules of the Securities and Exchange Commission.

As described in greater detail under the heading "*Compensation Discussion and Analysis,*" we seek to closely align the interests of our named executive officers with the interests of our shareholders. [Our compensation programs are designed to reward our named executive officers for the achievement of short-term and long-term strategic and operational goals and the achievement of increased total shareholder return, while at the same time avoiding the encouragement of unnecessary or excessive risk-taking.] [*This statement should be adapted as appropriate for the issuer. In this regard, a brief statement of the issuer's philosophy with respect to executive compensation is useful in this context.*]

[The proposal may include a brief discussion of important compensation actions and decisions in the last completed fiscal year. In this regard, the disclosure in the proposal can provide a high-level overview of the reasons why shareholders should vote for the issuer's executive compensation. The summary included in the proposal itself can work in conjunction with the "Executive Summary" or "Overview." In some instances, issuers choose to only cross-reference the CD&A disclosure without including a statement in support of the Say-on-Pay resolution in the proposal.]

This vote is advisory, which means that the vote on executive compensation is not binding on the Company, our Board of Directors or the Compensation Committee of the Board of Directors. The vote on this resolution is not intended to address any specific element of compensation, but rather relates to the overall compensation of our named executive officers, as described in this proxy statement in accordance with the compensation disclosure rules of the Securities and Exchange Commission. [To the extent there is a significant vote against our named executive officer compensation as disclosed in this proxy statement, the Compensation Committee will evaluate whether any actions are necessary to address our shareholders' concerns.] [*The SEC's rules do not require that an issuer address what actions it will undertake in response to the Say-on-Pay vote (by contrast to the disclosure required with respect to ratification of auditors), rather requiring a discussion in subsequent CD&A disclosure of whether and, if so, how the issuer has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's compensation decisions and policies. It may, nevertheless, be useful at the time of presenting the proposal to explain how the vote will be considered as a means of clarifying the advisory nature of the vote.]*

[The affirmative vote of a majority of the shares present or represented and entitled to vote either in person or by proxy is required to approve this Proposal [ ]]. [*Issuers will have to evaluate what is the most appropriate voting standard for a Say-on-Pay proposal. Issuers should also consider describing, in this section or in the front portion of the proxy statement, the effect of abstentions and broker non-votes on the vote.*]

Accordingly, we ask our shareholders to vote on the following resolution at the Annual Meeting:

[The following is the form of resolution that the SEC includes in the Instruction to Exchange Act Rule 14a-21(a).]

> "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED."

[The following is an alternative form of the resolution. In Exchange Act Rules Compliance and Disclosure Interpretations Question 169.05, the SEC Staff has indicated

that it is permissible for the Say-on-Pay vote to omit the words, "pursuant to Item 402 of Regulation S-K," and to replace those words with a plain English equivalent, such as, "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement." This alternative formulation also makes clear in the language of the resolution itself that the vote is advisory.]

> "RESOLVED, that the Company's shareholders approve, on an advisory basis, the compensation of the named executive officers, as disclosed in the Company's Proxy Statement for the 2011 Annual Meeting of Shareholders pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the Compensation Discussion and Analysis, the Summary Compensation Table and the other related tables and disclosure."

THE BOARD OF DIRECTORS UNANIMOUSLY RECOMMENDS A VOTE *FOR* THE APPROVAL OF THE COMPENSATION OF OUR NAMED EXECUTIVE OFFICERS, AS DISCLOSED IN THIS PROXY STATEMENT.

Annotated Model Say-on-Frequency Proposal

PROPOSAL [ ] – ADVISORY VOTE ON THE FREQUENCY OF AN ADVISORY VOTE ON EXECUTIVE COMPENSATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 14A to the Securities Exchange Act of 1934, which requires that we provide shareholders with the opportunity to vote, on a non-binding, advisory basis, for their preference as to how frequently to vote on future advisory votes on the compensation of our named executive officers as disclosed in accordance with the compensation disclosure rules of the Securities and Exchange Commission.

Shareholders may indicate whether they would prefer that we conduct future advisory votes on executive compensation once every one, two, or three years. Shareholders also may abstain from casting a vote on this proposal.

[The following language should be adjusted to reflect the board of directors' determination as to the recommended frequency of every year, every two years or every three years. Neither Rule 14a-21(b) nor the SEC's other proxy rules require that an issuer make a recommendation with respect to the Say-on-Frequency vote; however, the SEC notes that proxy holders may vote uninstructed proxy cards in accordance with management's recommendation only if the issuer follows the existing requirements of Rule 14a-4, which include specifying how proxies will be voted (*i.e.*, in accordance with management's recommendations) in the absence of instruction from the shareholder. Most proxy statements filed in the 2011 proxy season with mandatory Say-on-Frequency votes have included a recommendation as to the preferred frequency of future Say-on-Pay votes, with the majority of those recommendations favoring Say-on-Pay votes once every three years.]

[The Board of Directors has determined that an advisory vote on executive compensation that occurs once [every three years][every two years] is the most appropriate alternative for the Company and therefore the Board recommends that you vote for a [three-year interval][two-year interval] for the advisory vote on executive compensation. In determining to recommend that shareholders vote for a frequency of once [every three years][every two years], the Board considered how an advisory vote at this frequency will provide our shareholders with sufficient time to evaluate the effectiveness of our overall compensation philosophy, policies and practices in the context of our long-term business results for the corresponding period, while avoiding overemphasis on short-term variations in compensation and business results. An advisory vote occurring once [every three years][every two years] will also permit our shareholders to observe and evaluate the impact of any changes to our executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation.]

[The Board of Directors has determined that an annual advisory vote on executive compensation will permit our shareholders to provide direct input on the Company's executive compensation philosophy, policies and practices as disclosed in the proxy statement each year, which is consistent with our efforts to engage in an ongoing dialogue with our shareholders on executive compensation and corporate governance matters.]

This vote is advisory, which means that the vote on executive compensation is not binding on the Company, our Board of Directors or the Compensation Committee of the Board of Directors. The Company recognizes that the shareholders may have different views as to the best approach for the Company, and therefore we look forward to hearing from our shareholders as to their preferences on the frequency of an advisory vote on executive compensation. [*This statement is not required by the SEC's rules; however, it may be advisable to include this statement in order to clarify that the* *board of directors is open to considering the preferences expressed by shareholders through the vote, without necessarily committing to adopt the frequency most favored by the shareholders.*] [The Board of Directors and the Compensation Committee will take into account the outcome of the vote; however, when considering the frequency of future advisory votes on executive compensation, the Board of Directors may decide that it is in the best interests of our shareholders and the Company to hold an advisory vote on executive compensation more or less frequently than the frequency receiving the most votes cast by our shareholders.] [*The SEC's rules do not require an issuer to address in the proxy statement what actions it will undertake in response to the Say-on-Frequency vote, however, it may be useful to include this information as a means for describing the advisory nature of the vote. Moreover, issuers will have to evaluate what is the most appropriate voting standard for interpreting the Say-on-Frequency vote. In this regard, it should be noted that the SEC has added a new Note to Exchange Act Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal as "substantially implemented" if the proposal would provide for a Say-on-Pay vote, seek future Say-on-Pay votes, or relate to the frequency of Say-on-Pay votes. Such shareholder proposals may be excluded under the new Note if, in the most recent Say-on-Frequency vote, a single frequency received a majority of the votes cast and the issuer adopted a policy for the frequency of Say-on-Pay votes that is consistent with that choice. This does not mean that an issuer could not utilize a different voting standard for determining the preference of the shareholders, such as plurality (i.e., the frequency receiving the most votes cast by the shareholders)*.]

[The following is an example of a resolution for the Say-on-Frequency vote. The Staff indicates in Compliance and Disclosure Interpretations Question 169.06 that it is permissible for the Say-on-Frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years, or abstain."]

Shareholders may cast a vote on the preferred voting frequency by selecting the option of one year, two years, or three years (or abstain) when voting in response to the resolution set forth below.

> "RESOLVED, that the shareholders determine, on an advisory basis, whether the preferred frequency of an advisory vote on the executive compensation of the Company's named executive officers as set forth in the Company's proxy statement should be every year, every two years, or every three years."

[The following is an example of proposal language that does not include a resolution for the Say-on-Frequency vote. Exchange Act Rules Compliance and Disclosure Interpretations Question 169.04 indicates that the Say-on-Frequency vote need not be set forth as a resolution. Separately, the Staff has informally cautioned that the Say-on-Frequency vote must be clearly stated, and that in this regard it must be clear that shareholders can vote on the options of every one, two or three years (or abstain from voting), rather than solely following management's recommendation (if any is provided). It is likely that issuers will rely on this guidance to provide more Say-on-Frequency votes in a "proposal" format, such as by simply referencing the four choices that are available on the proxy card.]

The proxy card provides shareholders with the opportunity to choose among four options (holding the vote every one, two or three years, or abstain from voting) and, therefore, shareholders will not be voting to approve or disapprove the recommendation of the Board of Directors.

THE BOARD OF DIRECTORS RECOMMENDS THAT YOU VOTE *FOR* THE OPTION OF [ONCE EVERY THREE YEARS][ONCE EVERY TWO YEARS][ONCE EVERY YEAR] AS THE PREFERRED FREQUENCY FOR ADVISORY VOTES ON EXECUTIVE COMPENSATION.

Model Say-on-Pay and Say-on-Frequency Board Resolutions

Resolutions for the Annual Meeting

The following model resolutions can be utilized in preparing resolutions for the annual meeting:

<u>Advisory Vote on Executive Compensation</u>

WHEREAS, the Securities and Exchange Act of 1934, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), requires that the Corporation submit a resolution for its stockholders to approve, on an advisory basis, the compensation of the Corporation's "named executive officers" (as such term is defined in the applicable SEC rules), as disclosed in the Corporation's proxy statement under the SEC's rules, at least once every three years;

WHEREAS, in accordance with the Dodd-Frank Act, the vote to approve the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules shall not be construed: (i) as overruling any decision by the Corporation or the Board; (ii) to create or imply any change in the fiduciary duties of the Corporation or the Board; (iii) to create or imply any additional fiduciary duties for the Corporation or the Board; and (iv) to restrict or limit the ability of the Corporation's stockholders to make proposals for inclusion in the Corporation's proxy statement relating to executive compensation except as may be provided under applicable SEC rules;

WHEREAS, the Board has determined that it is in the best interests of the stockholders of the Corporation to submit a resolution for its stockholders to approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules at least once every three years; and

WHEREAS, the Board has determined that it is in the best interests of the stockholders of the Corporation for the Board to recommend that the stockholders of the Corporation vote, on an advisory basis, "For" the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules at least once every three years;

NOW, THEREFORE, BE IT RESOLVED, that the Corporation's stockholders shall vote on a resolution to approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in accordance with the SEC's rules in the proxy statement for the Annual Meeting of Stockholders; and

RESOLVED FURTHER, that the Board unanimously recommends that the Corporation's stockholders approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in accordance with the SEC's rules in the proxy statement for the Annual Meeting of Stockholders.

Frequency of the Advisory Vote on Executive Compensation

WHEREAS, the Dodd-Frank Act requires that the Corporation submit a resolution at least once every six years for its stockholders to determine, on an advisory basis, the frequency with which the Corporation's stockholders approve, on an advisory basis, the compensation of the Corporation's named executive officers as disclosed in the Corporation's proxy statement under the SEC's rules;

WHEREAS, in accordance with the Dodd-Frank Act, the vote on the frequency of the advisory vote on the compensation of the Corporation's named executive officers as disclosed in the proxy statement under the SEC's rules shall not be construed: (i) as overruling any decision by the Corporation or the Board; (ii) to create or imply any change in the fiduciary duties of the Corporation or the Board; (iii) to create or imply any additional fiduciary duties for the Corporation or the Board; and (iv) to restrict or limit the ability of the Corporation's stockholders to make proposals for inclusion in the Corporation's proxy statement relating to executive compensation except as may be provided under applicable SEC rules; and

[WHEREAS, the Board believes that an annual advisory vote on executive compensation will allow the Corporation's stockholders to provide the Corporation with their direct input on the Corporation's compensation philosophy, policies and practices as disclosed in the Corporation's proxy statement every year and that an annual advisory vote on executive compensation is consistent with the Corporation's general policy of seeking input from, and engaging in discussions with, the Corporation's stockholders on corporate governance matters and the Corporation's executive compensation philosophy, policies and practices;]

[WHEREAS, the Board believes that an advisory vote on executive compensation that occurs once [every three years][every two years] will provide stockholders with sufficient time to evaluate the effectiveness of the Corporation's overall compensation philosophy, policies and practices in the context of long-term business results for the corresponding period, while avoiding over-emphasis on short-term variations in compensation and business results; and that an advisory vote occurring once [every three years][every two years] will also permit the Corporation's stockholders to observe and evaluate the impact of any changes to the Corporation's executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation;]

NOW, THEREFORE, BE IT RESOLVED, that a proposal as to whether to hold an advisory vote on executive compensation once every year, once every two years, or once every three years shall be included in the proxy statement and submitted to the stockholders of the Corporation for a vote at the Corporation's Annual Meeting of Stockholders; and

RESOLVED FURTHER, that the Board unanimously recommends that the stockholders of the Corporation vote to approve, on an advisory basis, a frequency for holding an advisory vote on executive compensation of [once every year] [once every two years] [once every three years] until the next advisory vote on the frequency of holding an advisory vote on executive compensation.

General Authority

RESOLVED, that any and all actions heretofore taken by the officers and directors of the Corporation, or any one or more of them, within the terms of the foregoing resolutions are hereby approved, adopted, ratified and confirmed in all respects and declared to be the valid and binding acts and deeds of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to take such further action, and to execute, acknowledge, certify, file, deliver and record such documents, instruments, agreements, consents and certificates, as they or any of them in their discretion deem necessary or appropriate, to carry out the purposes and intent of the foregoing resolutions, and that the execution by such officers of any such documents, instruments, agreements, consents and certificates or the doing by them of any act in connection with the foregoing matters shall conclusively establish their authority therefor from this Corporation and the approval and ratification by this Corporation of the documents, instruments, agreements, consents and certificates so executed and the actions so taken.

Resolutions for after the Annual Meeting

The following model resolutions can be utilized in preparing resolutions for the determination of the frequency of the Say-on-Pay vote following the annual meeting:

Approval of Frequency of Say-on-Pay Votes

WHEREAS, at the recently completed Annual Meeting of Stockholders of the Corporation, it was determined that, with respect to the resolution on the frequency of holding an advisory vote on executive compensation, the option of once every [one year][two years][three years] [received the highest number of votes cast by the stockholders] and, accordingly, such frequency is the preferred frequency with which the Corporation is to hold a stockholder vote, on an advisory basis, to approve the compensation of the named executive officers, as disclosed pursuant to the Securities and Exchange Commission's compensation disclosure rules (which disclosure shall include the Summary Compensation Table and the other related tables and disclosure); and

[WHEREAS, the Board believes that an annual advisory vote on executive compensation will allow the Corporation's stockholders to provide the Corporation with their direct input on the Corporation's compensation philosophy, policies and practices as disclosed in the Corporation's proxy statement every year and that an annual advisory vote on executive compensation is consistent with the Corporation's general policy of seeking input from, and engaging in discussions with, the Corporation's stockholders on corporate governance matters and the Corporation's executive compensation philosophy, policies and practices;]

[WHEREAS, the Board believes that an advisory vote on executive compensation that occurs once [every three years][every two years] will provide stockholders with sufficient time to evaluate the effectiveness of the Corporation's overall compensation philosophy, policies and practices in the context of long-term business results for the corresponding period, while avoiding over-emphasis on short-term variations in compensation and business results; and that an advisory vote occurring once [every three years][every two years] will also permit the Corporation's stockholders to observe and evaluate the impact of any changes to the Corporation's executive compensation policies and practices which have occurred since the last advisory vote on executive compensation, including changes made in response to the outcome of a prior advisory vote on executive compensation;]

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby determines that, in light of the preferred frequency determined by the Corporation's stockholders at the Annual Meeting of Stockholders, the Corporation shall include an advisory vote of the stockholders on executive compensation in the Corporation's proxy materials once every [year][two years][three years] until the next required vote on the frequency of stockholder votes on the compensation of executives of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to implement the foregoing policy of the Corporation.

General Authority

RESOLVED, that any and all actions heretofore taken by the officers and directors of the Corporation, or any one or more of them, within the terms of the foregoing resolutions are hereby approved, adopted, ratified and confirmed in all respects and declared to be the valid and binding acts and deeds of the Corporation; and

RESOLVED FURTHER, that the officers of the Corporation are, and each of them is, hereby authorized, directed and empowered in the name and on behalf of the Corporation to take such further action, and to execute, acknowledge, certify, file, deliver and record such documents, instruments, agreements, consents and certificates, as they or any of them in their discretion deem necessary or appropriate, to carry out the purposes and intent of the foregoing resolutions, and that the execution by such officers of any such documents, instruments, agreements, consents and certificates or the doing by them of any act in connection with the foregoing matters shall conclusively establish their authority therefor from this Corporation and the approval and ratification by this Corporation of the documents, instruments, agreements, consents and certificates so executed and the actions so taken.

CHAPTER 3

KEY DISCLOSURE CONSIDERATIONS FOR PROXY STATEMENTS AND ANNUAL REPORTS

KEY DISCLOSURE CONSIDERATIONS FOR PROXY STATEMENTS AND ANNUAL REPORTS

SEC REVIEW PROCESS

The Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”) requires the SEC to review the Form 10-K of every public issuer at least once every three years. For the last few years, SEC comment letters and issuer responses to those letters have been posted on EDGAR at least 45 days after completion of the Staff review. Recently, the Staff announced that, beginning January 1, 2012, the SEC will release filing review correspondence no earlier than 20 business days following the completion of a filing review. As a result of the public availability of these letters, the Staff has come to expect that issuers are aware of the interpretive positions taken by the SEC in their comment letters, which often reflect nuanced readings of the rules or require more detailed disclosure than might otherwise be expected. It has become increasingly important that issuers make themselves familiar with Staff comment letters that have been issued to other issuers, so that they can respond to the issues raised in those letters when preparing their own filings.

In the past, the Staff of the Division of Corporation Finance has often limited its review to financial statements and related disclosure. However, recently the Staff has been conducting more complete legal reviews of periodic reports. In addition, review of executive compensation disclosures has been integrated into the Form 10-K and proxy statement review process, and comment letters often include at least one to two comments on executive compensation. Below is an analysis of recent frequent areas of Staff comment in Form 10-Ks and proxy statements. Attention to these areas during the drafting process can save time and effort later, when the filings become subject to Staff review.

SEC COMMENTS ON EXECUTIVE COMPENSATION DISCLOSURE

Over the past several years, the SEC has provided significant guidance with respect to its interpretation of executive compensation disclosure rules, including numerous Staff speeches, new and revised Compliance and Disclosure Interpretations, its “Staff Observations in the Review of Executive Compensation” (which was released in October 2007 following a review of the disclosure of 350 issuers), and Staff comments on individual filings. Historically, the Staff has addressed executive compensation disclosure deficiencies identified in the review process by issuing “futures” comments, which require an issuer to address any identified deficiencies in future filings. However, that approach has begun to change. In a November 2009 speech, Shelley Parratt, Deputy Director of the Division of Corporation Finance, stated:

> "[A]fter three years of futures comments, we expect companies and their advisors to understand our rules and apply them thoroughly. So, any company that waits until it receives Staff comments to comply with the disclosure requirements should be prepared to amend its filings if it does not materially comply with the rules."

Under the Staff's new approach, it has become increasingly likely that the SEC will require that issuers amend disclosure if it believes that the issuer has not appropriately followed outstanding Staff guidance. Issuers should attempt to address in their disclosure the issues that are most often raised by the Staff during the review process.

In her November 2009 speech, Ms. Parratt urged issuers to focus on several key areas of executive compensation disclosure, as well as consider the comments, reports and speeches on CD&A provided by the Staff over the years. In particular, Ms. Parratt provided the following recommendations for preparing 2010 proxy statement disclosures:

- Explain *why* compensation decisions were made in the context of addressing the decision-making processes;
- Disclose any material performance targets used in determining executive compensation for the named executive officers for the periods covered by the disclosure, as well as the actual achievement level against the targets;
- In the event of Staff review, be prepared to explain how disclosure of material performance targets would cause competitive harm when that is the basis for omitting the performance target disclosure;
- Provide meaningful disclosure regarding the degree of difficulty in achieving performance targets when those targets are omitted;
- Disclose the names of any peer group companies used for benchmarking purposes, how those companies were selected, and how the actual awards compared to the benchmarks; and
- In addition to addressing the examples provided in Item 402(b) of Regulation S-K, provide additional disclosure in the CD&A that would be material to an understanding of an issuer's compensation policies or decisions.

Trends in Executive Compensation Comments

There are a number of significant areas of focus in Staff comments and other interpretive guidance on executive compensation disclosure. For example, the Staff has repeatedly stated that an issuer's CD&A should focus on *how* and *why* the issuer arrived at specific executive compensation decisions and policies and should address why specific compensation decisions were made. Issuers frequently receive comments on this issue during the review process. Other principal areas of SEC comment in the CD&A have related to the disclosure of incentive plan performance targets, individual performance goals and benchmarking practices or processes.

Meaningful Analysis in the Compensation Discussion & Analysis

The Staff has repeatedly requested that issuers provide more detailed, meaningful analysis in the CD&A. Issuers should discuss both *how* and *why* they arrived at specific compensation decisions. In addition to identifying what the goals of the compensation program are, issuers should also identify the reasons for individual awards to named executive officers, as well as how those awards fit into the issuer's overall compensation objectives. The SEC expects issuers to provide detailed, specific analysis.

The Staff generally views as insufficient any discussion of award decisions that addresses all named executive officers as a group and does not address each named executive officer's individual circumstances. In addition, as part of the analysis of the reasons for each element of compensation (e.g., base salary, cash incentive award or equity award) for each named executive officer, the Staff expects a discussion of why the compensation committee decided to award specific amounts or make changes in an element of compensation from period to period. For example, this discussion should include the reasons the compensation for a named executive officer increased or decreased as compared to prior periods, as well as how the compensation committee arrived at its decision.

Disclosure of Performance Targets

Another focus of Staff comments on CD&A is on the disclosure of performance targets as they relate to executive compensation. Issuers are required to disclose any specific items of corporate performance that are taken into account in setting compensation policies and making compensation decisions. In addition to disclosing any material performance targets, issuers are expected to disclose the extent to which those performance targets were achieved. However, they are not required to disclose any performance targets that are not material or that would cause competitive harm to the issuer (applying the same competitive harm standard that is applied to confidential treatment requests).

Some issuers have chosen not to disclose performance targets in reliance on the argument that this disclosure would cause competitive harm to the issuer. However, the Staff has focused significant attention on the competitive harm argument in its comments and has limited the extent to which issuers may rely on it. The Staff has repeatedly required issuers to justify their use of the standard, sometimes going beyond the standards generally applied to confidential treatment requests. Issuers have been asked to specifically identify the nature of the competitive harm that they would suffer if the performance targets were to be disclosed, including how the issuer's competitors would actually use the information. If the Staff accepts the competitive harm argument, performance targets are not disclosed based on the competitive harm exception, then the issuer must disclose the level of difficulty associated with achieving the undisclosed goal.

The Staff is more likely to accept that disclosure of a performance target would cause competitive harm in the context of non-financial operational performance targets or performance goals related to specific business units. The Staff will generally not accept the argument that the disclosure of financial information or financial targets for a completed fiscal year will cause competitive harm. If the performance target relates to a completed fiscal year, the Staff position is that, because the issuer's financial results have already been publicly disclosed, no competitive harm should arise from the disclosure in the CD&A of the financial performance target and the extent to which it was met. However, the Staff generally does not require disclosure of financial performance targets for the current or a future period, if the issuer is able to argue that those current or future period targets are not material to an understanding of compensation policies and decisions with respect to the fiscal year being discussed in the CD&A.

If issuers use non-GAAP performance targets, the Staff requires that the non-GAAP performance targets be disclosed in the CD&A, together with an explanation of how it is calculated. However, a full-scale reconciliation to GAAP is not required.

Individual Performance Goals

Staff comments on CD&A have also focused on disclosure of individual performance goals for named executive officers. Issuers often provide general disclosure that states that some percentage or component of executive compensation is based on achievement of individual performance goals. However, the Staff raises a concern if sufficient disclosure of how the level of individual achievement affects the actual compensation received by the executive, or why the compensation committee adopted the performance goal and how achievement is measured.

The Staff has repeatedly requested that issuers provide more specific disclosure in this area. Issuers must identify the extent to which achievement of individual performance goals impacts compensation for each named executive officer. If individual performance goals were a material factor in determining compensation, issuers must disclose the specific performance goals and achievements, even if the performance targets are subjective and not quantifiable. Disclosure of specific performance targets may not be required if the performance target was not a material factor in determining compensation, for example if it was just one factor among many taken into account by the compensation committee. However, formulaic, objective or quantifiable performance targets should generally be disclosed in the Staff's view.

The Staff has also requested that issuers provide additional disclosure when the compensation committee has approved compensation in excess of or less than what is provided for in the issuer's compensation plans, or when the overall amount to which the executive is entitled under the program has been increased or decreased as a result of the executive's individual performance. In those situations, issuers have been asked to disclose the activities or individual performance standards that were applied in making that decision, as well as how the compensation committee considered those standards when making its decision.

Benchmarking

The use of benchmarking in the CD&A is another area of Staff focus throughout the comment process. It is important to note that many issuers use the term "benchmarking" in their CD&As when they are not in fact benchmarking as that term is understood by the SEC. For purposes of the CD&A, benchmarking refers to the tying of specific elements of compensation to a benchmark, as opposed to, for example, simply using comparable company data as a market check after arriving at compensation decisions based on some other method. As another example, a company is benchmarking when it ties base salaries to a certain targeted range (for example, the median level) within a set of peer companies. Issuers that do not engage in benchmarking should modify their disclosure in the CD&A to clarify how they use comparative issuer information.

For issuers that do engage in benchmarking, the Staff has consistently requested that all of the companies comprising the peer group or survey be listed and that the issuer describe the methodology it uses for assessing and utilizing the information. The issuer must also identify where its compensation plan falls within the targeted parameters. If its compensation falls outside of the targeted range, the issuer is asked to provide an explanation of the change.

Comments and Interpretations on Corporate Governance Disclosure

Background

On December 16, 2009, the SEC adopted, in Release No. 33-9089 (December 16, 2009), rule changes that mandate more disclosure in proxy and information statements regarding risk, compensation and corporate governance matters. Specifically, the changes require disclosure concerning:

- The relationship of an issuer's compensation policies and practices to risk management, when those compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the issuer;
- The grant date fair value of equity awards in the Summary Compensation Table, replacing the prior approach of requiring disclosure of the amounts of compensation expense recognized for financial reporting purposes;
- The potential conflicts of interest that compensation consultants may have when performing services for the issuer, focusing on disclosure of fees paid (subject to a $120,000 threshold) for executive compensation services and for additional services;
- The background and qualifications of directors and nominees for director, describing the experience and skills that led the issuer to choose the director or nominee for the board;
- Other public company directorships held by each director or nominee over the past five years;

- Legal proceedings involving an issuer's executive officers, directors, and nominees for director, including disclosure covering the past ten years and covering a significantly expanded list of relevant proceedings;

- The board of directors' consideration of diversity in the process by which directors are considered for nomination to the board;

- The leadership structure of the board, including whether the issuer has combined or separated the roles of chairman and principal executive officer, and why the issuer believes that its leadership structure is appropriate for the issuer, as well as a discussion, in some circumstances, of whether and why an issuer has a lead independent director;

- The extent of the board's role in the oversight of risk; and

- Voting results, which are to be provided on a significantly accelerated basis under cover of Form 8-K.

These rule changes were effective on February 28, 2010, and were first included in proxy statements for annual meetings occurring in 2010.

The Relationship between Compensation and Risk

The SEC adopted Item 402(s) of Regulation S-K, which elicits disclosure about the relationship of risk to the compensation policies and practices for *all* employees, not just the executive officers of the issuer. This disclosure is limited to compensation policies and practices, however, such that no further disclosure regarding the specific amounts of compensation paid to employees would be required under the rule. In response to commenters' concerns that this disclosure may be confusing if included as part of the CD&A, the SEC decided to require the disclosure outside of the CD&A, under a discrete disclosure requirement. Nonetheless, disclosure concerning the relationship between compensation and risk may be required in the CD&A specifically with regard to the named executive officers, consistent with the guidance that the SEC provided in both the proposing and adopting releases for this rule change, which both stated that "[t]o the extent … such risk considerations are a material aspect of the company's compensation policies or decisions for named executive officers, the company is required to discuss them as part of its CD&A under the current rules."

Requirements of Item 402(s) of Regulation S-K

As adopted, the disclosure is triggered if compensation policies and practices create risks that are "reasonably likely to have a material adverse effect" on the issuer. The standard of "reasonably likely to have a material adverse effect" tracks the requirements in Item 303 of Regulation S-K. In response to concerns expressed by commenters, the SEC decided to adopt this higher standard relative to the proposed standard, which looked to whether the compensation policies or practices "may have a material effect" on the issuer. In discussing these changes between the proposed rule and the final rule, the SEC noted that this standard would be more familiar to issuers, given that it is applied in determining whether known material trends, demands, events, and uncertainties must be disclosed. Focusing the standard on whether the risk may have a material adverse effect on the issuer also permits issuers to consider compensation policies and practices that mitigate or balance incentives. Further, the addition of the term "adverse" to the test clarifies that issuers do not have to discuss ways in which compensation policies and practices may encourage risk taking that is beneficial to the issuer.

The final rule includes a non-exclusive list of situations where compensation programs may have the potential to cause material adverse risks for issuers. These include compensation policies and practices:

- At a business unit of the issuer that carries a significant portion of the issuer's risk profile;
- At a business unit with compensation structured significantly differently than other units within the issuer;
- At a business unit that is significantly more profitable than others within the issuer;
- At a business unit where the compensation expense is a significant percentage of the unit's revenues; and
- That vary significantly from the overall risk and reward structure of the issuer, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the issuer from the task extend over a significantly longer period of time.

Further, the final rule includes a non-exclusive list of illustrative examples of the type of issues that an issuer may need to address if it has determined that compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the issuer. These issues include:

- The general design philosophy of the issuer's compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices, as such policies and practices relate to or that affect risk taking by those employees on behalf of the issuer, and the manner of their implementation;

- The issuer's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;

- How the issuer's compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring clawbacks or imposing holding periods;

- The issuer's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;

- Material adjustments the issuer has made to its compensation policies and practices as a result of changes in its risk profile; and

- The extent to which the issuer monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees.

This disclosure regarding the relationship between compensation and risk is not required for those issuers that qualify for scaled disclosure as a smaller reporting company.

The rule does not require an issuer to make an affirmative statement that it has determined that risks arising from compensation policies and practices are not reasonably likely to have a material adverse effect on the issuer, although issuers may need to consider whether to add such a statement, as well as an explanation of the issuer's process for evaluating risks arising from compensation policies and practices, in order to address the inevitable concerns of shareholders and proxy advisors.

SEC Staff Interpretations and Comments

During 2010, the Staff asked issuers what was done and what conclusion was reached in response to this disclosure item, most likely as a first-year check on compliance with the new rule. The Staff asked for a supplemental explanation if the issuer included no disclosure in the proxy statement regarding the evaluation of the relationship between employee compensation and risk; or if the issuer included only a statement of a conclusion without a description of the process; or where an issuer did include some discussion of the process undertaken, but did not include a fulsome discussion of the process.

In each of these situations, the Staff asked for a supplemental explanation of the process undertaken to reach the conclusion that compensation policies are not reasonably likely to have a material adverse effect on the issuer. In many of the responses, issuers describe a process whereby compensation programs were reviewed, particularly focusing on incentive compensation programs and program features which could potentially encourage risk taking. These processes involved identifying the specific business risks that related to these compensation features, as well as "mitigating" factors that offset the risks. Issuers consistently undertook an analysis to determine the potential effects of the risks and the impact of the other factors considered, and whether any of the particular situations described in Item 402(s) applied to the issuer. In most cases, issuers indicated that the compensation committee was involved in some capacity with the analysis; responses often noted that the analysis was conducted by management with the concurrence of or consultation with the compensation committee.

The findings that companies often reached were similar, focusing on:

- The mix of compensation, which tended to be balanced with an emphasis toward rewarding long-term performance;
- The use of multiple performance metrics that are closely aligned with strategic business goals;
- The use of discretion as a means to adjust compensation downward to reflect performance or other factors;
- Caps on incentive compensation arrangements;
- The lack of highly leveraged payout curves;
- Multi-year time vesting on equity awards which requires long-term commitment on the part of employees;

- The governance, code of conduct, internal control and other measures implemented by the company;
- The role of the compensation committee in its oversight of pay programs;
- Frequent business reviews;
- The existence of compensation recovery policies;
- The implementation of stock ownership or stock holding requirements;
- The use of benchmarking to ensure the compensation programs are consistent with industry practice;
- The uniformity of compensation programs across business units and geographic regions, or alternatively, the differences employed to reflect specific business unit or geographic considerations; and
- The immaterial nature of some plans.

Changes to the Summary Compensation Table and the Director Compensation Table

In the 2006 changes to the executive compensation disclosure rules, the SEC required disclosure in the Summary Compensation Table of the compensation expense associated with equity awards (which included expensed amounts related to awards granted in prior fiscal years), rather than the grant date fair value of the awards made in the subject fiscal year covered in the Summary Compensation Table.

This approach created difficulties for issuers when presenting their executive compensation disclosure, because the presentation in the Summary Compensation Table of equity award values did not necessarily correspond with decisions that the compensation committee made in the fiscal year covered by the CD&A. In order to address this disconnect, some issuers began including "alternative summary compensation tables" and taking other approaches to try to clarify how the decisions addressed in the CD&A related to the amounts presented for the named executive officers.

Accordingly, as part of the December 2009 amendments, the SEC adopted changes that now require the disclosure of the grant date fair value of the equity awards made during the fiscal year in the "Option Awards" and "Stock Awards" columns of the Summary Compensation Table and the Director Compensation Table. These numbers reflect the grant date fair values calculated in accordance with the Financial Accounting Standards Board's Accounting Standards Codification Topic

718 (formerly known as FAS 123R and referred to here as "ASC Topic 718"). For performance-based awards, the SEC requires reporting of the fair value at the grant date based on the probable outcome of the performance conditions (rather than the maximum potential value of the award), which should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under ASC Topic 718. The maximum potential value of the awards is disclosed in a footnote to the Summary Compensation Table and the Director Compensation Table.

Issuers are required to report the full grant date fair value of each equity award in the Grants of Plan-Based Awards Table. Performance-based equity awards reported in the Grants of Plan-Based Awards Table are reported based on the probable outcome of meeting the performance condition, as with the Summary Compensation Table.

The SEC decided not to adopt a proposed change to its rules that would have permitted issuers to report salary and bonus foregone at the named executive officer's election in the appropriate column for the award elected. As a result, salary and bonus is reported in the "Salary" and "Bonus" columns even when foregone at the named executive officer's election, with footnote disclosure indicating receipt of the non-cash compensation and referring to the Grants of Plan-Based Awards Table where the stock, option, or non-equity incentive plan compensation is reported.

Compensation Consultant Conflicts

The rules require disclosure about fees paid to compensation consultants and their affiliates in specified circumstances.

In particular, if the board, compensation committee, or other persons performing an equivalent function (referred to in this section as the "board") has engaged its own compensation consultant to provide advice or recommendations regarding the amount or form of executive and director compensation, and this same consultant or the consultant's affiliates provide other consulting services to the issuer (which consulting services do not involve executive compensation) in an amount that exceeds $120,000 during the last fiscal year, then the issuer must disclose:

- The aggregate fees paid for services provided either to the board or the issuer with regard to determining or recommending the amount or form of executive and director compensation;
- The aggregate fees paid for any additional services provided by the consultant or its affiliates; and

- Whether the decision to engage the compensation consultant or its affiliates for the non-executive compensation consulting services was made, or recommended by, management and whether the board approved such other services.

In situations where the board has not engaged its own consultant, then disclosures are required if a consultant is engaged to provide both executive compensation consulting services and non-executive compensation consulting services to the issuer, provided that the fees for the non-executive compensation consulting services exceed $120,000 during the issuer's fiscal year. In this situation, disclosure is required of:

- The aggregate fees paid to the consultant or its affiliates for determining or recommending the amount or form of executive and director compensation; and
- The aggregate fees paid for any additional services provided by the consultant or its affiliates.

If the board and management have different compensation consultants, then no fee disclosure is required even if management's compensation consultant provides additional services to the issuer, recognizing that when the board engages its own compensation consultant, it mitigates the risks for the conflicts of interest that the SEC is seeking to address with the additional fee disclosure. Moreover, disclosure is not required when the compensation consultant's only role in recommending the amount or form of executive or director compensation is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors of the issuer. Disclosure is also not required when the compensation consultant's services are limited to providing information, such as surveys, that is not customized for a particular issuer, or that is customized based on parameters that were not developed by the compensation consultant.

The SEC did not adopt a proposed requirement to disclose the nature and extent of additional services provided by the compensation consultant or its affiliates, given the potentially competitive nature of this information. Issuers still may provide some explanation of the types of services provided, if the additional information is necessary to an understanding of a potential conflict of interest.

Director and Nominee Qualifications

Requirements

The SEC adopted revisions to Item 401 of Regulation S-K, which sets forth disclosure requirements for the backgrounds of executive officers, directors, and nominees for director, to require pursuant to Item 401(e)(1) of Regulation S-K, for each director and any nominee for director, disclosure of the particular experience, qualifications, attributes, or skills that led the board to conclude that the person should serve as a director of the issuer, as of the time that the filing is made with the SEC. The disclosure is required for all nominees for director (including nominees put forward by a proponent other than the issuer), as well as for all existing directors, even if not subject to re-election at the meeting to which the proxy statement relates. This director and nominee disclosure requirement augments, but does not replace, specific disclosure required regarding the consideration by the nominating committee of minimum director qualifications, or specific qualities or skills.

The disclosure requirement does not mandate the particular information that must be disclosed. Rather, the SEC indicated that it wanted to provide issuers with flexibility to determine what information concerning a director's or nominee's skills, qualifications, or particular area of expertise should be disclosed to shareholders.

The SEC did not adopt a proposal to require disclosure of the specific experience, qualifications or skills that qualify a director to serve as a member of a particular committee. However, the SEC has noted in the adopting release that if the director or a nominee has been chosen to join the board because of particular expertise that is relevant to a specific committee, then that fact should be disclosed in response to the disclosure item.

SEC Staff Interpretations and Comments

In Regulation S-K Compliance and Disclosure Interpretations Question 116.05, the Staff made clear that it intended for issuers to disclose why the person's *particular* and *specific* experience, qualifications, attributes or skills led the board to conclude that such person should serve as a director of the issuer, so that disclosures made on a group basis would be unacceptable, even if the directors or nominees share similar characteristics.

Further, in Regulation S-K Compliance and Disclosure Interpretations Question 116.06, the Staff noted that an issuer with a classified board needs to provide the

Item 401(e)(1) disclosure for the entire board, focusing on the evaluation of the director's particular and specific experience, qualifications, attributes or skills, and the conclusion on why the director should continue serving on the board, as of the time that a filing containing the disclosure is made. The Staff noted that this interpretation may necessitate adding in additional disclosure controls and procedures to ensure that such information about directors who are not up for re-election at the upcoming shareholders' meeting is recorded, processed, summarized and reported in a timely manner.

The Staff raised a number of comments on the director qualifications disclosure provided in the 2010 proxy season, including the following:

- <u>Omission of Required Disclosure</u>. One consistent Staff comment on the governance disclosures, including the director qualification disclosures, was a comment asking the issuer to include the disclosure when it was not included. Perhaps because the rules became effective immediately before the proxy season, a surprising number of issuers did not comply with some or all of the new governance disclosure requirements in 2010. Given that it was the first year the disclosure was required, the Staff generally did not request that the issuers file an amendment to the Form 10-K to include the required disclosure, but rather allowed issuers to remedy the situation in future filings.

- <u>Specificity of the Disclosure</u>. In June 2010, SEC Chairman Mary Schapiro made a speech at the Stanford Directors' College where she discussed the adequacy of compliance with the new director qualifications disclosure item. She gave examples of actual good and bad disclosures (without identifying the issuers) to demonstrate the point that the disclosure should be individualized for each director and should avoid over-generalizations such as "our directors each have integrity, sound business judgment and honesty, which are important characteristics of a good board member." Chairman Schapiro's viewpoint was borne out through the Staff comment process, where the Staff frequently asked for an explicit description of the qualifications and experience over and above the basic biographical description that has been required by Item 401 of Regulation S-K, emphasizing that the disclosure needed to communicate how the specific qualifications, attributes or skills *led to the conclusion* that the director should serve on the particular issuer's board.

- Location of the Disclosure. The Staff did not typically raise comments concerning where issuers actually placed the director qualification disclosure. In many instances, the director qualification disclosure was included as a separate paragraph following each director's biographical information; in other cases, the disclosure was incorporated directly into the biography paragraph or included in a separate section entirely.

- Directors Serving Under a Shareholder Agreement. Many issuers have directors who serve because a shareholder has appointed the director to serve pursuant to some contractual or other arrangement, or particular shareholders nominate and elect certain directors under the terms of the issuer's charter, bylaws or other governing documents. In cases where issuers sought to reference only the shareholder agreement or arrangement as the basis for the conclusion as to why the director serves on the board, the Staff asked for the more complete description of the director's qualifications, even if that information had to be obtained from the shareholder.

Outside Directorships

The SEC also adopted a requirement for disclosure regarding other public company directorships held by directors or nominees over the past five years (even if a director is no longer serving as a director of the other public company). This requirement expands upon previously required disclosure regarding current director positions at other public companies.

Legal Proceedings

Item 401(f) of Regulation S-K previously required disclosure regarding a director's, nominee's, or executive officer's involvement in specific legal proceedings that are material to an evaluation of the integrity of such person. The SEC has extended the "look back" provision in Item 401(f) from five years to ten years, and now requires disclosure regarding the following additional legal proceedings:

- Any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity;

- Any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking, or insurance laws and regulations, or any settlement of such actions; and

- Any disciplinary sanctions or orders imposed by stock, commodities, or derivatives exchanges or other self-regulatory organizations.

The rules do not require disclosure of a settlement of a civil proceeding among private parties. As is the case before these amendments, the disclosure of specific legal proceedings (including the newly added proceedings specified above) are not required to be disclosed if the proceeding is not material to an evaluation of the ability or integrity of the director or director nominee.

Director Diversity

Requirements

The rules require disclosure of whether and, if so, how the nominating committee considers diversity in identifying director nominees. Further, if the nominating committee or the board has a policy with regard to the consideration of diversity in identifying director nominees, then disclosure is required of how the policy is implemented and monitored for effectiveness. In adopting this new requirement, the SEC has not defined the term "diversity," leaving it to each issuer to define diversity in the way that the issuer deems appropriate. The SEC noted that some issuers may define diversity to include "differences of viewpoint, professional experience, education, skill and other qualities or attributes that contribute to board heterogeneity," while other issuers may define diversity to include race, gender and national origin.

SEC Staff Interpretations and Comments

In some cases, issuers expressly disclaimed any policy on diversity, but the Staff consistently raised a comment requesting the "policy" disclosure whenever diversity is mentioned in a filing. In many cases, issuers have addressed diversity in the context of the director qualifications considered in the nomination process, and even if the word "diversity" is not used directly, but the disclosure implies the consideration of a broad range of skills and qualifications, the Staff will raise a comment asking for the complete diversity disclosure. As a result, the Staff's interpretation contemplates the policy disclosure whenever diversity (however defined) is considered, even if no such policy is actually articulated in writing. The additional disclosure required once it is determined that a diversity "policy" exists involves discussing how the policy has been implemented (i.e., through the nominating committee process) and how it is monitored (i.e., typically through the annual committee and/or board self-evaluation process).

Board Leadership Structure

Requirements

Under Item 407(h) of Regulation S-K, an issuer must disclose whether and why it has chosen to combine or separate the principal executive officer and board chairman positions, as well as the reasons why the issuer believes that this board leadership structure is the most appropriate structure for the issuer at the time of the applicable filing. In those situations where there is a combined principal executive officer and board chairman, but also a lead independent director, then the issuer must disclose whether and why the issuer has a lead independent director and the specific role that the lead independent director plays in the leadership of the issuer. Further, the issuer must explain the effect that the board's role in the oversight of risk has on the leadership structure.

SEC Staff Interpretations and Comments

The Staff's main focus in the comment process has been on eliciting a specific discussion of why the leadership structure is appropriate given the specific characteristics or circumstances of the issuer. In some cases, issuers did not explain why either the combined or separate Chairman/CEO made particular sense in light of an issuer's particular circumstances. This problem was particularly evident for issuers with a separate Chairman/CEO leadership structure, because that structure has historically been seen as a "good" governance practice. Nonetheless, the Staff has raised the comment asking for a more detailed explanation, even in those situations where the separate Chairman/CEO structure was in place. Issuers tended to not always include disclosures responsive to the requirement to explain the effect that the board's role in the oversight of risk has on the leadership structure, so the Staff frequently raised a comment seeking full compliance with Item 407(h). Some issuers chose to say that the board's role in the oversight of risk had no effect on the board leadership structure, while others focused on the interaction of the interested committees with the Chairman and/or CEO in the course of overseeing the issuer's risk management.

The Board's Oversight of Risk

The SEC mandates disclosure about the board's involvement in the oversight of the issuer's risk management process. Issuers have flexibility under this disclosure requirement to describe how the oversight role is exercised, i.e., whether it is through the activities of the entire board, a risk committee of the board, or another committee of the board, such as the audit committee. The SEC also indicates that, where relevant, issuers may want to address whether the individuals who supervise risk management report to the board or a board committee, or otherwise how the board or the appropriate committee receives information from risk managers.

Accelerated Disclosure of Voting Results

Prior to the SEC's action in 2009, voting results from annual or special meetings were required to be disclosed in periodic reports on Form 10-Q or 10-K, which resulted in a significant delay in the time between when the meeting occurred and when shareholders learned of the results from their voting decisions. The SEC moved the requirement for disclosure of voting results from Forms 10-Q and 10-K to Form 8-K. Now, voting results are filed under Item 5.07 of Form 8-K within four business days after the end of the meeting at which the vote was held.

In order to accommodate situations where it may be difficult to determine final voting results within the four-day filing window, the SEC provided an Instruction to Item 5.07 which indicates that an issuer is required to file preliminary voting results within four days after the end of the shareholders' meeting, and then file an amended Form 8-K within four business days after the final voting results are known. If definitive voting results are obtained within the initial four day filing window, then those definitive results may be filed and no preliminary results need be filed.

Areas of Focus in SEC Comments on Annual Reports

Recent Staff comments reflect the trend of Staff review of both legal and accounting or financial disclosures in the Form 10-K. Recent areas of frequent Staff comment have addressed disclosure of goodwill impairment charges, liquidity, debt covenants, disclosure controls and procedures, risk factors and exhibits. Each of these areas is further discussed below.

Management's Discussion and Analysis

Impairments

One of the most frequent areas of Staff comment on Form 10-Ks relates to disclosure of goodwill impairment. The Staff may request additional supplemental information or disclosure if an issuer has taken an impairment charge, but it has also raised comments if no impairment charge has been taken but goodwill accounts for a significant portion of total assets and there are downward trends in revenue, income or stock price. In situations where the issuer has already taken a goodwill impairment charge, the Staff may request that issuers discuss the primary drivers in assumptions that resulted in the charge. For example, the issuer may be asked whether it significantly reduced projected future revenues or net cash flows or increased the discount rates, or whether it considered an economic recovery in its cash flow projections. In addition, issuers are frequently asked to disclose expectations regarding future operating results and liquidity as a result of the impairment charge, including a discussion of whether they expect historical operating results to be indicative of future operating results.

If an issuer has not taken an impairment charge but goodwill accounts for a significant portion of total assets and there are downward trends in revenue, income or stock price, the Staff may issue comments related to the issuer's goodwill impairment analysis. For example, the issuer may be asked to provide a more detailed description of the steps it performs to review goodwill for recoverability, describe the nature of the valuation techniques and significant estimates and assumptions employed to determine the fair value in the impairment analysis and discuss whether there have been any changes to the assumptions and methodologies used since the last impairment test. In addition, the issuer may be asked to discuss its estimates of future cash flows, including disclosures related to the cash flow growth rate used to determine the future cash flow projections.

The Staff may also ask issuers to break down goodwill by reporting unit. Issuers may be requested to disclose any changes to reporting units or allocations of goodwill by reporting unit, as well as the reasons for these changes. The Staff may perform a detailed review of documentation related to the reporting structure in order to determine whether there is a basis for the allocation decisions.

Liquidity

Another area of increased Staff comments in Form 10-Ks has been in the liquidity disclosure of MD&A. The primary focus of Staff comments has been on how the economy has impacted the availability of cash and credit. Comments have reflected a concern that an issuer's risk factors and MD&A disclosure be consistent, and that the MD&A disclosure provide a sufficient level of detail about known trends, demands, events and uncertainties. The SEC has also released interpretive guidance related to liquidity disclosure in MD&A, which is described below in "Additional SEC Interpretive Guidance – Liquidity and Capital Resource Disclosure."

Staff comments related to liquidity also address the disclosure of financial covenants related to debt instruments. Issuers have been asked to disclose the specific terms of material financial covenants in both the footnotes to financial statements and MD&A. Typically, this disclosure must include any required ratios, as well as actual ratios as of the end of the period. As described below, the SEC has also issued interpretive guidance that provides that when management believes a financial covenant is material to the issuer's financial condition and/or liquidity, the financial covenant should be disclosed even if it relies on a non-GAAP measure. The disclosure around the non-GAAP measure should address the material terms of the credit agreement, the amount or limit required for compliance with the covenant, and the actual or reasonably likely effects of compliance or non-compliance with the covenant on the issuer's financial condition and liquidity. Issuers must also provide a reconciliation to GAAP.

The Staff has recently focused on the impact of offshore cash holding on the issuer's liquidity position. The Staff's comments have focused on the extent to which U.S. taxation of funds repatriated into the country would limit the availability of that offshore cash to satisfy the issuer's liquidity obligations.

Loss Contingency Disclosures

The standard for loss contingency accounting and disclosure is Accounting Standards Codification 450-20 (referred to as "ASC 450-20," formerly known as Statement of Financial Accounting Standards No. 5). At the end of 2010, the Staff of the Division of Corporation Finance announced an increased focus on disclosures made in financial statements, financial statement footnotes and in related disclosures when the Staff reviews Form 10-Ks in its regular review process.

Under ASC 450-20, each loss contingency must be classified as either a "probable" loss contingency, a "reasonably possible" loss contingency, or a "remote" loss contingency. Then, each loss contingency must be classified as either "reasonably estimable" or "not reasonably estimable." For probable loss contingencies, if the loss can be reasonably estimated, an issuer must record an accrual in the financial statements, disclose the nature of the accrued loss contingency in a footnote to the financial statements, and, if necessary for the financial statements to not be misleading, disclose the amount of the accrued loss contingency in a footnote to the financial statements. For reasonably possible loss contingencies (where it is determined that the contingency is less than probable but more than remote), no accrual is recorded in the financial statements, however, the issuer must disclose the nature of the loss contingency in a footnote to the financial statements. In addition, an issuer must disclose the reasonable estimate of the possible loss in a footnote to the financial statements or, if that amount is not reasonably estimable, the issuer must include a statement in a footnote to the financial statements that such an estimate cannot be made. Although not required by ASC 450-20, through the comment process the Staff has sought further disclosure with regard to why a contingency is not reasonably estimable. With regard to remote loss contingencies (where there is only a slight chance that the contingency will occur), no accrual is recorded in the financial statements, and no disclosure regarding the loss contingency is required in a footnote to the financial statements. No accrual or disclosure is required for loss contingencies that are immaterial to the issuer's financial statements, and when disclosure is required, reasonable aggregation has been permitted.

During 2011, the Staff has focused on often generic risk factor disclosure regarding the potential material adverse effects of pending or future litigation, as well as legal proceedings disclosure which states that the issuer has no pending material litigation and no disclosure regarding contingencies in their financial statements or the footnotes to those financial statements. In these circumstances, the Staff has requested an explanation as to how these disclosures are consistent. Moreover, the Staff has raised comments where issuers do not use the specific language of ASC 450-20, and as a result, issuers should specifically include disclosures regarding "contingencies," rather than "liabilities" or "results," and issuers should indicate that management believes that any contingencies would not have a material effect on "the issuer's financial statements," rather than "the issuer's results of operations" or "the issuer's financial condition."

The Staff's comments have also focused on announcements of significant settlements of litigation or regulatory actions and the Staff will review loss contingency disclosures in the periods prior to those settlements. The Staff will under these circumstances review the disclosures of the issuer, as well as any disclosures made by the co-parties or counter-parties to the litigation. The Staff also regularly seeks background information regarding the basis for "not reasonably estimable" determinations.

Disclosure Controls And Procedures

The Staff has continued to issue comments requiring issuers to include the entire definition of disclosure controls and procedures in their filings, as the definition is set forth in Exchange Act Rule 13a-15(e). Rule 13a-15(e) defines the term disclosure controls and procedures, then goes on to add "disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure." Issuers including part, but not all, of the above language will be asked to expand their disclosure to include it in its entirety. However, issuers may also limit their disclosure to state simply that their disclosure controls and procedures are effective (or not effective). Issuers using the shortened term "disclosure controls" are asked to refer to "disclosure controls and procedures." In addition, the Staff continues to focus on whether references to "reasonable assurance" are included in the disclosure controls and procedures section, and, if so, whether the issuer has indicated that the principal executive officer and principal financial officer have concluded that disclosure controls and procedures were effective at that reasonable assurance level.

Risk Factors

Recent Staff comments on risk factor disclosure in periodic reports have focused on the following areas: reliance on customers, suppliers, governments and key employees; the market for an issuer's products and services; the impact of regulatory changes; cybersecurity risks; ineffective disclosure and internal controls; legal exposures and reliance on legal positions; conflicts of interest and related party transactions; a history of operating losses; and going concern issues. Issuers should review their risk factors to ensure that they provide adequate disclosure of these issues, to the extent they are applicable. In addition, issuers should ensure that they updated their forward-looking statements disclaimer in conjunction with changes to their risk factors.

Exhibits

Staff comments have recently addressed the practice of omitting schedules and exhibits to material agreements other than merger agreements. Staff comments have highlighted that the exception permitting issuers to exclude schedules to a merger agreement does not apply to other material agreements filed under Item 601(b)(10) of Regulation S-K. Issuers have been asked to either provide a materiality analysis indicating that the omitted schedules and exhibits are not material, or to file the schedules and exhibits to the agreement as part of the agreement.

Additional SEC Interpretive Guidance

The SEC has also provided interpretive guidance outside of the comment process in several areas relevant to preparing Form 10-Ks and proxy statements in 2012.

Use of Non-GAAP Measures

On January 15, 2010, the Staff issued new Compliance and Disclosure Interpretations regarding the use of non-GAAP financial measures under Item 10(e) of Regulation S-K. These revised interpretations related to the use of non-GAAP measures arise out of the Staff's concern that periodic reports have become "compliance documents" that do not sufficiently communicate issuers' operating performance and financial condition in a manner that is consistent with the disclosure made by issuers outside of their SEC filings. According to the Staff, the new interpretations are not intended to encourage an increased use of non-GAAP measures, but rather to improve disclosure in SEC filings. By providing more flexibility to use non-GAAP measures in periodic reports, the SEC is expecting issuers to provide a consistent message across their SEC filings and other public communications. The Staff has also made clear that it reviews an issuer's statements outside of SEC filings to determine whether an issuer's public statements, including those using non-GAAP financial measures, are consistent with disclosure in its SEC filings.

While the Staff has indicated that it is not seeking to require that issuers put non-GAAP measures in filings, some of the key Non-GAAP Financial Measures Compliance and Disclosure Interpretations provide additional flexibility that will facilitate inclusion of some non-GAAP measures in filings in compliance with Item 10(e) of Regulation S-K. The key interpretations are as follows:

- <u>Permitting Adjustments for Recurring Items</u>. A frequent area of Staff comment has been with respect to Item 10(e)'s prohibition on adjustments that "eliminate or smooth items identified as non-recurring, infrequent or unusual" if the item occurred in the past two years or is reasonably likely to occur in the next two years. The Staff's comments have discouraged non-GAAP adjustments for what it views as recurring items even if there were sufficient additional disclosure to explain the nature of the item. Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.03 now permits the presentation of a non-GAAP measure that excludes a gain or charge that is recurring, as long as the issuer does not attempt to represent that particular item as non-recurring, infrequent or unusual.

- <u>Business Purpose Not Required for Use of Non-GAAP Measures</u>. Non-GAAP Financial Measures Compliance and Disclosure Interpretations

Question 102.04 clarifies that a non-GAAP measure may be included in an SEC filing even when management does not use the measure for the purpose of managing its business or for other purposes. The Staff focuses now on the fact that Item 10(e)(1)(i)(D) of Regulation S-K provides that a statement of additional purposes is required "if material" and that an issuer is to disclose additional purposes, "if any," for using the measure. This reverses a prior trend in the comment process, using this provision in Item 10(e) as one of the bases for objecting as to whether there is a legitimate purpose for presenting the non-GAAP measure. However, the interpretation does not alter the requirement in Item 10(e)(1)(i)(C) to describe the reasons why management believes that presentation of the non-GAAP measure provides useful information to investors regarding the issuer's financial condition and results of operations.

- Per Share Performance Measures Permitted. Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.05 clarifies that, while the SEC continues to prohibit per share non-GAAP liquidity measures in any documents filed with or furnished to the SEC, the Staff will not object to a per share non-GAAP measure used to present financial performance.

- Free Cash Flow Permitted. Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.07 indicates that Item 10(e) of Regulation S-K does not prohibit the presentation in SEC filings of a "free cash flow" measure, which is usually defined as cash flow from operating activities less capital expenditures. The Staff's guidance cautions that the free cash flow measure must be accompanied by a clear description of the way in which it is calculated as well as the necessary GAAP reconciliation, and that issuers should avoid "inappropriate or potentially misleading inferences about its usefulness," such as implying that the amounts represent "residual cash flow."

- Adjusted EBITDA under Financial Covenants. Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.09 indicates that the prohibitions in Item 10(e) on the presentation of adjusted EBIT and EBITDA has prevented issuers from fully addressing in MD&A the financial covenants of their credit agreements. The Staff states that, "the prohibition in Item 10(e) notwithstanding," when management believes that the credit agreement is material and that an adjusted EBIT/EBITDA financial covenant is material to understanding the agreement and the issuer's financial condition and/or liquidity, then the issuer may be required to disclose the measure in the MD&A. The interpretation also provides that the disclosure around the measure should probably also address: (1) the material terms of the credit agreement, including the covenant; (2) the amount or limit required for compliance with the covenant; and (3) the actual or reasonably likely effects of compliance or non-compliance with the covenant on the issuer's financial condition and liquidity.

Liquidity and Capital Resources Disclosures

Effective September 28, 2010, the Staff provided interpretive guidance intended to improve the discussion of liquidity and funding risks in MD&A. This guidance focuses on disclosures related to liquidity, leverage ratios and the contractual obligations table. The Staff has also proposed amendments to disclosure requirements related to short-term borrowings, but these amendments have not yet been adopted. The SEC's interpretive release, Release No. 33-9144 (September 17, 2010), emphasizes that issuers are required to disclose known trends or demands, commitments, events or uncertainties that will result in, or that are reasonably likely to result in, a material change in the issuer's liquidity. The release highlights a number of trends and uncertainties relating to liquidity that issuers should consider including in their MD&A, including: difficulties in accessing the debt markets; reliance on commercial paper or other short-term financing arrangements; maturity mismatches between borrowing sources and the assets funded by those sources; changes in terms requested by counterparties; changes in the valuation of collateral; and counterparty risk. Issuers should provide disclosure of any intra-period variations if their disclosure does not otherwise adequately convey their financing arrangements. In addition, if a repurchase transaction is reasonably likely to result in the use of a material amount of cash or other liquid assets, it may be required to be disclosed in MD&A. The SEC also suggests that issuers consider describing cash management and risk management policies that are relevant to an assessment of their financial condition.

The interpretive release also addresses the inclusion of capital and leverage ratios in MD&A. If a capital or leverage ratio financial measure is presented, the issuer should clearly state why the measure is useful to understanding its financial condition and the measure should be accompanied by a clear explanation of the calculation methodology. This explanation should include a discussion of any unusual, infrequent or non-recurring inputs, or any inputs that are adjusted so that the ratio is calculated differently from directly comparable measures. Issuers should also consider whether the measure differs from other measures used in their industry; if so, additional discussion may be required to ensure that the disclosure is not misleading. Any non-GAAP financial measure, including any non-GAAP capital or leverage ratio, that is disclosed in an issuer's filing should comply with SEC rules and guidance related to the inclusion of non-GAAP financial measures.

In its interpretive release, the SEC recognizes that different approaches to the contractual obligations table have developed. The SEC declines to provide specific presentation requirements or guidance on the treatment of certain items; instead, it states that issuers should provide a presentation that is clear, understandable and not misleading, and that appropriately reflects the obligations that are meaningful to the issuer. The format and content of the disclosure should support the purpose of the disclosure in this section, which is to provide aggregated information about contractual obligations in a single location in order to improve transparency of an issuer's liquidity and capital resource needs, and to provide context for assessing the role of off-balance sheet arrangements. Issuers should use footnotes, in the SEC's view, to provide information necessary for an understanding of the timing and amount of specified contractual obligations. Additional narrative disclosure should be provided if necessary to explain what the table does and does not include and to promote understanding of the information provided in the table.

Cybersecurity Disclosure

On October 13, 2011, the SEC's Division of Corporation Finance issued disclosure guidance to assist publicly-traded companies "in assessing what, if any, disclosures should be provided about cybersecurity matters in light of each registrant's specific facts and circumstances." CF Disclosure Guidance Topic No. 2 reviews the applicability of existing SEC disclosure requirements to today's cybersecurity concerns, noting that: (i) businesses increasingly focus or rely on internet communications and remote data storage; (ii) risks and potential costs associated with cyber attacks and inadequate cyber security are increasing; and (iii) as with other operational and financial risks and events, companies should on an ongoing basis review the adequacy of disclosure relating to cybersecurity risks and other cyber incidents. The Staff further notes that the guidance is meant to be consistent with disclosure considerations for any business risk, and that any disclosure should not compromise cybersecurity efforts. The Staff highlights a number of critical considerations, including: (i) potential costs and other negative consequences, such as increased protection costs (e.g., additional personnel, training, third party consultants), remediation costs, liability for stolen assets or information, the repair of damaged systems and incentives for customers to maintain business relationship after cyber attack; (ii) lost revenues arising from the unauthorized use of proprietary information, and the failure to retain or attract customers; (iii) litigation; and (iv) reputational damage.

Specifically with respect to risk factors disclosures, the Staff notes that issuers should consider the probability that cyber incidents will occur in the future, and the potential costs and other consequences that could result. In this regard, issuers must evaluate prior cyber incidents, including the severity and frequency of such incidents, as well as the probability of cyber attacks occurring. To the extent material, risk factor disclosure of potential cyber incidents may be necessary and may include aspects of a company's operations that give rise to or mitigate these cyber risks. The Staff indicates that issuers should not disclose "boilerplate" risks that generally apply to all public companies, and should not disclose any information in a risk factor that would increase a company's cybersecurity risks.

With regard to disclosures in MD&A, the Staff indicates that issuers should address cybersecurity risks or incidents if the costs or other impact of a known cyber risk or incident represents a material event, trend or uncertainty that is reasonably likely to have a material effect on the company's results of operations, financial condition or liquidity. MD&A disclosure may be required even if a past cyber incident did not have a material effect on the company's financial condition if the incident caused the company to materially increase its cybersecurity expenditures.

As for business disclosures, the Staff indicates that issuers should evaluate the impact of cyber incidents or cybersecurity risks on each reportable business segment, and if a cyber incident or cybersecurity risk materially impacts a company's (or business segment's) relationships with customers or suppliers, or materially impacts the competitive landscape, a company should summarize the cyber risk or incident and its impact in the description of that company's business. In the context of legal proceedings disclosure, issuers should discuss any material pending legal proceeding related to a cyber incident to which a company is a party.

The Staff notes that with regard to disclosure controls and procedures, issuers should evaluate the extent to which cyber incidents pose a risk to the company's ability to record, process, summarize and report information that is required to be disclosed in SEC filings. If it is reasonably possible that information would not be properly recorded, processed, summarized or reported due to a cyber incident, issuers must evaluate how cybersecurity risks impact the company's disclosure controls and procedures, whether these controls and procedures are effective and whether any remedial measures are required.

With respect to an issuer's financial statement disclosures, issuers should consider accounting principles that may be important when summarizing the impact of a cyber incident on the company's financial statements, including: (i) costs incurred to prevent cyber incidents; (ii) costs incurred to mitigate damages from a cyber incident; (iii) loss contingencies related to cyber incidents; (iv) impairment of certain assets; and (v) subsequent event disclosures.

Guidance on European Debt Exposures

On January 6, 2012, the SEC's Division of Corporation Finance issued guidance regarding disclosures about exposure to the debt of sovereign and non-sovereign issuers in Europe. Topic No. 4 of the SEC Staff's new "CF Disclosure Guidance" series addresses specific concerns about the adequacy of public disclosures made principally by financial institutions regarding their European debt exposures, and the potential consequences of such exposures on those issuers. The Staff encourages affected issuers to consider this guidance in preparing their SEC reports, including in the upcoming annual reports for calendar year-end issuers.

The Staff has focused its attention on disclosure about European debt exposure included (or required to be included) in risk factors, MD&A, qualitative and quantitative disclosure about market risks ("Market Risk Disclosure"), as well as Industry Guide 3 disclosures required of bank holding companies and similar lending and deposit-taking financial institutions ("Guide 3"). The Staff's guidance in Topic No. 4 is directed at both U.S. and non-U.S. financial institutions, and the Staff notes that, to date, disclosures about the nature and extent of direct or indirect exposure to European sovereign debt "have been inconsistent in both substance and presentation." For this reason, the Staff lays out a very specific structure for evaluating what disclosures may be necessary regarding these exposures, based on the Staff's own experience in commenting on those disclosures that it has, to date, found to be lacking.

In providing its guidance, the Staff has not specifically identified the countries in Europe that are of principal concern, noting that the specific countries may change over time. However, the Staff does indicate that issuers should focus on those countries experiencing "significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist." The Staff encourages issuers to identify the basis for determining which countries are included in the disclosure.

In recent comments issued by the Staff in its review of periodic reports filed in 2011, enhanced disclosure was requested, separately by country, as to: (i) gross sovereign, financial institutions, and non-financial corporations' exposure; (ii) quantified disclosure explaining how gross exposures are hedged; and (iii) a discussion of the circumstances under which losses may not be covered by purchased credit protection.

In addition to providing the disclosure separately by country as indicated above, the Staff has requested that issuers segregate between sovereign debt and non-sovereign debt exposures, and by financial statement category, in order to arrive at the gross funded exposure. In addition, the Staff has asked that issuers consider separately providing disclosure of gross unfunded commitments made. Further, the Staff suggests that information regarding hedges be provided in order to present an amount of net funded exposure. As discussed below, the Staff has provided a wide-ranging outline for assessing what qualitative and quantitative disclosures may be necessary regarding direct or indirect exposures to the European debt crisis.

The Staff believes that the disclosures outlined in Topic No. 4 are called for under existing, principles-based disclosure requirements. In this regard, the Staff notes the following applicable disclosure requirements and how they should be interpreted when evaluating what disclosure is necessary regarding European debt exposures:

- MD&A. Issuers must identify know trends or known demands, commitments, events or uncertainties that will result, or that are reasonably likely to result, in a material increase or decrease in liquidity, and issuers must also discuss any known trends or uncertainties that have had, or that the issuer reasonably expects may have, a material favorable or unfavorable impact on income.
- Guide 3. Item III.C.3 of Guide 3 calls for issuers to identify cross-border outstandings to borrowers in each foreign country where the exposures exceed one percent of total assets, as well as disclosure where "current conditions in a foreign country give rise to liquidity problems which are expected to have a material impact on the timely repayment of principal or interest on the country's private or public sector debt," including tabular disclosure of changes in outstandings, and in some situations tabular disclosure of restructured outstandings.

- Risk Factors and Market Risk Disclosure. Issuers must provide disclosure of material risks, including in risk factors disclosure and in specific Market Risk Disclosures, and the Staff indicates that such disclosures should not be generic "boilerplate" and should rather be tailored to the issuer's specific facts and circumstances.

In Topic No. 4, the Staff provides a highly detailed outline for preparing the types of disclosure called for by the guidance. This outline provides considerations to be used when determining, in light of an issuer's specific facts, what disclosure should be provided in a manner that is consistent with the guidance. The outline is as follows:

I. Gross Funded Exposure

   a. Countries

      i. The basis for the countries selected for disclosure.

      ii. The basis for determining the domicile of the exposure.

   b. Type of Counterparty

      i. Separate categories of exposure to sovereign and non-sovereign counterparties.

         1. Sovereign exposures consist of financial instruments entered into with sovereign and local governments.

         2. Non-sovereign exposures comprise exposure to corporations and financial institutions. To the extent material, separate disclosure may be required between financial and non-financial institutions.

   c. Categories of Financial Instruments

      i. Categories to be considered for disclosure include loans and leases, held-to-maturity securities, available-for-sale securities, trading securities, derivatives, and other financial exposures to arrive at gross-funded exposure.

         1. For loans and leases, the gross amount prior to the deduction of the impairment provision and the net amount after the impairment provision.

         2. For held-to-maturity securities, the amortized cost basis and the fair value.

3. For available-for-sale securities, the fair value, and if material, the amortized cost basis.

4. For trading securities, the fair value.

5. For derivative assets, the fair value, except that amount could be offset by the amount of cash collateral applied if separate footnote disclosure quantifying the amount of the offset is provided.

6. For credit default contracts sold, the fair value and the notional value of protection sold, along with a description of the events that would trigger payout under the contracts.

7. For other financial exposures, to the extent carried at fair value, the fair value. To the extent carried at amortized cost, the gross amount prior to the deduction of impairment and the net amount after impairment.

II. Unfunded Exposure

a. The amount of unfunded commitments by type of counterparty and by country.

b. The key terms and any potential limitations of the counterparty being able to draw down on the facilities.

III. Total Gross Exposure (Funded and Unfunded)

a. The effect of gross funded exposure and total unfunded exposure should be subtotaled to arrive at total gross exposure as of the balance sheet date, separated between type of counterparty and by country.

b. Appropriate footnote disclosure may be provided highlighting additional key details, such as maturity information for the exposures.

IV. Effects of Credit Default Protection to Arrive at Net Exposures.

a. The effects of credit default protection purchased separately by counterparty or country.

b. The fair value and notional value of the purchased credit protection.

c. The nature of payout or trigger events under the purchased credit protection contracts.

d. The types of counterparties that the credit protection was purchased from and an indication of the counterparty's credit quality.

e. Whether credit protection purchased has a shorter maturity date than the bonds or other exposure against which the protection was purchased. If the credit protection has a shorter maturity date, clarifying disclosure should be provided about this fact, as well as the risks presented by the mismatch of the maturity.

V. Other Risk Management Disclosures

a. How management is monitoring and/or mitigating exposures to selected countries, including any stress testing that is being performed.

b. How management is monitoring and/or mitigating the effects of indirect exposure in the analysis of risk. Disclosure should explain how the issuer identifies their indirect exposures, provide examples of the identified exposures, along with the level of the indirect exposures.

c. Current developments (rating downgrades, financial relief plans for impacted countries, widening credit spreads, etc.) of the identified countries, how those developments, or changes to them, could impact the issuer's financial condition, results of operations, liquidity or capital resources.

VI. Post-Reporting Date Events

a. Significant developments since the reporting date and the effects of those events on the reported amounts.

As noted in the "Supplementary Information" section of Topic No. 4, the statements in the CF Disclosure Guidance represent views of the Staff, and do not constitute a new rule, regulation or statement of the SEC. Nonetheless, financial institutions preparing disclosure for their SEC reports should carefully consider the disclosure that should be provided in response to the Staff's expectations, as the Staff's outline included in Topic No. 4 will likely serve as a roadmap for the type of comments that the Staff will issue when reviewing the annual reports of any issuers with European credit exposure in 2012. While the Staff has not sought to provide a "one-size-fits-all" approach for these disclosures, Topic No. 4 does seek to provide key principles that need to be considered when evaluating and describing European debt exposures in upcoming SEC reports.

Changes to the SEC's Review Program

On July 16, 2010, the SEC announced a restructuring of the Division of Corporate Finance that created three new offices, including an office for large and significant financial services companies. Although most public companies will not be subject to review by this new office, it is important to note that the office may become the archetype for a new "continuous review" approach that the Division of Corporation Finance has been developing over the past few years. Institutions covered by the new office will be subject to enhanced and continuous review of their filings and other disclosures, including press releases, presentations, websites and analyst reports, rather than just a periodic review of documents filed with the SEC. The restructuring also suggests that the SEC is focusing on ensuring that its Staff has expertise within an industry and knowledge of trends within that industry.

The shift towards continuous review by the Staff is also evident in another recent trend. Some issuers have received follow-up letters on their proxy statements, even though the Staff had already completed its review of the issuer's Form 10-K before the proxy statement was filed. If a continuous review model is adopted more broadly by the Staff, it could result in issuers spending more time responding to Staff comments.

In addition to the shift towards continuous review, the Staff has indicated that it will begin reviewing documents outside of an issuer's filings. This has been made clear in the updates to the Staff's statements in connection with the non-GAAP measures guidance discussed above. The Staff has expressed concern that issuers' SEC filings seem to have become "compliance" documents, rather than communicative tools that provide useful information to shareholders, and has suggested that it will look outside of an issuer's filings in its review of the issuer's risk factors and MD&A. The Staff has stated that it will focus on ensuring that the story an issuer is telling in its SEC filings is consistent with the story being told elsewhere, including in earnings releases, presentations, statements, news coverage and analyst reports. As a result, issuers are now more likely to see comments that reference disclosure made in other forums that raise questions or issues about the disclosures in filings.

CHAPTER 4

SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE

SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE

Introduction

Continued shareholder concerns over corporate governance and executive compensation issues will shape the outcome of votes in the 2012 proxy season. Issuers will need to continue to focus on voting policies of institutional shareholders and proxy advisory services when making corporate governance and executive compensation decisions.

Shareholder Proposal Trends in the 2011 Proxy Season

Trends in Shareholder Proposals

The 2011 proxy season saw a significant drop in the number of shareholder proposals on executive compensation issues due to a decrease in proposals seeking to establish an advisory vote on executive compensation. The number of governance shareholder proposals continued to drop in 2011, possibly due to the focus on Say-on-Pay. Trends included:

- Greater support for declassification;
- Renewed interest in majority voting;
- Increased support for independent chair proposals; and
- Decreased support for takeover defense limits.

Average support for shareholder proposals on environmental and social issues continued to rise in 2011:

- Political contribution shareholder proposals continued to focus attention on corporate giving in political campaigns, with an increase in the number of approaches following the 2010 *Citizens United* decision;
- Environmental shareholder proposals continued, with some obtaining significant support levels;
- Sustainability proposals continued to decline in 2011; and
- Other typical proposals included sexual orientation non-discrimination, health, and safety and recycling.

Key shareholder proposals in 2012 include:

- Compensation-related proposals (i.e., pay-for-performance, clawback compensation consultants, and conflicts of interest);
- Proxy access shareholder proposals;
- Majority voting for directors (particularly at Russell 3000 companies);
- Shareholder ability to call special meetings and take action by written consent;
- Disclosure, limits, board oversight, and shareholder approval or ratification of political contributions;
- Split chairman/CEO proposals; and
- Auditor rotation proposals.

Staff Legal Bulletin No. 14F

On October 18, 2011, the Division of Corporation Finance issued Staff Legal Bulletin No. 14F ("SLB 14F"). SLB 14F clarified that only Depository Trust Corporation ("DTC") participants should be viewed as "record" holders of securities that are deposited with DTC. In accordance with this guidance, a shareholder that owns shares through a broker or bank that is not a DTC participant must obtain and submit two proof of ownership statements—one from the shareholder's broker or bank confirming the shareholder's ownership and one from the DTC participant through which the securities are held confirming the ownership of the shareholder's broker or bank. A company that seeks to exclude a shareholder proposal from its proxy materials on the basis of proof of ownership now must take at least the following steps: (i) determine whether the shareholder is a registered shareholder by checking its list of registered shareholders; (ii) review the proof of ownership to see if the bank or broker providing such proof is a DTC participant by comparing such bank or broker's name against the list of DTC participants; and (iii) notify the shareholder that the person that provided proof of ownership is not a DTC participant and request that the shareholder obtain a second letter demonstrating proof of ownership from the bank or broker that is a DTC participant through which the other bank or broker holds shares.

SLB 14F also suggests that a shareholder proponent use the following format to have its broker or bank provide the required proof of ownership as of the date the shareholder plans to submit the proposal: "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."

Under new guidance provided in SLB 14F, if a shareholder proponent submits a revised proposal before the company's deadline, the company must accept the revised proposal. If a shareholder submits a revised proposal after the company's deadline, the company does not have to accept the revised proposal. The Staff also notes in SLB 14F that an issuer which wishes to withdraw a no-action request for a proposal submitted by multiple proponents need only provide a letter from the lead proponent. Lastly, the Staff now transmits Rule 14a-8 no-action responses by e-mail to companies and proponents, provided that they include e-mail addresses for recipients in their correspondence.

Proxy Access in 2012

Important developments with the SEC's proxy access rule have resulted in 2012 being a season when proxy access shareholder proposals will come to some issuers' ballots for the first time.

Section 971 of the Dodd-Frank Act provided the SEC with authority to promulgate "proxy access" rules, allowing specified shareholders to include director nominees in a company's proxy materials. The Dodd-Frank Act did not prescribe specific standards for these rules, and the SEC had in fact proposed proxy access rules prior to enactment of the Dodd-Frank Act. The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, and such rules were scheduled to become effective on November 15, 2010. However, the effectiveness of those rules was stayed due to litigation challenging the rules.

Under Rule 14a-11 as adopted by the SEC, qualifying shareholders or groups holding at least three percent of the voting power of a company's securities, who had held their shares for at least three years, would have had the right to include director nominees in proxy materials upon meeting certain other requirements. An amendment to Rule 14a-8 provided that companies may not exclude from their proxy materials shareholder proposals for less restrictive proxy access procedures. However, on September 29, 2010, the Business Roundtable and Chamber of Commerce of the United States of America filed a petition with the United States Court of Appeals for the District of Columbia Circuit (the "Court") seeking judicial review of the changes to the SEC's proxy access rule, and on the same day filed with the SEC a request to stay the effective date of Rule 14a-11. On October 4, 2010, the SEC granted the request for a stay of the Rule 14a-11 and associated rules pending resolution of the petition for review by the Court.

On July 22, 2011, the Court vacated Rule 14a-11. The Court held that the SEC was "arbitrary and capricious" in promulgating Rule 14a-11, based principally on the SEC's failure to adequately address the economic effects of the rule. The Court expressed significant concerns about the conclusions that the SEC reached and the agency's consideration of comments during the course of the rulemaking. The Court did not address the First Amendment challenge to the rule that had been raised by the petitioners. On September 6, 2011, the SEC issued a statement indicating that it would not seek rehearing of the Court's decision, nor would it seek Supreme Court review of the decision however, the SEC's staff would continue to study the viability of a proxy access rule. The statement also indicated that the amendment to Rule 14a-8 referenced above would go into effect when the Court's mandate was finalized, which occurred on September 14, 2011. As a result, the amendments to Rule 14a-8 (along with other rules adopted in connection with Rule 14a-11) became effective on September 20, 2011, following the SEC's publication of a notice announcing the effective date of the rule changes.

The amendments to Rule 14a-8 may permit under certain circumstances the type of "private ordering" for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking. Under Rule 14a-8(i)(8), as amended, a company may no longer exclude under this basis for exclusion a shareholder proposal that would amend or request that the company consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of the upcoming election of directors.

While the SEC's amendments to Rule 14a-8(i)(8) eliminated one basis to exclude proxy access shareholder proposals, there may be other options for seeking to exclude proxy access shareholder proposals. An issuer could: (i) argue that the proposal is contrary to the proxy rules under Rule 14a-8(i)(3), i.e., the resolution contained in the proposal is inherently vague or indefinite; (ii) that by adopting its own proxy access bylaw amendment, the shareholder's proxy access proposal has been "substantially implemented" under Rule 14a-8(i)(10); (iii) the shareholder proposal conflicts with a similar company-sponsored proposal under Rule 14a-8(i)(9) or (iv) other potential bases for exclusion that may be applicable based on the wording of the proposal and supporting statement.

Many companies are taking a "wait-and-see" approach with respect to amending their bylaws to permit proxy access in order to allow greater flexibility in responding to a future shareholder proposal. There have been approximately seventeen proxy access shareholder proposals in the months since these Rule 14a-8 amendments became effective. A number of these proposals have been based on a model proxy access proposal drafted by U.S. Proxy Exchange, an organization of retail investors. These shareholder proposals tend to have lower ownership thresholds and shorter holding period requirements than the SEC rule that was vacated. In this regard, the ownership threshold is usually between 1% and 5% of outstanding shares and the length of ownership is usually between one and three years of continuous ownership.

KEY PROXY ADVISER VOTING GUIDELINES FOR 2012

INSTITUTIONAL SHAREHOLDER SERVICES

On November 17, 2011, ISS, the leading proxy advisory firm, released 2012 updates to its U.S. proxy voting guidelines. The policy updates include revisions to ISS's pay-for-performance policy and methodology. Other significant updates relate to the responsiveness of boards of directors to prior Say-on-Pay votes, and the frequency of such votes, as well as revisions to the policy on proxy access in the wake of revisions to the SEC shareholder proposal rules. The ISS policy changes are effective for shareholder meetings on or after February 1, 2012.

Pay-for-Performance Policy

As part of its evaluation of a company's Say-on-Pay proposal, ISS conducts a pay-for-performance evaluation that considers the alignment of the CEO's pay with company performance over time. ISS has revised its approach to pay-for-performance in response to comments from both investors and issuers that pay-for-performance should be viewed in a long-term context rather than focusing only on the most recent year. As a result, ISS has made some changes to its pay-for-performance analysis to consider pay and performance over a longer time frame.

The new approach to pay-for-performance begins with a quantitative analysis for companies in the Russell 3000 index. The quantitative analysis considers both peer group alignment and absolute alignment. ISS generally establishes a peer group of 14-24 companies based on market capitalization, revenue and industry group.

The peer group alignment has two components. The first is the degree of alignment between the company's total shareholder return rank within the peer group and the CEO's total pay rank within the peer group. This alignment is measured over both a one-year and a three-year period, with the periods weighted 40% and 60%, respectively. The second component is the multiple of the CEO's total pay relative to the median CEO pay in the peer group.

The absolute alignment portion of the quantitative analysis looks at the alignment between the trend in CEO pay and company total shareholder return over the prior five fiscal years. ISS indicates that this is the difference between the trend in annual changes to compensation and the trend in annual total stockholder return over the five-year period.

For companies in the Russell 3000 index, if the quantitative analysis does not demonstrate unsatisfactory pay-for-performance alignment, ISS would not conduct a further qualitative analysis. For non-Russell 3000 index companies where a pay-for-performance misalignment is otherwise suggested, and for companies for which the quantitative analysis demonstrates unsatisfactory pay-for-performance alignment, ISS will analyze the following qualitative factors: (i) the ratio of performance-to time-based equity awards; (ii) the ratio of performance-based compensation to overall compensation; (iii) the completeness of disclosure and rigor of performance goals; (iv) the company's peer group benchmarking practices; (v) actual results of certain financial and operational metrics; (vi) special circumstances (e.g., new CEO); and (vii) any other relevant factors.

ISS indicates that its revised approach will better address market needs and identify pay-for-performance alignment over a longer period of time, which will give institutional investors a better view of the relationship between executive pay and company performance over time.

Response to Say-on-Pay Vote

For most U.S. public companies, the 2011 proxy season was the first year the company conducted a Say-on-Pay vote mandated by Section 951 of the Dodd-Frank

Act. As part of the rules implementing Section 951 of the Dodd-Frank Act, the SEC requires an issuer to discuss in its CD&A whether, and if so, how, the issuer considered the results of the most recent Say-on-Pay vote in determining compensation policies and decisions.

Even though any company that conducted a Say-on-Pay vote in 2011 will be required to discuss the results in its 2012 CD&A, ISS has indicated that it will focus on issuers whose prior-year Say-on-Pay votes received the support of less than 70% of the votes cast. ISS will recommend voting, on a case-by-case basis, against members of the compensation committee (or, in exceptional cases, the full board) if the prior-year Say-on-Pay vote received the support of less than 70% of the votes cast, but will take into account the company's response, including the disclosure of its efforts to engage with institutional investors and the specific actions it has taken to address the issues that contributed to the low level of support. In formulating its recommendation, ISS will also consider whether the issues are recurring or isolated, the company's ownership structure and whether the support for the Say-on-Pay vote was less than 50%.

Any company that received less than a very high level of support for its 2011 Say-on-Pay proposal should describe in detail its efforts to engage with its major shareholders and discuss the relevant changes to its compensation policies in light of the Say-on-Pay vote results. Companies that received support for Say-on-Pay at levels less than 70%, however, should formulate their CD&A discussions with particular care given this new policy from ISS.

Response to the Say-on-Frequency Vote

Another aspect of Section 951 of the Dodd-Frank Act was that shareholders must also vote, on a non-binding basis, on the frequency of Say-on-Pay votes. Shareholders are given the choice of having Say-on-Pay votes every year, every two years or every three years.

As part of its 2012 policy update, ISS indicates that it will recommend voting against or withholding votes from the entire board (other than new nominees) if the board implements a Say-on-Pay vote on a less frequent basis than the frequency that received a majority of the votes cast in the most recent frequency vote. For example, if a majority of the votes cast favor a frequency of every year for Say-on-Pay votes, and the board of directors instead opts to conduct Say-on-Pay votes every three years, ISS would recommend voting against or withholding votes from each director in the upcoming proxy season.

ISS indicates that in cases where no one choice of frequency receives the support of a majority of the votes cast, the preferences of shareholders may be unclear. In these circumstances, ISS will consider its recommendation on a case-by-case basis, taking into account the board of director's rationale for its frequency decision, ownership structures, compensation concerns, and the level of support for Say-on-Pay.

Proxy Access Proposals

While the ISS policy on proxy access proposals remains a case-by-case approach, ISS indicates that it is expanding the factors that it will examine in formulating a recommendation on both shareholder and management proxy access proposals. These factors include the ownership threshold, both the percentage of ownership and the duration of ownership, the maximum proportion of directors that shareholders may nominate in a year, and the method for determining which nominations should appear on the ballot if there are multiple shareholder nominations.

Other Policy Changes

In addition, ISS has changed its approach to recommendations on proposals to approve compensation plans for newly public companies that will entail a full equity plan evaluation when a company presents an equity plan proposal to comply with the provisions of Section 162(m) of the Internal Revenue Code. Under its prior approach, ISS typically recommended voting in favor of plan amendments to comply with Section 162(m).

ISS has also updated its policies to take a case-by-case approach to exclusive venue management proposals and to consolidate the factors it will consider on proposals on dual-class common stock structures. The 2012 policy update also changes the approach to proposals requiring corporate political contribution disclosure from case-by-case consideration to generally recommending voting in favor of such proposals. Finally, ISS has amended its policies on certain social and environmental issues, including hydraulic fracturing, recycling, lobbying issues, workplace safety and water issues.

Glass Lewis

The proxy advisory service Glass Lewis has recently updated its voting policies in light of the 2011 Say-on-Pay experience and other developments for the 2012 proxy season.

Response to Say-on-Pay Vote

Glass Lewis expects that directors at companies that received a significant vote against Say-on-Pay (which Glass Lewis considers to be anything greater than 25% of the votes cast) must demonstrate some level of shareholder engagement and responsiveness to shareholder concerns which led to the adverse vote result. If the board of directors has not demonstrated active engagement with shareholders, Glass Lewis will recommend voting against or withholding votes from compensation committee members.

Poison Pills and Classified Boards

Under revised Glass Lewis policy, when a classified board adopts a poison pill without shareholder approval within the prior 12 months and shareholders are unable to vote against all members of the board due to the staggered structure, Glass Lewis will recommend a vote against the remaining directors in the next year that they are up for election.

Exclusive Forum Provisions

In Glass Lewis's view, any charter or bylaw provision limiting a shareholder's choice of legal venue is not in the best interest of shareholders—such as "forum selection clauses"—may effectively discourage the use of shareholder derivative claims by increasing the associated costs and making them more difficult to pursue. As a result, Glass Lewis believes that shareholders should be wary of approving any limitation on their legal recourse, including limiting themselves to a single jurisdiction without compelling evidence that it will benefit shareholders. As a result, Glass Lewis generally recommends that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision. In the event that a company seeks shareholder approval of a forum selection provision as part of a bundled bylaw or charter amendment rather than as a separate proposal, Glass Lewis will weigh the benefits of the other bundled provisions when determining its ultimate voting recommendation.

When a board adopts a forum selection provision without shareholder approval, or if a board is currently seeking shareholder approval of a forum selection clause pursuant to a bundled bylaw or charter amendment rather than as a separate proposal, Glass Lewis will recommend voting against the chairman of the corporate governance committee. In those cases where the board adopts an exclusive forum provision prior to the issuer's initial public offering, Glass Lewis will recommend voting against the chairman of the corporate governance committee, or in the absence of such a committee, the chairman of the board, who served during the period when the exclusive forum provision was adopted.

Political Spending Shareholder Proposals

Reflecting a change in policy, Glass Lewis will recommend voting in favor of proposals requesting reports on or increased disclosure of political spending if there is no explicit board oversight of corporate political spending.

Proxy Access

Glass Lewis will consider recommending support of what it deems to be well-crafted and reasonable proxy access proposals. Glass Lewis believes that, in some cases, adoption of a proxy access provision will allow for improved shareholder rights and ensures that shareholders with long-term interests in an issuer have an opportunity to nominate candidates to the board. Glass Lewis reviews proxy access proposals on a case-by-case basis, and considers the following factors in its analysis: (i) issuer size; (ii) the shareholder proponent and their reasoning for putting forth the proxy access proposal; (iii) the percentage ownership requested and holding period requirement; (iv) the shareholder base, both in terms of percentage of ownership and type of ownership; (v) responsiveness of the board and management to shareholders, as evidenced by progressive shareholder rights policies; (vi) company performance and steps taken to improve poor performance; (vii) the existence of anti-takeover protections or other entrenchment devices; and (viii) opportunities for shareholder action, i.e., to act by written consent or the right to call a special meeting.

CHANGES TO NYSE POLICY REGARDING DISCRETIONARY VOTING ON GOVERNANCE MATTERS

The NYSE recently sent out a notice to its members regarding broker discretionary voting on certain corporate governance proposals. The notice relates to the application of NYSE Rule 452 to certain types of corporate governance proxy proposals. NYSE Rule 452 governs when NYSE member organizations may vote customer shares without specific client instructions.

In the past, the NYSE had determined that certain corporate governance proposals should be treated as "Broker May Vote" matters for uninstructed shares when the subject proposal is supported by company management. As a result brokers had "discretionary" authority to vote the shares in the absence of any instruction from the ultimate beneficial owner. In light of the narrowing of circumstances where discretionary broker voting is permitted as a result of SEC rule changes and the enactment of the Dodd-Frank Act, the NYSE reexamined its treatment of corporate governance proposals under NYSE Rule 452, and determined that, effective for the 2012 proxy season, the NYSE will no longer continue its prior approach of permitting discretionary broker voting of uninstructed shares on these proposals. Proposals that the NYSE had previously ruled as "Broker May Vote," including, for example, proposals to declassify the board of directors, majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides, will now be treated as "Broker May Not Vote" matters.

CHAPTER 5

REVISITING KEY CORPORATE GOVERNANCE AND DISCLOSURE POLICIES

REVISITING KEY CORPORATE GOVERNANCE AND DISCLOSURE POLICIES

INTRODUCTION

A number of important regulatory, legislative, and market developments arising since the onset of the financial crisis have made this an ideal time to revisit your key corporate governance and disclosure policies in order to determine whether changes should be made to reflect current law, standards, or best practices, and to determine whether additional policies should be implemented in light of recent events. Many of these key policies are critical to help protect the company and its employees from potential securities law violations, and to provide assurance to investors and others that the issuer is maintaining an appropriate "tone at the top" through the implementation of the latest corporate governance best practices.

Much like the financial scandals that brought about the enactment of the Sarbanes-Oxley Act, the recent financial crisis and the enactment of the Dodd-Frank Act has focused attention on the corporate governance and disclosure practices of all issuers. Following the enactment of the Sarbanes-Oxley Act, issuers embarked on an extraordinary effort to revise or document, for the first time, many key corporate governance and disclosure policies, whether due to SEC disclosure requirements, listing standards, or as a result of evolving standards of best practices. These policies should not be static, but rather should continually be reassessed in light of a changing legal landscape and the issuer's needs. Against the backdrop of the recent financial crisis and the related legislative and regulatory responses, and given the recent initiatives by shareholders and proxy advisory firms, now is an ideal time for issuers to revisit many of these policies to determine whether revisions should be made to existing policies or whether new policies are needed. In addition, when reassessing its policies, an issuer should not overlook the need to revisit the methodology used for communicating and training employees on the policies in order to ensure that those impacted by the policies fully understand what is required, how to comply, and the potential consequences of non-compliance.

There is no one-size-fits-all approach to corporate governance and disclosure policies. The following suggestions may or may not be applicable to an issuer based on its individual circumstances. Nevertheless, it is useful to compare your company's policies to the latest standards to ensure that best practices are considered and implemented, as appropriate.

INSIDER TRADING POLICIES

BACKGROUND

Concerns about insider trading are by no means a new issue for issuers. In light of the mandates of the Insider Trading and Securities Fraud Enforcement Act of 1988, general corporate compliance considerations for directors seeking to fulfill their fiduciary duties, and concerns about reputational risks arising from potential insider trading claims, insider trading policies have become a mainstay of corporate compliance programs.

Recent trends with enforcement proceedings brought by the SEC and criminal proceedings brought by federal prosecutors have demonstrated a renewed interest in insider trading cases, with a particular focus in recent months on large and complex insider trading rings involving high-profile individuals. In 2009, for example, the SEC filed 35 insider trading actions and federal prosecutors brought criminal charges involving insider trading against 31 individuals. These cases have involved parallel civil and criminal proceedings, aggressive penalties, and in some cases, an expanded scope of insider trading law. Overall, this recent insider trading activity is reminiscent of the Ivan Boesky-related scandals of the 1980s in both the scope of the investigations and the level of media attention.

One of the notable developments with these recent insider trading cases is the allegations against employees (including high- profile employees) of issuers that undoubtedly had robust insider trading policies in place. This is a reminder that simply having a policy in place is not sufficient if the policy is not promoted and enforced within an issuer. The increased level of enforcement activity provides a good opportunity to revisit the insider trading policy, both in terms of its content and the way in which employees are trained on the applicability of the policy to them.

In addition to concerns about stepped-up enforcement efforts, the financial crisis has particularly highlighted practices that are worth revisiting in the context of insider trading policies, including the practice of allowing employees to hedge, pledge, or sell short the company's securities, or engage in derivative transactions that have the same or similar effect. These activities can have significant consequences both for the employee and the company, and thus now warrant a closer look.

Potential Considerations for Insider Trading Policies

While there are many considerations that should be taken into account in drafting or revising an insider trading program, several key areas should be reviewed in light of recent events.

Pre-clearance Requirements and Blackout Periods

Many issuers have pre-clearance requirements and a trading blackout period. The pre-clearance requirements of an insider trading policy generally require directors, officers, and certain employees to pre-clear all of their trades in the issuer's securities with a designated officer of the issuer. A trading blackout period is defined as a specific period of time when the issuer's officers, executives, and certain employees are prohibited from trading in the issuer's stock, except for specific exceptions. The date for beginning blackout periods may range from as early as 30 days before the end of the quarter to the end of the quarter or even, in some cases, a day or two after the end of the quarter, depending largely on the specific nature of the issuer's business. Today, blackout periods will typically last until the market has had time to absorb the earnings release and reflect the information from the release in the stock price, which typically may be from one to three trading days after the earnings release. In light of recent events, issuers should evaluate whether additional executive officers or employees should be covered by pre-clearance requirements and blackout periods in light of their potential direct or indirect access to material non-public information. In addition, issuers should consider adopting specific procedures that would impose blackout periods on selected employees in connection with specific events, such as during the consideration of major strategic decisions, including contemplated acquisitions or dispositions, as well as potential customer wins, vendor problems, or other potential material events. In the case of special blackout periods, it is important to evaluate employees' abilities to access potential material non-public information, and, in some cases, a blackout on trading may be appropriate for all employees and directors. In this regard, it is important for employees to understand the significant ramifications that can result from disclosing pending transactions or other special situations to co-workers, family members, or others when a blackout period has been imposed.

Sharing Information About and Trading in Securities of Other Companies

While the focus of the insider trading program should be on trading in the issuer's securities, it is also important for the insider trading policy to contain provisions (or, alternatively to include provisions in the code of conduct) which make clear that employees have an obligation to maintain the confidentiality of information about companies that may potentially be acquisition targets, business partners, vendors, customers, etc., when the information is derived from a business relationship with those entities. In this regard, employees should be advised through the policy that they should not trade in the securities of other companies based on information derived from their course of dealings with those companies.

Pledging, Hedging, Short Sales and Other Similar Activities – Significant market swings in connection with the financial crisis focused attention on the issues arising in connection with the practice of pledging shares by executives of public companies. The last time this issue received so much attention was in the midst of the WorldCom scandal, when Bernie Ebbers, the former Chairman and CEO of WorldCom, was forced to liquidate his considerable holdings of WorldCom stock as the price rapidly declined following disclosure of the scandal. The pledging of securities has, in some circumstances, raised concerns as to whether the executive's or director's interests remain aligned with shareholders through the equity awards obtained by the executive. Similar concerns are often raised with hedging arrangements or short sales of the company's securities. Additional considerations include the potential adverse public perception of executives and directors engaging in these types of transactions and the potential for liability resulting from market sales of securities subject to these arrangements. As a result, some insider trading policies include express prohibitions or restrictions with respect to pledging, hedging, short sales, and similar activities (including through the use of derivatives). Issuers need to carefully consider their responses to these trends, particularly in light of the fact that there are situations where an appropriately-tailored hedging transaction may be appropriate for an individual, and potential concerns with respect to that transaction can be addressed through, for example, the adoption of a Rule 10b5-1 plan.

The Dodd-Frank Act requires the SEC to adopt rules requiring disclosure of whether any employee or director is permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director. This disclosure may cause issuers to consider adopting policies or adding provisions to existing insider trading policies or codes of conduct to specifically address these types of transactions. The options that boards will likely consider include: (a) prohibiting hedging transactions for employees and directors; (b) subjecting hedging transactions to a pre-approval process; (c) restricting the types of hedging transactions that may be undertaken; or (d) continuing to permit hedging transactions without any specific policy on their use.

Confidentiality and Personal Responsibility – The policy should make clear that the imposition of any special blackout period or the fact that any intended trade has been denied pre-clearance should itself be treated as confidential information, and should only be disclosed to those persons with a need to know that information. Further, the policy should place employees and directors on notice that, in all cases, the responsibility for determining whether an individual possesses material, non-public information rests with that individual, and pre-approval of a transaction does not constitute legal advice and does not in any way insulate an individual from liability under the securities laws.

Rule 10b5-1 Plans – Rule 10b5-1 trading plans, when properly adopted, have become an effective means for insiders to continue to trade in their company's securities even when they are aware of material non-public information and even during a blackout period. An effective insider trading policy should specifically acknowledge the use of Rule 10b5-1 plans as an exception to the general prohibitions on trading while in possession of material non-public information. In light of recent attention paid to Rule 10b5-1 plans by the SEC's Division of Enforcement and in the course of private litigation in the courts, an issuer may also want to consider providing for some specific parameters for Rule 10b5-1 plans in the insider trading policy or in a separate Rule 10b5-1 Plan policy. Such parameters might include: (1) specification of when a plan may be entered into, such as only outside of a blackout period; (2) pre-approval procedures for the plan; (3) a cooling-off period before the first trade under a Rule 10b5-1 plan is permitted to occur, which might range from 14 to 90 days; (4) an admonition regarding the termination of, and the entry into, successive trading plans, as well as a mandatory waiting period following the termination of a plan before a new plan may be adopted, so as not to call into question the individual's good faith in adopting the first plan; and (5) limitations on modifications to plans, including subjecting such modifications to the same standards applicable for the termination of a plan and entry into a new plan. Issuers should also consider adopting a policy requiring disclosure of the entry into Rule 10b5-1 plans, given that such disclosure may ultimately prove beneficial in the event of private securities litigation, because a court can take judicial notice of publicly disclosed plans in considering allegations of scienter.

Implementing Effective Audit Procedures – Given the significance of a potential breach of an insider trading policy, it is important to establish appropriate audit procedures that will not only serve to detect potentially problematic trades, but will also serve as a deterrent against violations of the policy and federal securities laws. Today, with significant advances in technology, there are available tools that issuers can use to facilitate the audit of employee trades and compliance with the policy.

Training and Awareness – Perhaps the most important element of implementing an effective insider trading program is to take all of the steps necessary to ensure that executive officers, directors, and employees understand and are aware of the policy at all times. This may involve regular training regarding the policy, the inclusion of the policy in relevant procedures manuals, and revisiting the policy periodically with employees so that they do not forget the parameters of the policy. Any changes to the policy should be promptly communicated to executive officers, directors, and employees. It is critical that any training and awareness efforts focus on the potential consequences for the individual and the issuer in the event of an insider trading issue.

REGULATION FD POLICIES

BACKGROUND

When Regulation FD was adopted in 2000, some issuers adopted formal policies to govern the conduct of communications that could potentially implicate Regulation FD. For those issuers that did adopt such policies, now may be a good time to revisit those policies in light of SEC enforcement actions regarding Regulation FD and recent Compliance and Disclosure Interpretations issued by the Staff of the Division of Corporation Finance. For issuers that have not adopted a policy governing compliance with Regulation FD or a more broadly applicable investor relations or public communications policy, the SEC's recent guidance and enforcement activities should act as the impetus to now adopt a formal policy and ensure that executives, directors and employees are adequately trained to comply with Regulation FD.

With respect to the SEC's enforcement efforts since the adoption of Regulation FD, several key concepts should be considered and factored into the drafting or updating of a Regulation FD policy. First, it is evident from the SEC's actions that private meetings with analysts or institutional investors are particularly fraught with risk from a Regulation FD perspective, and as a result special precautions should be considered whenever such meetings take place. It is important to remember that any determination as to whether or not material non-public information was communicated during a private meeting with analysts or investors will be made by the SEC in hindsight, with the benefit of looking at a myriad of external evidence, such as stock price movements or the recollections of those who were attending the meeting, each of which may suggest material information may have been conveyed at the meeting. Such evidence, in the SEC's view, could include not only the actual statements made by company representatives but also the tone, demeanor, or body language of the individual.

Another key consideration when crafting a Regulation FD policy (or revising an existing policy) is that, consistent with both past enforcement actions and the Staff's informal guidance, it should still be acceptable to reaffirm guidance privately within a relatively short time after guidance is announced publicly, as long as there have been no subsequent intervening events that would call into question the prior public guidance (e.g., the loss of a significant customer or the booking of a larger than anticipated order) or the timing of the guidance or the context in which the confirmation is made conveys additional material information; however, outside of those parameters, there may be significant risks associated with engaging in private discussions with analysts and investors regarding guidance.

With the variability of financial results driven by the recession and the financial crisis, executive officers have increasingly found themselves in situations where they risk violating Regulation FD by providing selective disclosure with respect to prior guidance. Analysts and investors often press for information as to management's level of comfort with prior guidance, particularly in circumstances where there is a substantial level of uncertainty about future results, raising the potential for violations of Regulation FD, depending on the circumstances in which these discussions arise. As a result, issuers should consider whether it is prudent to implement a "no comment" policy regarding confirmation of prior guidance, particularly in those situations where there is a heightened risk for selective disclosure regarding the prior guidance.

Further, in the course of the financial crisis, many issuers have also considered whether to suspend their prior guidance or to otherwise change their guidance practices, given the many uncertainties that they face. In general, any change to guidance practices, including the suspension of current guidance, should be announced in a manner that complies with Regulation FD, preferably in the same manner in which the issuer typically provides guidance.

In Release No. 34-58288 (August 1, 2008), the SEC provided three considerations for determining whether information posted on a corporate website is considered "public":

- Is an issuer's website a "recognized channel of distribution?";
- Is information posted in a manner calculated to reach investors?; and
- Is information posted for a reasonable period of time so that it has been absorbed by investors?

In the context of whether a website posting satisfies the public disclosure requirement of Regulation FD following the selective disclosure of material, non-public information, the guidance from the SEC's release indicates that issuers must consider whether website postings are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." In conducting this analysis, an issuer must examine the first two factors referenced above, and also must consider whether its website is capable of meeting the simultaneous and prompt timing requirements under Regulation FD once a selective disclosure has been made. Issuers have continued to struggle with applying the SEC's guidance in practice, given the difficulty in making judgments about the nature of an issuer's website. As a result, practices have not significantly changed regarding how information is disseminated in order to make the information public or to comply with Regulation FD's public disclosure requirement.

Potential Considerations for Regulation FD Policies

A Regulation FD policy (or a broader investor relations policy) should address, in a comprehensive manner, the procedures for dealing with situations where a potential Regulation FD violation could occur. Key provisions of an effective Regulation FD policy include:

Controlling the Flow of Material Non-Public Information – Regulation FD is focused on the communication of material non-public information to specified persons or institutions that could use that information; therefore, the core of an effective Regulation FD policy is the control of the flow of information within the issuer and in communications outside of the issuer. An important aspect of controlling information is substantially limiting the number of officers, directors, or employees that are authorized to speak publicly on behalf of the issuer, and to make clear that no other officers, directors, or employees should have any communication with any of the persons or institutions enumerated in Regulation FD. Implementation of this policy could mean, for example, limiting the authorized persons specified in the Regulation FD policy to the CEO, the CFO, and one or more members of the board of directors, as well as the person or persons involved in investor relations and public relations.

Another key element for controlling the flow of material non-public information is to establish a "central clearinghouse" for the information by appointing a compliance officer for the purposes of the policy. The compliance officer should be responsible for administering and directing compliance with Regulation FD and the policies and procedures set forth in the policy. Any questions relating to compliance with Regulation FD should be directed to the compliance officer, and the policy should provide that all public disclosures should be approved by the compliance officer or someone designated by the compliance officer. The compliance officer should also designate other officers or senior-level employees in each department or operating group to be responsible for ensuring that the compliance officer is aware of developments within that department or group that may be material. The best practice is to appoint an executive officer or other senior officer as the compliance officer, and the compliance officer function need not necessarily be performed by the general counsel or other in-house counsel. When the compliance officer is not within an issuer's legal function, it is important that the policy provide that determinations as to materiality and disclosure should be made by the compliance officer in consultation with the issuer's internal and external legal counsel.

Further, issuers should be cognizant when implementing their Regulation FD policy and overall disclosure controls and procedures that disclosure of material information is required only in situations where there is an affirmative disclosure obligation, which could arise, for example, as a result of a duty to: (1) comply with specific SEC and securities exchange disclosure requirements; (2) disclose material information before trading in the company's own securities; (3) correct inaccurate prior statements; (4) speak truthfully and not mislead once a statement of material fact is made; (5) comply with Regulation FD because of an inadvertent disclosure of material non-public information; and (6) update previous statements made about new developments under certain circumstances. Unless one of these duties applies, federal securities laws generally do not require that public companies disclose material corporate developments (including material negative developments) as soon as they occur.

<u>The Role of Directors in a Regulation FD Policy</u> – Over the last several years, continuing concerns with corporate governance have led to greater engagement between directors and shareholders. During this time, shareholders have sought greater input into governance practices utilizing, among other practices, "vote no" and withhold campaigns against key company proposals and some or all of a company's director nominees. With the enactment of the Dodd-Frank Act, shareholders now will be able to express views with respect to executive compensation through an advisory vote on executive compensation beginning in the 2011 proxy season. In order to directly address the concerns of shareholders, directors are increasingly finding themselves in situations where direct communication with significant shareholders is necessary.

Concerns have been expressed as to whether this trend toward greater director involvement in direct communications with shareholders could potentially raise the risk for Regulation FD violations involving the information communicated by directors. In a recent Regulation FD Compliance and Disclosure Interpretation issued by the SEC Staff, it is noted that if directors are authorized to speak on behalf of an issuer and those directors plan to speak privately with a shareholder or a group of shareholders, then the issuer should consider implementing policies and procedures that are intended to avoid potential Regulation FD violations. The Staff suggests that some policies that should be applicable to director discussions might include a pre-clearance policy on the discussion topics with a shareholder, having the issuer's counsel participating in the meeting, or obtaining an express agreement from the shareholder(s) to maintain the disclosed information in confidence.

<u>Pre-approval of Presentations</u> – The policy should provide that pre-approval is required for any presentations to analysts or investors, no matter what the forum, and that the content of any such presentations be approved by the compliance officer. Further, requests for information, comments, or interviews made to officers, directors, or employees should likewise be presented for consideration by the compliance officer (subject to some limited exceptions for normal course communications). Review and pre-approval of presentations may also be necessary in situations beyond the typical analyst presentations that are often viewed as creating the most significant risks from a Regulation FD perspective. For example, when presentations are made to groups such as customers, vendors, distributors, etc., those parties may also be investors in the company, therefore the potential for Regulation FD violations could arise. For this reason, it is important that legal counsel be aware of all upcoming presentations so that the prospect for a potential Regulation FD situation can be evaluated.

<u>Communication with Analysts</u> – An effective Regulation FD policy should provide that earnings guidance is not to be provided to securities analysts, unless the guidance is provided strictly in accordance with the Regulation FD policy. The policy should also specify that, in general, the issuer should not review analyst reports, and that any review actually undertaken by the issuer or individuals acting on its behalf should be limited to historical items and similar factual matters. The Regulation FD policy should also make clear that any updates to the previously disclosed material non-public information should be done only through the procedures set forth in the Regulation FD policy. The issuer should consider whether a strict "no comment" policy should be adopted with respect to requests from analysts or investors to update guidance or to affirm guidance. To the extent the issuer does not adopt a strict "no

comment" policy, then the issuer and its counsel should carefully consider how such updates are to occur and what specifically will be communicated in the update.

Social Media – The proliferation of social media, including blogs, Twitter, Facebook, LinkedIn and other similar outlets, raises particular concerns with regard to potential Regulation FD issues. Issuers need to consider whether they should specifically address the use of social media in Regulation FD policies, including whether prohibitions, restrictions or editorial oversight should be implemented to govern the use of social media by those persons authorized to speak for the issuer. This remains an evolving area that must be continually monitored, as the methods for interacting with shareholders, analysts and others are rapidly changing.

Ongoing Compliance Monitoring – Vigilant monitoring of an issuer's communications, trading activity, and communications by market participants is necessary at all times. Given the need to quickly disclose information that may have been inadvertently released contrary to the prohibition in Regulation FD, an issuer's Regulation FD policy should specifically contemplate procedures that can be implemented to monitor for unusual trading activity in the issuer's securities, analyst and investor communications, and market rumors to determine if any corrective disclosure is necessary. Once a potential Regulation FD violation is identified, the compliance officer, company counsel, and senior management should meet to determine what actions must be taken, including the release of information or corrective disclosure, and potentially self-reporting to the SEC.

Training – Much like an insider trading policy, it is critical that a Regulation FD policy be adequately communicated to officers, directors, and employees, and that those individuals understand the application of the policy and the potential consequences for noncompliance. An appropriate "rollout" of the Regulation FD policy is likely to include regular training regarding the policy, the inclusion of the policy in relevant procedures manuals, and periodic "refreshers" regarding the policy for executive officers, directors, and employees so that they are fully aware of the scope of the policy and will be sensitive to reporting any potential violations or concerns to the compliance officer.

EXECUTIVE COMPENSATION POLICIES

BACKGROUND

Concerns with compensation practices at financial institutions involved in the financial crisis quickly spawned concerns with compensation practices at all public companies, thus giving rise to a need to revisit or establish new policies focused on executive compensation and the process by which executive compensation is determined.

While the concerns with executive compensation are wide-ranging, some very particular concerns have been articulated as a result of the financial crisis, and potential means of addressing those concerns have, thereafter, been advocated by investors and government officials. These concerns focus on: (1) whether the compensation of executive officers is tied to the long-term interests of shareholders; (2) whether the issuer has the ability to recoup compensation that was paid based on erroneous financial results or that was paid without adequately taking into account the time horizon for risk; (3) excessive perquisite compensation or other compensation elements that are not driven by performance; (4) generous severance and post-employment compensation; and (5) the independence of compensation consultants in the compensation-setting process.

Potential Considerations for Executive Compensation Policies

The following are policies that, in light of the developments referenced above, an issuer may want to consider revising or implementing:

<u>Stock Ownership Guidelines</u> – As a result of concerns that executive officers' interests are not properly aligned with shareholders' interests, many issuers have adopted stock ownership guidelines for executive officers and directors. Issuers are now considering raising the required stock ownership levels in these guidelines. Some issuers have also adopted more stringent requirements known as "hold to retirement" or "hold through retirement" policies, which require that executive officers hold a substantial portion of their equity compensation to or through their retirement from the company.

With highly volatile stock prices over the past two years, issuers with stock ownership guidelines specifying a fixed dollar amount of holdings have in some cases had to revisit their policies as the value of executive officers' holdings declined. Issuers have, in some instances, implemented stock ownership guidelines based on a fixed number of shares as opposed to dollar amounts, or have reserved discretion to the compensation committee to adjust dollar value guidelines or deadlines to take account of market conditions.

<u>Clawback Policies</u> – Clawback policies (and similar provisions in executive compensation arrangements) are being adopted with increasing frequency, as issuers

seek to ensure that executives are not in a position to keep compensation that was awarded to them based on what later turns out to be erroneous financial results. Section 304 of the Sarbanes-Oxley Act originally focused significant attention on clawback policies, and now the presence of broader clawback provisions as part of the TARP legislation and the Dodd-Frank Act (which will be applicable to all listed companies) has reignited interest in clawbacks as an effective means for discouraging inappropriate conduct. In the current climate, even those issuers that have previously adopted clawback policies and provisions need to re-evaluate those measures, because the triggering events may be too narrow and fail to deal with circumstances where it turns out—well after compensation decisions have been made—that the executive had engaged in conduct which ultimately harms the company and shareholders.

Perquisite Policies – Recent economic and financial pressures have driven many issuers to review every aspect of their budget. In light of continued investor criticism, it has become increasingly more difficult for issuers to justify the need for expensive perquisites as an element of compensation, particularly when fundamental business needs cannot be funded. These heightened cost concerns come at a time when perquisites are increasingly being cut back, and federal legislation and investment policies are targeting many perquisites, including the use of aircraft by issuers that accepted TARP funding. Given these fundamental shifts in attitude, compensation committees are increasingly reviewing policies with respect to perquisites to consider whether perquisites should be maintained and whether, and to what extent, it may be appropriate for the issuer to discontinue particular perquisites or to require repayment of the cost of perquisites.

Severance and Post-Employment Benefits – The Dodd-Frank Act's requirement for an advisory vote on golden parachute payments in connection with any shareholder vote on a merger or other extraordinary transaction, as well as investor concerns about the size of severance and post-employment benefits, have focused attention on policies with respect to severance, change-in-control, and other post-employment compensation arrangements. In the past few years, issuers have been revisiting provisions of employment and change-in-control agreements, replacing single-trigger change-in-control provisions with double-trigger provisions, so that benefits will only accrue upon both a change-in-control and a qualified termination of employment. Issuers have also considered eliminating or limiting pension enhancements, tax gross-ups, severance benefits, and evergreen employment contracts. Moreover, some companies have adopted sunset provisions on severance and change-in-control benefits, recognizing that the need for such benefits presumably decreases the longer an executive stays with the issuer.

Compensation Consultant Independence – A lively debate has continued over the last several years as to whether business done by compensation consultants outside of their consulting with the issuer or compensation committee impairs the independence of the consultant. In December 2009, the SEC adopted rules requiring disclosure of fees paid to compensation consultants when they provide executive compensation consulting or additional services. The Dodd-Frank Act will require listing standards which provide that consultants or legal counsel ("Advisors") retained by compensation committees of publicly listed issuers to advise on executive compensation may only be selected after an issuer has taken into consideration independence factors to be established by the SEC. The legislation requires that such independence factors include: (a) provision of other services by the person who employs the Advisor; (b) the amount of fees received as a percentage of an entity's total revenue; (c) policies designed to prevent conflicts of interest; (d) any business or personal relationship of the Advisor with a member of the compensation committee; and (e) any stock of the issuer owned by the Advisor. In light of these developments, issuers have begun to adopt specific policies designed to reduce potential conflicts of interest with compensation consultants. Such policies may prohibit the provision of additional services to the issuer, may provide that some *de minimis* level of services may be provided, and/or may establish a process for pre-approval of any additional services. These policies also may require that compensation consultants provide a certification to the issuer as to their independence to help support the issuer's disclosure controls and procedures relevant to this issue.

Emergency Succession Planning

Background

The past three years have been marked by increasingly rapid turnover in the position of CEO, as well as turnover in other senior management positions. This turnover has in some cases happened very quickly, particularly when associated with scandals, potential illegal activity, the loss of investor confidence, or other crisis events. At the same time, there has been increasing media scrutiny of the loss of senior executives (even if on a temporary basis) due to illness, incapacity, or death. Further, succession planning has become increasingly of interest to investors, and the SEC Staff recently focused additional attention on the topic of succession planning with Staff Legal Bulletin No. 14E, which indicated that shareholder proposals addressing CEO succession issues would no longer be excludable as "ordinary business."

In considering an overall succession plan for an issuer and the relationship of that plan to the issuer's strategic needs, it is often too easy to forget about the potential for significant unexpected occurrences that could alter the make-up of management overnight and have a profound effect on the issuer's short-term valuation and long-term plans. As a result, an emergency succession plan remains a critical component of any issuer's overall management succession process. While not all issuers have implemented emergency succession plans, the implementation of such plans appears to be on the rise.

The principal purpose of an emergency succession plan is to ensure that decisions about successor appointments are made in advance of an unexpected event, such as the illness, incapacity, death, resignation, or termination of the CEO or other critical members of senior management. Given that these unexpected occurrences could potentially have an adverse impact on an issuer's stock price, ongoing operations, and short-term and long-term prospects, it is important that the board establish defined lines of succession that can be quickly implemented when necessary.

The board should carefully consider the design and operation of an effective emergency succession plan well in advance of ever needing to implement the plan, and the board should then review the plan at least annually and more frequently when there is an orderly change in management or in the event of some significant event.

An emergency succession plan may be very different from the issuer's long-term succession plan. It may be the case that different executive officers or directors are identified to succeed a CEO or other executive officers on an interim basis as compared to the long-term succession plan, because an effective emergency succession plan is designed to ensure a seamless transition of management during a crisis situation, rather than seeking to meet the issuer's long-term strategic objectives.

Potential Considerations for Emergency Succession Plans

In designing an effective emergency succession plan, it is important that the plan address a number of key areas.

Oversight – A committee of the board, such as the compensation committee or the nominating and corporate governance committee, is typically vested with responsibility for the emergency succession plan. While that committee is deemed responsible for the plan, the full board should remain responsible for any appointments (including permanent or interim appointments) under the plan.

Scope – An effective emergency succession plan contemplates not only succession in the event of unexpected occurrences such as death, disability, and resignation or removal under unexpected circumstances, but also succession in the event of temporary, unplanned absences (which may be defined as exceeding a specific time period, e.g., six months), such as when an individual expects to be out of the office on an extended basis, for example due to a treatable illness.

Appointments – A plan should provide that, unless otherwise specified by the board, all appointments will be made on an interim basis, so as to preserve flexibility for the board to make permanent appointments at the time of the succession event, particularly in situations where the established lines of succession are consistent with long-term succession plans. Generally, plans will afford the board discretion to ascertain the term of any interim appointments, the scope of authority of successors, and the compensation for successors under the emergency succession plan and other company policies. An emergency succession plan should also provide that appointments made by the board occur within a very short time period, so as to minimize the amount of uncertainty associated with the succession event. A time period of two business days after the notice of a succession event is received may be reasonable, although a different period may be appropriate depending on an issuer's individual circumstances.

Coverage – While many emergency succession plans focus on the succession of the CEO, it may also be appropriate to provide in the plan for the succession of other executive officers, particularly when other specified executive officers (such as the president or CFO) are slated to succeed the individual serving as CEO. In order to preserve maximum flexibility upon the occurrence of a succession event, it is often appropriate to identify two or three executive officers who are designated as successors, in order to address the potential that more than one executive officer could be subject to the unexpected event at one time.

Preserving Flexibility – While an effective emergency succession plan is designed to provide an important level of certainty for the board when a crisis arises, it is critically important that the board preserve flexibility to adapt its actions with respect to management succession to the particular situation that the board faces. Even with an emergency succession plan in place, the board will need to look at the overall circumstances arising in connection with the unexpected occurrence, and should carefully consider the planned succession in light of those circumstances. For example, a board could face a situation where they need to "clean house" in the face of some illegal conduct that has involved the CEO and those slated to succeed the CEO under the emergency succession plan.

Confidentiality – It is recommended that the terms of an emergency succession plan remain confidential, with access limited to the board and a limited group of employees who have a need to know about the existence of the plan in order to carry out the plan in the event of an unexpected occurrence. While there is no requirement to publicly disclose the existence or terms of an emergency succession plan, an issuer may want to consider revising its corporate governance guidelines and proxy statement disclosures to note the existence of an emergency succession plan, so that investors and proxy advisory firms can be assured that the board is attentive to this critical issue.

Related Party Transactions

Background

Related party transaction policies have been a particular area of focus since the SEC's 2006 changes to the executive compensation and related party transaction disclosure rules, which for the first time required issuers to describe the material features of an issuer's policies and procedures for the review, approval, or ratification of related party transactions. The SEC rules specify examples of information that may need to be disclosed regarding such policies and procedures, including the types of transactions covered by the policies and procedures, the standards to be applied pursuant to the policies and procedures, the directors or groups of directors with responsibility for applying the policies and procedures, and whether the policies and procedures are in writing or otherwise evidenced. In addition, the disclosure requires the identification of any related party transactions occurring since the beginning of the last fiscal year for which the policies or procedures did not require review, approval, or ratification, or where the policies and procedures were not followed.

Related party transactions, and the board's involvement in oversight of related party transactions, have been of interest to the SEC's Division of Corporation Finance and Division of Enforcement in recent years, and it is likely that, in the aftermath of the financial crisis, disclosure regarding related party transactions and the board's level of involvement in reviewing and approving such transactions will continue to be an area of focus.

Potential Considerations for Related Party Transaction Policies

Some of the potential areas that issuers may want to consider in connection with related party transaction policies are as follows:

Integration With the Board's Risk Management Policies – With an increased focus on risk oversight, and given the unique potential risks presented by related party transactions, it is increasingly important for the board to consider how the related party transaction review and approval policy fits with the board's oversight of risk management policies and the issuer's code of conduct. In this regard, the board should consider whether the appropriate committee of the board is responsible for oversight of related party transactions and whether sufficient information regarding these transactions and the approval process is provided to the board on a regular basis.

Scope of the Policy – It is often useful to have the related party transaction policy cast a wider "net" than specifically picking up only the transactions contemplated by the definition included in Item 404(a) of Regulation S-K. In this regard, some policies do not utilize a materiality qualifier in defining "related party transaction" for the purposes of the policy, so that a broader group of transactions is brought to the attention of the board without interposing management's determinations as to the materiality of the transaction or a related party's interest.

Parameters – It is helpful for the related party transaction policy to specify the parameters under which transactions will be considered, such as whether the board will specifically consider whether the terms of the transaction are no less favorable than terms generally available to an unaffiliated third party under similar circumstances. The policy may also specify the information that should be provided regarding the related party transaction and how that information is to be provided to the designated committee or to the board. Other factors may also be specified, such as the extent of the related party's interest in the transaction or the expected benefits of the transaction for the issuer.

Pre-Approvals – In order to facilitate effective implementation of the policy, it is often advisable to designate specific transactions as pre-approved, such as transactions that are specifically identified in exceptions noted in instructions to Item 404(a) of Regulation S-K, or transactions meeting certain quantitative thresholds for which the board has determined that individual approval for each transaction is not necessary. The policy may also vest pre-approval authority with a particular director (such as the chair of the committee tasked with overseeing the related party transaction policy) for specified transactions. A pre-approval approach is usually preferable to providing exceptions for certain transactions, given the potential disclosure consequences of not subjecting certain transactions to review, approval or ratification.

Recusal – The policy should mandate that no director who is a related party involved in a transaction subject to the policy should participate in the discussion or approval of the related party transaction, except to the extent that it is necessary for that director to provide information about the transaction.

Follow-up – It is critically important that once an effective related party transaction policy is in place, the issuer and board continue to follow the policy on a consistent basis with respect to all potential related party transactions, and that appropriate disclosure controls and procedures are implemented to ensure that any transactions reportable under Item 404(b) of Regulation S-K are identified and reported when necessary. For ongoing related party transactions, it may be appropriate for the policy to provide that the board will review and assess the ongoing relationships on a periodic basis (at least annually), to determine if the transaction remains within the guidelines and is consistent with what the board originally approved.

Conclusion

The financial crisis, the Dodd-Frank Act, and increasingly active shareholders focused on governance and compensation issues have made it all the more important to have the most up-to-date key corporate governance and executive compensation policies.

APPENDIX A

COMPLIANCE CHECKLIST

SCHEDULE 14A

FOR AN ANNUAL MEETING OF STOCKHOLDERS

February 2012

This checklist is a summary of the proxy rules that are generally applicable to proxy statements for annual stockholder' meetings. This checklist should not replace a careful review of the proxy rules and requirements, including, without limitation, Schedule 14A and Rule 14a-1 through Rule 14b-2 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). References to Items herein are references to Items of Schedule 14A unless otherwise noted, and references to rules herein are references to rules under the Exchange Act unless otherwise noted.

Item 1. Date, Time and Place Information

- The date, time, and place of the annual meeting.
- The complete mailing address of the company's principal offices, including the zip code.
- The approximate date on which the proxy statement and form of proxy are being sent to stockholders must appear on the first page of the proxy statement as delivered to stockholders.
- The deadline for submitting shareholder proposals for inclusion in the company's proxy statement for the following year (calculated according to Rule 14a-8(e)).
- The date after which a notice of shareholder proposal submitted outside the process of Rule 14a-8 is considered untimely.

Item 2. Revocability of Proxy

State whether or not the proxies are revocable. If the right to revoke is limited in any way or subject to compliance with any formal procedures, briefly describe such limitation or procedure.

Item 3. Dissenters' Rights of Appraisal

- Briefly outline the appraisal rights or similar rights of the dissenters with respect to any proposal to be acted on, and indicate the procedures that must be followed by a stockholder, including a deadline, if any, to exercise or perfect such rights.

- Indicate whether a stockholder's failure to vote against a proposal will constitute a waiver of appraisal or similar rights and whether a vote against a proposal will be deemed to satisfy any notice requirements.

Item 4. Persons Making the Solicitation

- State that the company (or its board of directors, on behalf of the company) is soliciting the proxy.
- If any director has informed the company that he or she intends to oppose a proposal, state the name of the director and the proposal at issue.
- State who will pay the costs of solicitation.
- If proxy solicitors are to be used, disclose the material terms of their contract, the anticipated costs, and who is paying the costs.
- If the solicitation is to be made in a manner other than through the mail, describe the methods to be used.
- If the proxy is being filed in connection with a proxy contest by a person in opposition to management's slate, see Item 4(b) for additional disclosure requirements.

Item 5. Interest of Certain Persons in Matters to be Acted Upon[1]

- Briefly describe any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:
    - ➢ each person who has been a director or executive officer of the company at any time since the beginning of the last fiscal year;
    - ➢ each nominee for election as a director of the company; and
    - ➢ each associate of any of the foregoing persons.

Item 6. Voting Securities and Principal Holders Thereof

- For each class of voting stock entitled to vote at the meeting, state the number of shares outstanding and the number of votes to which each class is entitled.
- State the record date for the annual meeting.

[1] Note, disclosure is not required if interest arises solely from ownership of the company's securities.

- If action is to be taken with respect to the election of directors and the stockholders have the right to cumulative voting, state the existence of the rights, briefly describe the rights, and state the conditions to the exercise of the rights.

- If the company has undergone a change of control since the beginning of its last fiscal year, see Item 6(e) for required disclosure.

Security Ownership of Certain Beneficial Owners and Management (Item 403 of Reg. S-K)

The following people must be listed in this table:

- Beneficial owners of more than 5% of any class of voting securities;

- Directors and director nominees; and

- Named executive officers (as defined under Item 402(a)(3)).

The table must include columns listing the following:

- Class of security;

- Name of beneficial owner (and home or business address for 5% shareholders);

- Amount and nature of beneficial ownership;

- Percentage of class owned; and

Any arrangement known to the company, including any pledge of the company's securities, which might result in a change of control must be described. See Item 403(c) of Regulation S-K.

Item 7. Directors and Executive Officers

If action is to be taken with respect to the election of directors, the following information must be included for each director, executive officer, person chosen to become an executive officer and director nominee, using tables where possible (Item 401 of Reg. S-K):

- Name and age;

- All positions and offices held with the company;

- Term of service with the company;

- A brief description of the person's business experience during the past five years, including the name and principal business of employers and whether or not these employers are parents, subsidiaries or affiliates of the company;
- Other public company directorships held or held during the last 5 years;
- A brief description of any arrangement or understanding with any other person by which the director was selected and the identity of such other person;
- Any involvement in certain legal proceedings during the last 10 years, including, without limitation, bankruptcy petitions, criminal convictions, orders limiting business practices or securities law violations among others (see Item 401(f) of Reg. S-K);
- Any material proceedings where any directors, nominees, executive officers or any of their associates is an adverse party to the company or any of its subsidiaries (see Instruction 4 to Item 103 of Reg. S-K);
- If the company has gone public in the last year, additional disclosure may be required for promoters or "control persons" (see Item 401(g) of Reg. S-K*)*; and
- Briefly describe any family relationships between any director, executive officer, person chosen to become an executive officer or director nominee.

Related Person Transactions (see Item 404 of Reg. S-K)

Describe any transaction or series of related transactions, since the beginning of the company's last fiscal year, or any currently proposed transaction, in which the company was or is to be a participant and the amount involved exceeds $120,000,[2] and in which any director, executive officer, person chosen to become an executive officer, director nominee or 5% stockholder (or family member of any of the foregoing) had or will have a direct or indirect material interest. Such description must include the following information regarding the transaction:

- The name of the related person and the basis on which the person is a related person.

[2] For smaller reporting companies, the disclosure is required if the transaction amount exceeds the lesser of $120,000 or 1% of the company's total assets, and transactions must be reported for the prior <u>two</u> years.

- The related person's interest in the transaction, 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.
- The approximate dollar value of the amount involved in the transaction.
- The approximate dollar value of the amount of the related person's interest in the transaction, which shall be computed without regard to the amount of profit or loss.
- In the case of indebtedness, 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.
- Any other material information regarding the transaction or the related person in the context of the transaction.

Review and Approval of Related Party Transactions[3]

- Describe the company's policies and procedures for the review, approval, or ratification of any transaction required to be reported as a related party transaction, such as, among other things:
    - ➢ The types of transactions that are covered by such policies and procedures;
    - ➢ 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
- Identify any related party transaction that was required to be reported since the beginning of the company'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.

[3] Not required for smaller reporting companies.

Compliance with Section 16(a) of the Exchange Act

- Identify any person required to file reports under Section 16 of the Exchange Act that failed to timely file a report under Section 16 during the last fiscal year, including:
    - ➢ The number of late reports;
    - ➢ The number of transactions that were not timely reported; and
    - ➢ Any known failure to file a required report.

Corporate Governance

- Director Independence (see Item 407(a) of Regulation S-K)
    - ➢ Identify each director and nominee for director that is independent under applicable listing standards;[4]
    - ➢ State the total number of board meetings that took place during the last fiscal year;
    - ➢ Name each director who attended less than 75% of the aggregate of (i) the total number of board meetings and (ii) the total number of meetings of committees on which he or she served; and
    - ➢ Describe the company's policy, if any, with respect to board member attendance at annual stockholders' meetings.
- State whether or not the company has the following committees;
    - ➢ Audit committee;
    - ➢ Compensation committee; and
    - ➢ Nominating committee.
- For each of these committees:
    - ➢ Describe briefly the functions performed by the committee;
    - ➢ Identify each committee member, and whether each member is independent under applicable listing standards and heightened standards for audit committee members, if applicable;
    - ➢ State whether the committee has a charter, and if so, whether it can be found on the company's website or is otherwise available;

[4] If the company is not listed on an exchange, the definition of independence for any national securities exchange may be used, but the definition used should be noted.

- ➢ State the number of committee meetings held during the last fiscal year; and
- ➢ List the members of the audit committee that qualify as an "audit committee financial expert," (as defined in Item 407(d)(5) of Regulation S-K).

Nominating Committee (see Item 407(c) of Regulation S-K)

- If the company does not have a nominating committee, state the basis for the board's view that it does not need one, and identify each director who participates in the consideration of director nominees.
- If the company has a policy concerning shareholder nominees for director, discuss the material terms of such policy, and the procedures for shareholders who want to nominate a director; if the company has no such policy, state the basis for the board's view that it does not need one.
- Describe the nominating committee's procedures for identifying and evaluating director nominees, and any differences in procedures with respect to shareholder nominees, including any minimum qualifications for serving on the board and how the nominating committee considers diversity in evaluating nominees.
- With regard to each nominee for director (other than current directors or executive officers), disclose the source of the nomination: stockholder, director, CEO, other executive officer, third party search firm, or other source.
- Disclose any fees paid to a third-party search firm.
- If the nominating committee received a shareholder nomination from a stockholder or group of stockholders holding in the aggregate 5% of more of the company's outstanding stock, disclose that fact.

Audit Committee Requirements (see Item 407(d) of Regulation S-K)

- Include an Audit Committee Report, stating:
  - ➢ Whether the audit committee has reviewed and discussed the audited financials with management;
  - ➢ Whether the audit committee has discussed with the auditors the matters required to be discussed by SAS 61 (Codification of

Statements of Auditing Standards, AU § 380), as adopted by the Public Company Accounting Oversight Board in Rule 3200T;

- ➢ Whether the audit committee has received the required independence-of-auditor letter from the accountants and has had discussions with the accountants regarding their independence;
- ➢ Whether the audit committee has recommended to the Board that the audited financials be included in the company's 10-K; and
- ➢ The name of each member of the audit committee must be set forth below the report.

Compensation Committee

- Describe the committee's processes and procedures for determining executive compensation, including:
  - ➢ The scope of authority of the compensation committee (or persons performing the equivalent functions);
  - ➢ The extent to which the compensation committee may delegate any authority, specifying what authority may be so delegated and to whom;
  - ➢ The role of executive officers in determining or recommending the amount or form of executive and director compensation; and
  - ➢ The role of compensation consultants in determining or recommending the amount or form of executive and director compensation.
- The fees paid to any compensation consultant used by the compensation committee, if the company paid such consultant fees in excess of $120,000 during the last fiscal year for services other than consulting on executive compensation.
- Compensation Committee Interlocks and Insider Participation (see Item 407(e)(4) of Regulation S-K – must be separately captioned)
  - ➢ Identify each person who served on the compensation committee during the last fiscal year who was an employee of the company during the last fiscal year, was ever an officer of the company, or

had a relationship during the last fiscal year requiring disclosure under Item 404(a) of Regulation S-K, describing such relationship.

  - ➢ If an executive officer of the company served as a director (or on the compensation committee) of another entity during the past year, and an executive officer of the other entity serves on the company's board or compensation committee, identify the directors and describe the relationships.

- Compensation Committee Report (see Item 407(e)(5) of Regulation S-K – must be separately captioned)

  - ➢ State that the compensation committee has reviewed the CD&A and recommended it for inclusion in the Form 10-K.

  - ➢ The name of each compensation committee member must be set forth below the report.

Shareholder Communications (see Item 407(b) and (f) of Regulation S-K)

- Describe the manner in which stockholders may send communications to members of the board.

- If company does not have a process for stockholders to communicate with the board, explain why.

- If all security holder communications are not sent directly to board members, describe the company's process for determining which communications will be relayed to board members.

Board Leadership and Role in Risk Oversight (*see Item 407(h) of Regulation S-K)*

- Disclose whether the same person serves as CEO and board chairman.

- Describe why the company has chosen to combine or separate the CEO and board chairman positions, as well as the reasons why the company believes that this board leadership structure is the most appropriate structure for the company at the time of the applicable filing.

- Where there is a combined CEO and board chairman but also a lead independent director, disclose whether and why the company has a lead independent director and the specific role that the lead independent director plays in the leadership of the company.

- Disclose the extent of the board's role in risk oversight.
    - ➢ Disclose the effect that the board's role in the oversight of risk has on the leadership structure.

Item 8. Compensation of Directors and Executive Officers

Furnish the following information if action is to be taken with respect to (a) the election of directors; or (b) any compensation plans in which executive officers or directors participate.

The compensation disclosure required by Item 8 is extensive and detailed. A high level summary of the requirements is below, however we strongly advise you to consult Item 402 of Regulation S-K for the specific disclosure requirements.[5]

- Compensation Discussion and Analysis
    - ➢ Objectives of the company's compensation program;
    - ➢ What the compensation program is designed to reward;
    - ➢ Each element of compensation;
    - ➢ Why the company chooses to pay each element;
    - ➢ How the company determines the amount (and, where applicable, the formula) for each element;
    - ➢ How each element and the company's decisions regarding that element fits into the overall compensation objectives and affects decisions regarding other elements; and
    - ➢ Whether, and if so, how, the company has considered the results of the most recent shareholder advisory vote on executive compensation (as required by Section 14A of the Exchange Act or Exchange Act Rule 14a-20) in determining compensation policies and decisions and, if so, how that consideration has affected the company's compensation decisions and policies.
- Summary Compensation Table

[5] Smaller reporting companies have scaled reporting requirements which are set forth in Items 402(l) – (r).

- Grants of Plan-Based Awards Table
- Narrative Disclosure to the Summary Compensation Table and the Grants of Plan-Based Awards Table – Describe material factors necessary to understand tables, including:
    - ➢ Material terms of each named executive officer's employment arrangements, whether written or unwritten;
    - ➢ Material modifications to options or other equity-based awards, including repricings;
    - ➢ Material terms of any plan-based award disclosed in the tables, including formulas to be applied in determining amounts and vesting schedules; and
    - ➢ An explanation of the amount of salary and bonus in proportion to total compensation.
- Outstanding Equity Awards at Fiscal Year-End Table
- Option Exercises and Stock Vested Table
- Pension Benefits Table
- Nonqualified Deferred Compensation Table
- Potential Payments Upon Termination or Change in Control
    - ➢ Describe and explain the specific circumstances that would trigger payments or other benefits, including perquisites and healthcare benefits;
    - ➢ Describe and quantify estimated payments and benefits;
    - ➢ Describe how payment and benefit levels are determined under various circumstances;
    - ➢ Describe material obligations or conditions to receipt of payments or benefits, e.g., non-compete, non-solicitation or non-disparagement agreements; and
    - ➢ Any other material factors.
- Director Compensation Table

- Narrative to Director Compensation Table – Describe material factors necessary to understand the table, including:
    - ➢ 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
    - ➢ Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.
- Narrative of the Company's Compensation Policies and Practices as they Relate to Risk Management
    - ➢ If risks arising from the company's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the company, disclose the company's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives.

Item 9. Independent Public Accountants.

- If the meeting involves (1) election of directors or (2) approval or ratification of the company's accountant, include the following:
    - ➢ The name of the accountant selected or being recommended for approval or ratification;
    - ➢ The name of the accountant for the last fiscal year if different from the accountant being recommended for approval or ratification, or if no accountant is being named for the current year;
    - ➢ Whether or not representatives of the accountant will be present at the annual meeting;
    - ➢ Whether or not the representatives of the accountant will have the opportunity to make a statement at the meeting if they desire to do so; and
    - ➢ Whether or not the representatives of the accountant will be available at the meeting to answer questions.
- If the accountant has changed during the last two years, additional disclosure may be required under Item 9(d).

Accountant Fee Disclosure (see Item 9(e))

- Under the caption “Audit Fees” list the aggregate fees billed by the accountant for the preparation of the annual financials for each of the last two fiscal years and the financials included in the company’s 10-Qs for those fiscal years.

- Under the caption “Audit-Related Fees” list the aggregate fees billed for each of the last two fiscal years for assurance and related services by the accountant that are reasonably related to the audit or review of the company’s financial statements and are not reported as “Audit Fees.”

- Under the caption “Tax Fees” list the aggregate fees billed for each of the last two fiscal years for professional services rendered by the accountant for tax compliance, tax advice, and tax planning and describe the nature of the services provided.

- Under the caption “All Other Fees” list the aggregate fees billed for each of the last two fiscal years by the accountant for all other services not otherwise described and identify the nature of the services provided.

- Describe the audit committee’s pre-approval policies and procedures.

- Describe the percentage of services other than Audit Fees that were approved by the audit committee pursuant to the “de minimis” exception in Regulation S-X Rule 2.01(c)(7)(1)(C).

- If more than 50% of the audit work was performed by persons other than the accountant’s full-time employees, list the percentage of work done by these people.

Item 10. Compensation Plans.

If any action is to be taken with regard to any compensation plan (cash or noncash) provide the information listed below. If a plan is being amended, provide the information for the amended plan and note any material differences from the existing plan.

- Briefly describe the material features of the plan being acted on, including (i) each class of persons that will be entitled to participate, (ii) the approximate number of people in each class and (iii) the basis for participation.

- Using the form of table specified in Item 10(a)(2)(i), disclose the benefits or amounts under the plan that will be received by or allocated to, subject to shareholder approval, each of the following:
  - ➢ Each named executive officer;
  - ➢ All current executive officers as a group;
  - ➢ All current directors who are not executive officers as a group; and
  - ➢ All employees, including all current officers who are not executive officers, as a group.
- If the plan grants options or warrants disclose:
  - ➢ The title and amount of securities underlying the options or warrants;
  - ➢ The price, expiration date and other material conditions for exercising the options or warrants;
  - ➢ The consideration received or to be received by the company on grant of the options or warrants;
  - ➢ The market value of the securities underlying the options or warrants as of the latest practicable date; and
  - ➢ In the case of options, the federal income tax consequences of the issuance and exercise of the options for the recipient and the company.
- The options received or to be received by the following people must be listed separately:
  - ➢ Each named executive officer;
  - ➢ All current executive officers as a group;
  - ➢ All current directors who are not executive officers as a group;
  - ➢ Each nominee for director;
  - ➢ Each associate of any such director, executive officer or nominee;
  - ➢ Each other person who will receive 5% of the options under the plan; and

- ➢ All employees, including all current officers who are not executive officers, as a group.

- If the plan is a written, it must be filed as an appendix to the proxy statement in the SEC filing. See Instruction 3 to Item 10. The plan does not need to be included in the printed version of the proxy statement sent to stockholders.

- Equity Compensation Plan Table (Item 10(c) of Schedule 14A and Item 201(d) of Regulation S-K)

Item 21.[6] Voting Procedures.

As to each matter which is to be submitted to a vote of security holders, furnish the following information:

- The vote required for approval or election, other than for the approval of auditors.

- The method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as the company's organizational documents.

Item 23. Delivery of Documents to Security Holders Sharing an Address.

If one annual report, proxy statement or notice of availability of proxy materials is being delivered to multiple stockholders at the same address:

- State that only one annual report, proxy statement or notice of internet availability of proxy materials, as applicable, is being delivered to multiple security holders sharing an address unless the company has received contrary instructions from one of the security holders.

- Promptly deliver a separate copy of the applicable materials, if requested.

- Provide a phone number and mailing address for stockholders to contact if they wish to receive a separate copy of such materials in the future.

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[6] Items 11 through 20 of Schedule 14A set forth disclosure requirements applicable when action is being taken with respect to specific matters such as issuance of securities, modification or exchange of securities, mergers, consolidations or similar matters, restatement of accounts and amendment of charter or bylaws among other matters. Please refer to Items 11 through Item 20 to determine whether those requirements are applicable to your particular circumstances.

- Provide instructions on how stockholders can request delivery of a single copy if they are receiving multiple copies.
- Provide instructions on how a stockholder can request separate copies in the future.

Item 24. Shareholder Approval of Executive Compensation.

Companies that are required to provide any of the separate shareholder votes pursuant to Exchange Act Rule 14a-21 shall disclose:

- That they are providing such vote as required pursuant to Section 14A of the Exchange Act;
- A brief explanation of the general effect of each vote, such as whether each such vote is non-binding;
- Where applicable, the current frequency of advisory votes on executive compensation as required by Exchange Act Rule 14a-21(a) and when the next such shareholder advisory vote will occur.

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APPENDIX B

ANNOTATED MODEL DIRECTORS AND OFFICERS QUESTIONNAIRE

CONFIDENTIAL

[Insert Company Name]

Directors and Officers Questionnaire

Date: ____

Name: ____

This Questionnaire is being furnished to you to obtain information to prepare and file the Proxy[1] Statement and an Annual Report on Form 10-K (collectively, the "Annual Report") of [Insert Company Name] (the "Company") with the Securities and Exchange Commission (the "SEC") covering the fiscal year ended [Insert Date of Last Fiscal Year End] ("Fiscal Year [Insert Last Fiscal Year]"). The Questionnaire will also assist the Company's board of directors in assessing each of its members' independence (as defined by the SEC and **[Nasdaq] [the New York Stock Exchange (the "NYSE")]**). As used in this Questionnaire, the term "Company" includes any *affiliate* of the Company, [including **[Insert Applicable Entities]**]. "You" also refers to any entity on whose behalf you are responding. Certain terms are *italicized,* and definitions of those terms are provided at the end of the Questionnaire.

Unless otherwise directed, please answer every question. If the Company has completed portions of the Questionnaire on your behalf, please confirm the accuracy of that information. If your answer to a question is "None" or "Not Applicable," please so state. If you do not provide an answer to a question, the Company will assume the answer is "None" or "No," as applicable. Unless otherwise stated, your answers should be given as of the date you sign the Questionnaire. Please note that certain questions are necessarily broad in scope, so if you have doubts regarding whether something should be included in your response please err on the side of over-inclusion. The Company may have additional follow-up questions for you in connection with preparing the Annual Report. It is important that you review the draft(s) of the Annual Report that are presented to you to confirm that the information about you is accurate.

Once you have completed the Questionnaire, please sign it to indicate: (i) your consent for the Company to use the information provided in its Annual Report; (ii) your acknowledgment that material misstatements or omissions in the Annual Report may give rise to civil and criminal liabilities to the Company, each officer and

[1] If preparing for Schedule 14C, replace "Proxy" with "Information."

director of the Company signing the Annual Report, the officers providing certifications pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act, and other persons associated with the preparation and filing of the Annual Report; (iii) your agreement to notify the Company of any misstatement of a material fact in the Annual Report, and of the omission of any material fact necessary to make the statements contained in the Annual Report not misleading, promptly after you become aware of any such misstatement or omission; (iv) your agreement to promptly notify the Company of any changes in information provided in the Questionnaire occurring after the date you sign the Questionnaire; and (v) your confirmation that the information contained in the Questionnaire is true and correct, to the best of your knowledge and belief after a reasonable investigation, as of the date you sign the Questionnaire.

Please complete the Questionnaire and return it, along with a copy of your current resume, by **[insert date—should allow at least two weeks]. THE EXISTENCE AND CONTENTS OF THE QUESTIONNAIRE, AS WELL AS YOUR ANSWERS AND ALL NOTES AND DRAFTS PREPARED BY YOU, ARE CONSIDERED EXTREMELY CONFIDENTIAL AND PROPRIETARY BY THE COMPANY AND SHOULD BE TREATED ACCORDINGLY.**

BACKGROUND INFORMATION

QUESTION 1. Name, Birth Date, Address and Telephone Number[2]

(a) Your full name (as it should appear in the Company's Annual Report):

____

(b) Please provide all previous, assumed or fictitious names or aliases:

____

(c) Your birth date:______________________________

Business Address:	***Home Address:***
Business Telephone: ( )	***Home Telephone: ( )***
E-Mail Address:	

[2] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(a), (b) (c) and instruction thereto.

QUESTION 2. Arrangement for Selection

Is there any *arrangement* between you and any other person(s) pursuant to which you were or are to be selected as a director, nominee for directorship, or officer?[3]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "YES," please describe:

QUESTION 3. Family Relationships

(a) Is there any "family relationship" between you and any director, *executive officer*, or person nominated or chosen to become a director or *executive officer* of the Company?[4] The term "family relationship" means any relationship by blood, marriage or adoption not more remote than first cousin.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

(b) Are any of your *family members* employed by the Company or any of its *affiliates*, or do any of your *family members* otherwise have business or other relationships with the Company or any of its *affiliates*? To your knowledge, does any group or entity with which any of your *family members* are affiliated have any business or other relationships with the Company or any of its *affiliates*?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

QUESTION 4. Business Experience

(a) Please describe your business experience during the past five (5) years in the table below (please attach additional pages as necessary), and note whether your

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[3] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(a), (b) and instruction thereto.

[4] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(d) and instruction thereto.

employer was an *affiliate* of the Company.[5] (You may refer to your attached resume if it provides the requested information.)

Time Period (Month/Year) From:	To:	Principal Occupation	Position or Office	Name and Principal Business of Employer	Nature of Responsibilities	*Affiliate* of the Company?
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO
						☐ YES ☐ NO

(b) Please list in the table below all positions and offices (including board of directors memberships) that you have held with the Company and/or any *subsidiary* during the past five (5) years (including your present position(s)), and the time periods in which you have held those positions or offices.[6] (You may refer to your attached resume to the extent that it provides the requested information.)

Positions/Offices Held	Time Period (Month and Year)	
	From:	To:

[5] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(e)(1) and instruction thereto.

[6] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(e)(1) and instruction thereto.

QUESTION 5. Directorships

Have you served as a director of any entity besides the Company at any time in the past five years, or have you been selected to serve in the future as a director of any such entity?[7]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please list in the following table the name of each such entity, the positions (including committee memberships) you have held or have been selected to hold, your dates of service, and indicate if the applicable entity is a public company or a registered investment company.

Entity	Positions and/or Board Committees	Dates of Service (Month and Year)		Public Company/ Registered Investment Company
		From:	To:	
				☐ YES ☐ NO
				☐ YES ☐ NO
				☐ YES ☐ NO
				☐ YES ☐ NO

QUESTION 6. Educational [and Other] Background[8]

(a) Please complete the following table regarding your educational background. (You may refer to your attached resume if it provides the requested information.)

Name and Address of College, University or Professional School Attended	Dates of Attendence (Month and Year)		Area of Study (Major)	Degree Received
	From:	To:		

[7] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(e)(2) and instruction thereto.

[8] Consider attaching the prior year's disclosure for each recipient regarding background and including space for the recipient to update any changes.

(b) **[**If you are a director, aside from any information provided in Questions 4 through 6(a), above, please describe any specific experiences, qualifications or skills that qualify you to serve as a director.[9] Such information may include information about your risk assessment skills or any particular area of expertise. (You may refer to your attached resume if it provides the requested information.)**]**[10]

QUESTION 7. Involvement in Legal and Regulatory Proceedings

Have any of the following events occurred during the past ten (10)[11] years? When computing the ten-year period, the date of an event should be the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed. Regarding bankruptcy petitions, the date should be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final. If your answer is "*YES*" to any of these questions, or if you are in doubt as to whether a question applies to a particular proceeding, please provide details on a separate sheet and attach it to the Questionnaire.[12]

(a) Was a petition under the federal bankruptcy laws or any state insolvency law filed by or against, or a receiver, fiscal agent or similar officer appointed by a court for the business or property of: (i) you, (ii) any partnership in which you were a general partner within two (2) years before the time of the filing, or (iii) any corporation or business association of which you were an *executive officer* at or within two (2) years before the time of the filing?[13]

ANSWER: *YES* ☐ *NO* ☐

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[9] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(e)(1) and instruction thereto.

[10] Note, this information is required disclosure; however, consider whether or not this question should be included in the Questionnaire or left to the Company and/or the nominating committee to address through enhanced disclosure based on the background information otherwise obtained from directors in Questions 4, 5 and 6(a). If this question is not included in the Questionnaire, please ensure that the drafter is made aware of this disclosure requirement.

[11] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f) and instructions thereto. See also Cal. Corp. Code § 1502.1(a)(6), (7) and § 2117.1(a)(6), (7).

[12] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f) and instructions thereto.

[13] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(1) and instructions thereto.

(b) Were you convicted in a criminal proceeding, or are you the named subject in a criminal proceeding that is presently pending (other than traffic violations and other minor offenses)?[14]

ANSWER: *YES* ☐ *NO* ☐

(c) Were you the subject of any court order, judgment or decree, not subsequently reversed, suspended or vacated, which permanently or temporarily enjoined you or otherwise limited you from any of the following activities:[15]

(i) Acting as a futures commission merchant, introducing broker, commodity trading adviser, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the U.S. Commodity Futures Trading Commission, or an associated person of any of the foregoing; or as an investment adviser, *underwriter*, broker or dealer in securities, or as an affiliated person of any of the foregoing; or as a director or employee of any investment company, bank, savings and loan association or insurance company; or engaging in or continuing any conduct or practice in connection with such activity?[16]

(ii) Engaging in any type of business practice?[17]

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of federal or state securities laws or federal commodities laws?[18]

ANSWER: *YES* ☐ *NO* ☐

(d) Were you the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, or any professional disciplinary proceeding, of any federal or state authority barring, suspending or otherwise limiting for more than sixty (60) days your right to engage in any of the activities described in (c)(i) above or your right to be associated with persons engaged in any such activities?[19]

ANSWER: *YES* ☐ *NO* ☐

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[14] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(2) and instructions thereto.

[15] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(3) and instructions thereto.

[16] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(3)(i).

[17] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(3)(ii).

[18] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(3)(iii).

[19] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(4) and instructions thereto.

(e) Were you found by a court of competent jurisdiction in a civil action or by the SEC to have violated any federal or state securities law where the judgment or finding has not subsequently been reversed, suspended or vacated?[20]

ANSWER: *YES* ☐ *NO* ☐

(f) Were you found by a court of competent jurisdiction or by the U.S. Commodity Futures Trading Commission to have violated any federal commodities law where the judgment or finding has not been subsequently reversed, suspended or vacated?[21]

ANSWER: *YES* ☐ *NO* ☐

(g) Other than in connection with the settlement of a civil proceeding among private litigants, were you the subject of, or a party to, any federal or state judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to any of the following?

(i) An alleged violation of any federal or state securities or commodities law or regulation?[22]

(ii) An alleged violation of any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order?[23]

(iii) An alleged violation of any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity?[24]

ANSWER: *YES* ☐ *NO* ☐

(h) Were you the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization, any registered entity, or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member?[25]

ANSWER: *YES* ☐ *NO* ☐

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[20] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(5) and instructions thereto.

[21] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(6) and instructions thereto.

[22] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(7)(i).

[23] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(7)(ii).

[24] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(7)(iii).

[25] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(f)(8). Self-regulatory organization is defined by 15 U.S.C. 78c(a)(26); registered entity is defined by 7 U.S.C. 1(a)(29).

(i) Were you convicted of fraud?[26]

ANSWER: *YES* ☐ *NO* ☐

(j) Have you ever been: (i) suspended or barred from being associated with an issuer or public accounting firm; or (ii) suspended or barred from appearing or practicing before the SEC?[27]

ANSWER: *YES* ☐ *NO* ☐

QUESTION 8. **[Promoters and Control Persons]**[28]

To your knowledge, has one or more of the events listed in (a) through (f) in Question 7 occurred to any *promoter* or *control person* of the Company during the past five (5) years?[29]

ANSWER: *YES* ☐ *NO* ☐

OFFICER COMPENSATION AND RELATED MATTERS

Note: Questions 9 through 18 should be completed by (i) **all** executive officers of the Company, (ii) anyone who served as the Company's principal executive officer (or acted in a similar capacity) at any time during Fiscal Year **[Insert Last Fiscal Year]**, and (iii) **anyone** who served as the Company's principal financial officer (or acted in a similar capacity) at any time during Fiscal Year **[Insert Last Fiscal Year]**.[30]

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[26] See Footnote 11 above. To the extent that the Company is required to file Form SI-PT in California, the Questionnaire should include this question regarding fraud convictions.

[27] 15 U.S.C. § 7215(c)(7)(B) (Sarbanes-Oxley Act § 105(c)(7)(B)).

[28] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 401(g) and instructions thereto. This question only needs to be included if the Company has not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the 12 months immediately prior to the filing of the document to which this item is applicable, and if the Company had a promoter at any time during the past five fiscal years per Item 401(g) of Regulation S-K.

[29] Form 10-K, Item 10; Schedule 14A, Item 7(b). Regulation S-K, Item 401(g).

[30] Form 10-K, Item 11; Schedule 14A. See Regulation S-K, Item 402(a)(3). Please note that compensation disclosure under Item 402 of Regulation S-K is also required for up to two additional individuals for whom disclosure would have been required 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 – i.e., someone who was hired as or promoted to an executive officer position after the end of the last fiscal year or was terminated from an executive officer position prior to the end of the last fiscal year. Item 402(a)(3)(iv). The Company will likely be required to rely on its own records for any such additional person who was terminated. Any new hires should be picked up by the "all executive officers" note in the introduction to the Compensation section of the Questionnaire.

QUESTION 9. Salary; Bonus; Earnings Under Non-Equity Incentive Plans (Officers Only)[31]

Please indicate in the table below the dollar value of the base salary (cash and non-cash) and any bonus (cash and non-cash) you earned from the Company or any of its *affiliates* during Fiscal Year **[Insert Last Fiscal Year],** whether or not you elected to forego any portion of such base salary or bonus amounts. If any amount of your salary or bonus earned is not presently calculable please so indicate in the table.[32]

If you elected to forego any portion of your salary or bonus and instead receive stock, equity-based or other forms of non-cash compensation from the Company, please describe such election below the table.[33] Do not include the amount of salary or bonus taken instead as non-cash compensation in the "Salary" and "Bonus" columns below, but instead note those amounts in your description of the election.[34]

Please also indicate in the table below the dollar value of all earnings for services performed during Fiscal Year **[Insert Last Fiscal Year]** pursuant to awards under *Non-Equity Incentive Plans* and all earnings on any outstanding awards under those plans.[35] (Please note that a "*Non-Equity Incentive Plan*" includes plans that are commonly thought of as "bonus" plans but that are designed to provide cash incentive for performance to occur over a specified period of time, e.g., a management incentive plan or bonus plan where cash payouts are dependent on the satisfaction of financial or other targets.)

If the relevant performance measure(s) under a *Non-Equity Incentive Plan* were satisfied during Fiscal Year **[Insert Last Fiscal Year]** (including for a single year in a plan with a multi-year performance measure), you should report the earnings in the table below (even if they are not payable until a later date) and note the payment terms below the table.[36] All earnings under *Non-Equity Incentive Plans during Fiscal Year* **[Insert Last Fiscal Year]** *should be reported, whether the earnings were paid during the fiscal year, payable during the period but deferred at your election, or payable by their terms at a later date.*[37]

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[31] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(a) and (b)(2)(ii), (iii)(A) and (B) and instructions thereto.

[32] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K.

[33] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Instruction 2 to Item 402(c)(2)(iii) and (iv).

[34] Form 10-K, Item 11; Schedule 14A. Instruction 2 to Item 402(c)(2)(iii) and (iv) of Regulation S-K.

[35] Form 10-K, Item 11; Schedule 14A. See Regulation S-K, Item 402(c)(2)(vii).

[36] Form 10-K, Item 11; Schedule 14A. See Regulation S-K, Instruction 1 to Item 402(c)(2)(vii).

[37] Form 10-K, Item 11; Schedule 14A. See Regulation S-K, Instruction 2 to Item 402(c)(2)(vii).

Fiscal Year	Salary	Bonus	Non-Equity Incentive Plans
[Insert Last Fiscal Year]			

QUESTION 10. Stock and Option/SAR Awards *(Officers Only)*

(a) Please indicate in the table below all awards of stock (including restricted stock) that were granted to you during Fiscal Year **[Insert Last Fiscal Year],** including the date the particular grant was made, the number of shares subject to the award, the vesting period, forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and any consideration you paid for the shares.[38] Please include and note any stock granted in lieu of cash compensation payments and indicate the amount of compensation foregone.[39] If any of the stock you were granted was not common stock, please so indicate.[40]

Stock Granted (#)	Grant Date	Vesting and/or Conditions (if applicable)	Consideration Paid

(b) Please indicate in the table below all awards of *stock options*, with or without tandem *SARs*, that were granted to you during Fiscal Year **[Insert Last Fiscal Year]**, including the date the particular grant was made, the number of shares or SARs subject to the award, the per share exercise or base price, any forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and the expiration date of the *stock options* or *SARs*.[41] You should include in the table any *stock options* or *SARs* that were granted to you but that you subsequently transferred.[42]

[38] Form 10-K, Item 11; Schedule 14A. Item 402(c)(2)(v) of Regulation S-K.

[39] Form 10-K, Item 11; Schedule 14A. See Regulation S-K, Item 402(c)(1) and (2)(iii)-(iv) and instructions thereto.

[40] Most grants will be of common stock, but it should be noted if that was not the case.

[41] Form 10-K, Item 11; Schedule 14A, Item 8. Item 402(c)(2)(vi) of Regulation S-K.

[42] Form 10-K, Item 11; Schedule 14A, Item 8. Item 402(c)(2)(vi) of Regulation S-K.

If the exercise or base price is adjustable, please so indicate and describe the adjustment feature. If the Company made more than one grant to you during Fiscal Year **[Insert Last Fiscal Year]**, please use a separate line to note each grant. *Stock options* granted in connection with an option repricing transaction reported in Question 11 should also be reported below. Please include and note any *stock option* granted in lieu of cash compensation payments and indicate the amount of compensation fore-gone.[43]

Options Granted (#)	SARS Granted (#)	Exercise or Base Price (Dollar Value/Share)	Expiration Paid

QUESTION 11. Repricings

Was the exercise price of any of your outstanding *stock option*, *SAR* or other equity-based awards adjusted or amended, whether through amendment, cancellation, replacement grants or other means, during Fiscal Year **[Insert Last Fiscal Year]**?[44] Were the terms of any of your outstanding *stock option*, *SAR* or other equity-based awards otherwise modified during Fiscal Year **[Insert Last Fiscal Year]**?[45]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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QUESTION 12. Pension and Non-Qualified Deferred Compensation Earnings *(Officers Only)*

[43] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(c)(1) and (2)(iii)-(iv) and instructions thereto.

[44] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction 2 to Regulation S-K, Item 402(c)(2)(v)-(vi).

[45] Form 10-K, Item 11; Schedule 14A, Item 8. See Instruction 2 to Item 402(c)(2)(v) and (vi) of Regulation S-K. Only material modifications (and all repricings) must be disclosed, but the Questionnaire is designed to elicit information about any modifications so that the drafter can determine whether the modifications are material. See also Item 402(e)(1)(ii).

(a) Did you participate in any defined benefit or other pension plans (including supplemental plans) of the Company during Fiscal Year **[Insert Last Fiscal Year]**?[46] This would include any 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 (e.g., a plan that pays a life annuity at retirement based on annual compensation at retirement and years of service) and supplemental executive retirement plans (e.g., a non-qualified deferred compensation plan that is related to a traditional pension plan), but would exclude any tax-qualified defined contribution plans (e.g., a 401(k) or profit sharing plan) and nonqualified defined contribution plans (e.g., a traditional deferred compensation plan).[47]

ANSWER: *YES* ☐ *NO* ☐

(b) Did you defer any compensation during Fiscal Year **[Insert Last Fiscal Year]** on a basis that was not tax qualified (i.e., generally other than through a 401(k) or profit sharing plan)?[48] If "YES," please note the aggregate dollar amount of deferrals/contributions and the dollar amount of aggregate interest or other earning accrued during the fiscal year[49] below.

ANSWER: *YES* ☐ *NO* ☐

(c) If you answered "YES" to question (b) above, did you receive above-market or preferential earnings (or dividends in the case of deferred stock) on the compensation you deferred?[50] For purposes of this question, interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding at the rate that corresponds most closely the rate under

[46] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(c)(2)(viii)(A) and Item 402(h). This question is designed to elicit basic information to enable the drafter to prepare disclosure responsive to both Items 402(c) and 402(h). With respect to Item 402(h), the Company will need to provide the majority of the data.

[47] See Instruction 1 to Regulation S-K, Item 402(c)(2)(viii) and Instruction 1 to Regulation S-K, Item 402(h)(2).

[48] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(c)(2)(viii)(B) and Item 402(i).

[49] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(i)(2)(iv).

[50] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(c)(2)(viii)(B) and the instructions thereto. Only the above-market portion of the interest or dividends must be reported. The Company will likely need to calculate this amount. The Company will also need to identify whether there has been a discretionary reset of the applicable interest rate. The calculation will also be different if the rates vary depending upon conditions such as a minimum period of continued service. See Instruction 2 to Item 402(c)(2)(viii).

the applicable plan at the time the interest rate or formula was set.[51] If you are not sure whether you received above-market or preferential earnings, please indicate below.

ANSWER: *YES* ☐ *NO* ☐

(d) If you answered "YES" to question (b) above, did the Company contribute any funds on your behalf to the plan(s) during Fiscal Year **[Insert Last Fiscal Year]**?[52] If "YES," please note the aggregate dollar amount of contributions below.

ANSWER: *YES* ☐ *NO* ☐

(e) If you answered "YES" to question (b) above, did you make any withdrawals or receive any distributions from the plan(s) during Fiscal Year **[Insert Last Fiscal Year]**?[53] If "YES," please note the aggregate dollar amount of withdrawals and distributions below.

ANSWER: *YES* ☐ *NO* ☐

(f) If you answered "YES" to question (b) above, please indicate below the total balance in your account(s) under each particular plan as of the end of Fiscal Year **[Insert Last Fiscal Year]**.[54]

If you answered "YES" to any of the questions above, please elaborate on your responses by noting the specific plans, the amount deferred (i.e., contributed by you), the amount the Company contributed or other information requested above:

QUESTION 13. Other Officer Compensation *(Officers Only)*

Please indicate in the table below all other compensation (regardless of amount) awarded to, earned by, or paid to you during Fiscal Year **[Insert Last Fiscal Year]** that is not already reported under <u>Questions 9-12</u> above[55] (including compensation related to transactions between the Company or any of its *affiliates* and any third party

[51] Form 10-K, Item 11; Schedule 14A, Item 8. See Instruction 2 to Regulation S-K, Item 402(c)(2)(viii).
[52] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(i)(2)(iii).
[53] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(i)(2)(v).
[54] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(i)(2)(vi).
[55] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix).

where a purpose of the transaction was to furnish compensation to you or your *family members*). Such compensation would include, but is not limited to:

- Perquisites and other personal benefits, or property, **[unless the aggregate amount of such compensation (based on its incremental cost to the Company) was less than $10,000]**;[56]
- All "gross-ups" or other amounts reimbursed to you during the fiscal year for the payment of taxes;[57]
- Any security that you purchased from the Company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of the security on the date of purchase, unless the discount is generally available either to all security holders of the Company or to all of the Company's salaried employees;[58]
- Amounts you received or accrued in connection with a change of control of the Company;[59]
- Company contributions or other allocations to vested and unvested defined contribution plans (e.g. matching contributions to a 401(k) plan);[60]
- The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit;[61] and
- The dollar value of any dividends or other earnings paid on stock or option awards.[62]

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[56] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(A) and Instruction 4 thereto. Note that the drafter may want to delete the exclusion of perquisites amounting to less than $10,000 to enable the Company to obtain information regarding all perquisites and then consider for itself the proper valuation for disclosure purposes.

[57] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(B).

[58] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(C).

[59] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(D)(2). Note that under Item 402(c)(2)(ix)(D)(1) payments or accruals in connection with a Named Executive Officer's termination of employment, including through retirement, resignation, severance or constructive termination (including a change in responsibilities), must be reported, but someone in that position will not likely be filling out a D&O questionnaire. The Company will need to provide the required information.

[60] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(E).

[61] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(F).

[62] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(c)(2)(ix)(G). Note that this only needs to be disclosed if the amounts were not factored into the grant date fair value required to be reported for the stock or option award itself. The drafter will need to confirm with the Company whether that was the case.

The SEC has stated that among the factors to be considered in determining whether an item is a perquisite or other personal benefit are the following:[63]

- An item is not a perquisite if it is integrally and directly related to the performance of your duties. This factor should be interpreted narrowly.
- 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. This factor should be interpreted broadly.

The following are some examples of items that would qualify as perquisites or other personal benefits: (i) club memberships not used exclusively for business entertainment purposes; (ii) personal financial or tax advice; (iii) personal travel using vehicles owned or leased by the Company; (iv) personal travel otherwise financed by the Company; (v) personal use of other property owned or leased by the Company; (vi) housing and other living expenses (including but not limited to relocation assistance and payments for you to stay at your personal residence); (vii) security provided at a personal residence or during personal travel; (viii) commuting expenses (whether or not for the Company's convenience or benefit); and (ix) discounts on the Company's products or services not generally available to employees on a nondiscriminatory basis.[64]

Description of Other Fiscal Year [Insert Last Fiscal Year] Compensation	**Dollar Value**

[63] SEC Release 33-8732, 34-54302, p. 74 (August 29, 2006) (Final Rule Release re Executive Compensation and Related Person Disclosure).

[64] Note that any item for which an executive officer has actually fully reimbursed the Company for its total cost should not be considered a perquisite or other personal benefit. See SEC Staff Guidance, Item 402(c) of Regulation S-K, Question 119.07.

QUESTION 14. Grants of Plan-Based Awards *(Officers Only)*

Did you receive any grants or awards under any *Incentive Plan* during Fiscal Year **[Insert Last Fiscal Year]**?[65] This would include grants or awards under both *Non-Equity Incentive Plans* and *Equity Incentive Plans*, and would also include grants or awards that you subsequently transferred.[66]

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please briefly describe each grant or award (including the grant date and any threshold, target and maximum amounts applicable to the awards) in the table below.[67] If you paid any consideration for the particular award, please note the amount you paid.[68] You may cross reference to grants of stock, *stock options* and *SARs* that you previously noted in response to Question 10 instead of repeating the information.

Date of Grant/Award	Description of Grant/Award

QUESTION 15. Outstanding Equity Awards *(Officers Only)*

Please describe in the table below all outstanding equity awards (e.g., *stock options*, *SARs*, restricted stock, restricted stock units and similar instruments) that you held as of the end of Fiscal Year **[Insert Last Fiscal Year]** (regardless of when the award was granted to you).[69] Please indicate the number of securities, vesting schedule, expiration date and exercise price, as applicable, for each award.[70] If any of the

[65] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(d).

[66] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(d)(1).

[67] This question is designed to elicit basic information to identify the particular grants and awards that the grantee received. Additional information may be necessary under Item 402(d), such as deviations between the grant date and the date on which the award was approved, deviations between the strike price of the award and the closing market price of the underlying security on the date of grant, etc.

[68] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction 5 to Regulation S-K, Item 402(d).

[69] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(f).

[70] This data is required to be disclosed per Item 402(f) to the extent it is applicable to the particular award. This question is designed to elicit basic information to identify the particular grants and awards that the grantee held at the end of the subject fiscal year.

awards have been transferred other than for value, please so indicate and describe the nature of the transfer.[71] You may cross reference to grants of stock, *stock options* and *SARs* that you previously noted in response to Question 10 instead of repeating the information.

Date of Grant/Award	Description of Grant/Award

If you have been granted any equity awards (e.g., *stock options*, *SARs*, restricted stock, restricted stock units and similar instruments) since the end of Fiscal Year **[Insert Last Fiscal Year]**, please note the grants below:

QUESTION 16. Option Exercises and Stock Vesting *(Officers Only)*

(a) Please describe in the table below each exercise of *stock options*, *SARs* and similar instruments that you had in during Fiscal Year **[Insert Last Fiscal Year]**.[72] If you transferred any such securities for value, please indicate which securities were transferred, when they were transferred and what you received as consideration for the transfer.[73]

Exercise Date	Security Exercised (Option, SAR, etc.)	Grant Date of Security Exercised	Number Exercised	Sale Price (if applicable)

[71] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction 1 to Item 402(f)(2).
[72] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(g).
[73] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(g)(2)(iii).

(b) Please describe in the table below each grant of stock, including restricted stock, restricted stock units and similar instruments, that you held at any point during Fiscal Year **[Insert Last Fiscal Year]**.[74] To the extent that any or all of the grants that would be responsive to this question were already reported in response to Question 15 above (because you held them at the end of the fiscal year), you may so indicate instead of repeating the information. If you transferred any such securities for value, please indicate which securities were transferred, when they were transferred and what you received as consideration for the transfer.[75]

Security	Grant Date	Vesting Schedule

QUESTION 17. Termination and Change of Control Arrangements *(Officers Only)*

Do you have any contract, agreement, plan or other *arrangement* with the Company, whether written or unwritten, that provides for payment(s) to you at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination, or a change of control of the Company or a change in your responsibilities?[76] This question does not apply to contracts, agreements, plans or other *arrangements* to the extent they do not discriminate in scope, terms or operation in favor of executive officers of the Company and that are available generally to all salaried employees.[77]

ANSWER: *YES* ☐ *NO* ☐

[74] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(g). The Company will be required to disclose information regarding amounts realized upon vesting of outstanding stock options, restricted stock, etc., during the last fiscal year, which can be derived based on the data provided regarding the vesting schedules, etc. for the particular awards.

[75] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(g)(2)(v).

[76] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(j). This question is designed to elicit information regarding the existence of any such contract, agreement, plan or arrangement. If the respondent identifies any such agreement, the drafter will need to work with the respondent and the Company to identify the information regarding that agreement that Item 402(j) requires to be disclosed.

[77] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction 5 to Item 402(j).

If you answered "YES," please identify each such contract, agreement, plan or other *arrangement*:

QUESTION 18. Employment Agreements *(Officers Only)*

Except for any change of control agreement identified in response to Question 17, do you have any other contract, agreement, plan or *arrangement* with the Company with respect to your employment (such as an employment agreement or offer letter)?

ANSWER: *YES* ☐ *NO* ☐

If you answered "YES," please identify each such contract, agreement, plan or *arrangement*:

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DIRECTOR COMPENSATION AND RELATED MATTERS

QUESTION 19. Director Compensation *(Directors only)*

(a) Please provide a description of any *arrangement* (including the Company's standard *arrangements* with directors), stating amounts, pursuant to which you are compensated for all services as a director, including any additional amounts payable for committee participation or special assignments.[78]

(b) Please state the aggregate dollar amount of all fees you earned or were paid in cash for services as a director during Fiscal Year **[Insert Last Fiscal Year]**, including annual retainer fees, committee and or chairmanship fees, and meeting fees.[79]

[78] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(3). The Company is required to disclose both its standard compensation arrangements with directors and whether any director has a non-standard arrangement.

[79] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(ii).

(c) Please identify in the table below any awards of stock (including restricted stock) and *stock options* (with or without tandem *SARs*) that you were granted during Fiscal Year **[Insert Last Fiscal Year],** the number of shares subject to the award, the vesting period, forfeiture terms, and/or performance, market or other conditions (if applicable) of the award and any consideration you paid for the shares.[80] Please note in the table any awards that you subsequently transferred.[81]

Security Granted	Grant Date	# Shares/ Units	Vesting and/ or Conditions (if applicable)	Consideration Paid (if applicable)

(d) Please describe in the table below all outstanding *stock option* (with or without tandem *SARs*) and stock (including restricted stock) awards that you held as of the end of Fiscal Year **[Insert Last Fiscal Year]** (regardless of when the award was granted to you).[82] You may cross reference to grants that you previously noted in response to Question 19(c) instead of repeating the information.

Security Granted	Grant Date	# Shares/ Units	Vesting and/ or Conditions (if applicable)	Consideration Paid (if applicable)

(e) Did you participate in any *Non-Equity Incentive Plan* during Fiscal Year **[Insert Last Fiscal Year]**?[83]

ANSWER: *YES* ☐ *NO* ☐

[80] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(iii) and (iv).
[81] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(iv).
[82] Form 10-K, Item 11; Schedule 14A, Item 8. Instruction to Regulation S-K, Item 402(k)(2)(iii) and (iv). Unlike with respect to officers of the Company, only the aggregate number of stock awards and aggregate number of option awards outstanding at fiscal year end needs to be disclosed for directors.
[83] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(v).

If you answered "YES," please identify the plan(s) and note the dollar value of all earnings for services performed during Fiscal Year **[Insert Last Fiscal Year]** and all earnings on outstanding awards under the plan(s), as applicable:

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(f) Did you participate in any defined benefit or other pension plans (including supplemental plans) of the Company during Fiscal Year **[Insert Last Fiscal Year]**?[84] This would include any 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 (e.g., a plan that pays a life annuity at retirement based on annual compensation at retirement and years of service) and supplemental executive retirement plans (e.g., a non-qualified deferred compensation plan that is related to a traditional pension plan), but would exclude any tax-qualified defined contribution plans (e.g., a 401(k) or profit sharing plan) and nonqualified defined contribution plans (e.g., a traditional deferred compensation plan).[85]

ANSWER: *YES* ☐ *NO* ☐

(g) Did you defer any compensation during Fiscal Year **[Insert Last Fiscal Year]** on a basis that was not tax qualified (i.e., generally other than through a 401(k) or profit sharing plan)?[86]

ANSWER: *YES* ☐ *NO* ☐

(h) If you answered "YES" to question (g) above, did you receive above-market or preferential earnings (or dividends in the case of deferred stock) on the compensation you deferred?[87] For purposes of this question, interest on deferred compensation is

[84] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(k)(2)(vi)(A) and (B). This question is designed to elicit basic information to enable the drafter to prepare responsive disclosure. With respect to Item 402(k)(2)(vi)(A), the Company will need to provide the data.

[85] See Instruction 1 to Regulation S-K, Item 402(c)(2)(viii). Certain instructions to Item 402(c) apply equally to Item 402(k) as well per Instruction to Item 402(k).

[86] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(k)(2)(vi)(B).

[87] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 402(c)(2)(viii)(B) and the instructions thereto. Certain instructions to Item 402(c) apply equally to Item 402(k) as well per the instruction to Item 402(k). Only the above-market portion of the interest or dividends must be reported. The Company will likely need to calculate this amount. The Company will also need to identify whether there has been a discretionary reset of the applicable interest rate. The calculation will also be different if the rates vary depending upon conditions such as a minimum period of continued service. See Instruction 2 to Item 402(c)(2)(viii).

above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding at the rate that corresponds most closely the rate under the applicable plan at the time the interest rate or formula was set.[88] If you are not sure whether you received above-market or preferential earnings, please indicate below.

ANSWER: *YES* ☐ *NO* ☐

(i) Please indicate in the table below all other compensation (regardless of amount) awarded to, earned by, or paid to you during Fiscal Year **[Insert Last Fiscal Year]** that is not already reported in this Question 19[89] (including compensation related to transactions between the Company or any of its *affiliates* and any third party where a purpose of the transaction was to furnish compensation to you or your *family members*). Such compensation would include, but is not limited to:

- Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation (based on its incremental cost to the Company) was less than $10,000;[90]
- All "gross-ups" or other amounts reimbursed to you during the fiscal year for the payment of taxes;[91]
- Any security that you purchased from the Company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of the security on the date of purchase, unless the discount is generally available either to all security holders of the Company or to all of the Company's salaried employees;[92]
- Amounts you received or accrued in connection with a change of control of the Company;[93]
- Company contributions or other allocations to vested and unvested defined contribution plans (e.g. matching contributions to a 401(k) plan);[94]

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[88] See Instruction 2 to Regulation S-K, Item 402(c)(2)(viii).

[89] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii).

[90] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(A) and Instructions 2 and 3 thereto.

[91] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(B).

[92] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(C).

[93] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(D)(2). Note that under Item 402(k)(2)(vii)(D)(1) payments or accruals in connection with a director's resignation, retirement or other termination must be reported, but someone in that position will not likely be filling out a D&O questionnaire. The Company will need to provide the required information.

[94] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(E).

- Consulting fees earned from, or paid or payable by the Company and/or its *subsidiaries* (including joint ventures);[95]

- The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs;[96]

- The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit;[97] and

- The dollar value of any dividends or other earnings paid on stock or option awards.[98]

The SEC has stated that among the factors to be considered in determining whether an item is a perquisite or other personal benefit are the following:[99]

- An item is not a perquisite if it is integrally and directly related to the performance of your duties. This factor should be interpreted narrowly.

- 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. This factor should be interpreted broadly.

The following are some examples of items that would qualify as perquisites or other personal benefits: (i) club memberships not used exclusively for business entertainment purposes; (ii) personal financial or tax advice; (iii) personal travel using vehicles owned or leased by the Company; (iv) personal travel otherwise financed by the Company; (v) personal use of other property owned or leased by the Company;

[95] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(F).

[96] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(G) and Instruction 1 to Item 402(k)(2)(vii).

[97] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(H).

[98] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(I). Note that this only needs to be disclosed if the amounts were not factored into the grant date fair value required to be reported for the stock or option award itself. The drafter will need to confirm whether that was the case.

[99] SEC Release 33-8732, 34-54302, p. 74 (August 29, 2006) (Final Rule Release re Executive Compensation and Related Person Disclosure).

(vi) housing and other living expenses (including but not limited to relocation assistance and payments for you to stay at your personal residence); (vii) security provided at a personal residence or during personal travel; (viii) commuting expenses (whether or not for the Company's convenience or benefit); and (ix) discounts on the Company's products or services not generally available to employees on a nondiscriminatory basis.

Description of Other Fiscal Year [Insert Last Fiscal Year] Compensation	**Dollar Value**

QUESTION 20. Director Legacy Program *(Directors Only)*

Does the Company have a "director legacy" or "charitable awards" program in which you participate?[100] For the purposes of this question and Question 19, programs in which the Company has agreed to make donations to one or more charitable institutions in your name, payable by the Company currently or on a designated event, such as your retirement, (as well as similar programs) are considered "director legacy" or "charitable awards" programs.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a description of the material terms of, and the total dollar amounts payable under, each such program:

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QUESTION 21. Boards of Director and Committees *(Directors Only)*[101]

(a) Please state whether you attended the prior year's annual meeting of stockholders.[102]

ANSWER: *YES* ☐ *NO* ☐

[100] Form 10-K, Item 11; Schedule 14A, Item 8. Regulation S-K, Item 402(k)(2)(vii)(G) and Instruction 1 to Item 402(k)(2)(vii).

[101] Schedule 14A, Item 7(d). Regulation S-K, Item 407(b). This item also requires disclosure of the Company's policy regarding board members' attendance at annual meetings.

[102] Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).

(b) Please state below the total number of meetings of the board of directors (including regularly scheduled and special meetings) held during Fiscal Year **[Insert Last Fiscal Year]**:[103]

Number of meetings: __________

(c) During Fiscal Year **[Insert Last Fiscal Year]**, did you attend all meetings of the board of directors of the Company? If your answer is "*NO*," please indicate the number of meetings you missed.[104]

ANSWER: *YES* ☐ *NO* ☐

Number of meetings missed: __________

(d) Please complete the table below regarding the committees of the Company's board of directors. Please specify if you served as a member of any committee of the board of directors for less than the full fiscal year and complete the table for the portion of the fiscal year during which you served:[105]

	Board Has Committee	**I am a Member**	**Number of Meetings Held During Fiscal Year [Insert Last Fiscal Year]**	**Number of Meetings I Attended During Fiscal Year [Insert Last Fiscal Year]**
(i) Audit	Yes ☐ No ☐	Yes ☐ No ☐		
(ii) Compensation	Yes ☐ No ☐	Yes ☐ No ☐		
(iii) Nominating **[/Corporate Governance[106]]**	Yes ☐ No ☐	Yes ☐ No☐		
(iv) Other:	(list name of committee)	Yes ☐ No ☐		
	(list name of committee)	Yes ☐ No ☐		

[103] Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).
[104] Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).
[105] Schedule 14A, Item 7(d). Regulation S-K, Item 407(b)(1).
[106] Include if the Company is listed on the NYSE. See NYSE Listed Company Manual § 303A.04.

SECURITY OWNERSHIP

QUESTION 22. Stock Ownership

(a) Please state in the table below the type and number of the Company's equity securities *beneficially owned* by you and/or which you have the right to acquire (through the exercise of options, warrants or otherwise) on or before **[Insert Date Sixty (60) Days After the Most Recent Practicable Date Prior to the Anticipated Filing]**. Include in this table all of the Company's equity securities that are: (i) registered in your name, including shares registered in your name as trustee, executor, custodian, pledgee, agent or nominee, either alone or with others; (ii) owned *beneficially* by you or any *associate* of yours; or (iii) registered in the name of a nominee or in street name, including any shares held for the account of any of the above.[107] If you do not have sole voting and investment power over any of the securities, please so indicate in the table below.

Name of Record Owner	Type of Security	Number of Shares	Type of Ownership (trust, partnership, direct, personal, etc.)

(b) Please state the following information in the table below regarding all *stock options* you hold: (i) the grant date, (ii) the number of shares subject to the originally granted options, (iii) the number of shares remaining subject to the options, and (iv) the schedule or terms of any vesting or exercise provisions.[108]

Grant Date	Number of Shares Originally Subject to Option	Number of Shares Remaining Subject to Option	Vesting Schedule

[107] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

[108] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

(c) Do you hold any warrants, convertible debt or other securities (other than options) or rights to acquire securities of the Company?[109] If your answer is "*YES*," please describe the securities or rights below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

(d) Do you share voting and/or investment control over any shares of the Company's securities?[110] If your answer is "*YES*," please provide below a brief description of any *arrangement* concerning the shared control and the number of shares subject to the *arrangement*. "Shared voting power" and "shared investment power" are generally applied to securities held as tenants in common and in cases where you are a co-trustee or where someone's signature and approval other than your own are necessary to vote or sell the securities.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

(e) Are any of the Company's securities that you *beneficially own* pledged as security (e.g., pledged to a bank or broker in connection with a loan or margin account) or subject to a negative pledge (e.g., a promise by a borrower to a lender not to convey securities to a third party or otherwise encumber them)?[111] If your answer is "*YES*," please provide below a brief description of the nature of any such pledge, the type and amount of securities subject to the pledge, and the amount outstanding under the pledge. Please also provide a brief description of the material terms of the pledge *arrangement*.

ANSWER: *YES* ☐ *NO* ☐

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[109] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

[110] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

[111] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403(b) and instructions thereto. See also Exchange Act Rule 13d-3(d)(1). See also SEC Staff Guidance, Item 403 of Regulation S-K, Question 129.04.

Description, if applicable:

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Do you wish to disclaim *beneficial ownership* of any of the shares reported in response to Question 22?[112]

Note: Whether you make such a disclaimer is, of course, entirely a matter of your own decision. You may wish to consult with counsel in this connection as a disclaimer may be important not only in connection with the securities laws, but also because, without it, your reporting the ownership of such shares might be construed as an admission of ownership by you for other purposes, such as short-swing trading liabilities.

ANSWER: *YES* ☐ *NO* ☐

If the answer is "*YES*," please complete the table below with the requested information regarding the person(s) who should be shown as the *beneficial owner(s)* of the shares in question.

Class of Stock	Number of Shares Beneficially Owned	Name of Actual Beneficial Owner	Relationship of Such Person to You

QUESTION 24. Interest in Subsidiaries

Do you beneficially own any equity securities of any *subsidiary* of the Company? If your answer is "*YES*," please list your interest(s) in the table below.[113]

ANSWER: *YES* ☐ *NO* ☐

Name of Subsidiary	Securities Owned	Date Acquired

[112] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-4.

[113] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403(b) and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

QUESTION 25. 5% Stockholders

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

Do you know of any person (including yourself and your *associates*) who is the *beneficial owner* of more than 5% of any class of the Company's equity securities? If your answer is "*YES*," please provide the requested information in the table below to the extent you know such information.[114]

ANSWER: *YES* ☐ *NO* ☐

Shareholder's Name and Address	Title of Securities	Amount Held	Percentage Owned	Nature of Ownership ("Direct" or "Indirect")*

Note: Please explain the nature of any indirect ownership (e.g., "indirectly, as trustee for children," "indirectly, by spouse," "indirectly, by trust," etc.).

QUESTION 26. Voting Arrangements

Do you know of any voting trust or similar agreement or *arrangement* pursuant to which more than 5% of the Company's outstanding common stock is held or is to be held? If your answer is "*YES*," please describe below.[115]

[114] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403 and instructions thereto. See also Exchange Act Rule 13d-3(d)(1).

[115] Form 10-K, Item 12; Schedule 14A, Item 6. See Regulation S-K, Item 403(b) and Instruction 7 thereto. See also Exchange Act Rule 13d-3(d)(1).

TRANSACTIONS AND RELATIONSHIPS

QUESTION 27. Transactions with Company

(a) Has there been any *transaction* since the beginning of **[Insert Last Fiscal Year]**, or is there any currently proposed *transaction*, to which the Company or any of its *affiliates* was or is to be a participant, which exceeds $120,000 in amount and in which you or any *related person* had or will have a direct or indirect interest?[116] The amount of the interest is to be computed without regard to the amount of any profit or loss involved in the transaction.[117]

In the case of a *transaction* involving a lease or otherwise providing for periodic payments or installments, include the aggregate amount of all periodic payments or installments due on or after the beginning of the last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transactions providing for periodic payments or installments.[118] In the case of a transaction involving indebtedness, include the largest amount of all indebtedness outstanding at any time since the beginning of the last fiscal year and all amounts of interest payable on it during the last fiscal year.[119] The following items may be excluded from the calculation of the amount of indebtedness: 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.[120]

Examples of possible interests which must be disclosed are: You or any of your *associates* (i) has been, is now, or proposes to be a shareholder holding in excess of ten percent (10%) of the Company's stock, an officer, director or employee of a major creditor, customer or supplier of the Company or any *subsidiaries* or has an interest in

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[116] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b) and Item 22(b). See Regulation S-K, Item 404(a) and instructions thereto Item 404(a) only requires disclosure of material interests, but this question is designed to elicit information to allow the drafter and the Company to determine what is material. Note also that certain interests are not required to be disclosed pursuant to the instructions to Item 404(a).

[117] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b). Regulation S-K, Item 404(a)(4), but the question is designed to elicit information to allow the drafter to determine if any of the exceptions apply.

[118] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b). Instruction 3(a) to Regulation S-K, Item 404(a).

[119] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b). Instruction 3(b) to Regulation S-K, Item 404(a).

[120] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b). Instruction 4(a) to Regulation S-K, Item 404(a). Note also that in the case of indebtedness, if the lender is a bank, savings and loan or broker-dealer you may also omit certain disclosures in some circumstances as described in Instruction 4(c) to Item 404(a).

any such creditor, customer or supplier; (ii) is a seller, buyer, lessee or lessor of property to, or from, the Company or any *subsidiary*; (iii) is the lender or guarantor of a loan made to, or is a borrower from, the Company or any *subsidiary*; (iv) is the debtor under an obligation which the Company or any *subsidiary* guarantees; and (v) is a buyer of securities or evidences of indebtedness from the Company or any *subsidiary*. If applicable, such transaction(s), the name of any such *associate(s)* and the nature of your relationship(s) with such *associate(s)* should be included. If any of your *immediate family members* are employed by the Company or any of its *subsidiaries* and such person's annual compensation exceeds $120,000, such relationship should be disclosed.

ANSWER: *YES* ☐ *NO* ☐

If your answer to question (a) is "*YES*," please (i) name the *related person* and briefly describe the basis on which the person is a *related person*, (ii) briefly describe the *related person's* interest in the *transaction*, including their 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*, (iii) note the approximate dollar value of the amount involved in the transaction (in the case of indebtedness, please indicate the largest aggregate amount of principal outstanding, the amount outstanding as of the latest practicable date, the amount of principal and interest paid during the relevant period, and the rate or amount of interest payable on the indebtedness. Please also indicate any other information regarding the *transaction* or the *related person* in the context of the *transaction* that is material in light of the circumstances of the particular transaction.[121]

Description, if applicable:

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(b) Other than those you have described elsewhere in this Questionnaire, has there been any *transaction* since the beginning of Fiscal Year **[Insert Last Fiscal Year]**, or is there any currently proposed *transaction*, to which the Company or any of

[121] Form 10-K, Item 13; Schedule 14A, Item 5(b)(1)(xi), Item 7(b). Regulation S-K, Item 404(a)(6).

its *affiliates* was or is to be a participant, and in which you or any of your *family members* had or will have a direct or indirect interest?[122] If your answer is "*YES*," please describe below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 28. Contracts with the Company

Are you, or is any *associate* of yours, a party to any contract (including any management contract or compensatory plan, contract or *arrangement*) with the Company or in which the Company or any *subsidiary* has a beneficial interest, or to which the Company has succeeded by assumption or assignment, which is to be performed in whole or in part at or after the end of the Company's last fiscal year, or which was entered into within the Company's last two (2) fiscal years? If your answer is "*YES,*" please describe below.[123]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 29. Personal Loans from the Company

Have you received at any time during the previous 24 months, or do you currently have outstanding any loan or extension of credit in the form of a personal loan from the Company or any of its *affiliates*?[124]

ANSWER: *YES* ☐ *NO* ☐

Has the Company or any of its *affiliates* arranged such a loan or an extension of credit in the form of a personal loan from any third party during the same time period?[125]

ANSWER: *YES* ☐ *NO* ☐

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[122] This question is designed to elicit information that does not otherwise fall within the general scope of Item 404(a) but that may otherwise be material, or may, upon further investigation, fall within the general scope of Item 404(a). It is also designed to elicit information that, while not disclosable under Item 404(a), may need to be categorized by type and disclosed under Item 407(a)(3).

[123] Form 10-K, Item 15. See Regulation S-K, Item 601(b)(10).

[124] See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).

[125] See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).

Is any such loan or extension of credit proposed to be extended to you during Fiscal Year **[Insert Current Fiscal Year]**?[126]

ANSWER: *YES* ☐ *NO* ☐

If you answered "*YES*" to any of these questions, please describe below the material terms of the loan or extension of credit, including the original principal amount, the current balance and the material terms of the loan (including term, interest rate, etc.). Please also describe any modifications, amendments, renewals or forgiveness of such loans or extensions of credit made during the previous 24 months or intended to be made during Fiscal Year **[Insert Current Fiscal Year]** to any pre-existing loans or extensions of credit.

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QUESTION 30. Compensation Committee Interlocks and Insider Participation

(a) During the last three (3) fiscal years, have you participated in deliberations of the Company's board of directors (or compensation committee) concerning executive officer compensation? If your answer is "*YES*," please describe the details below.[127]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

(b) During the last three (3) fiscal years, have you (i) served as a <u>member of the compensation committee</u> (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of another entity, which had an *executive officer* who served as a director or 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 the Company or (ii) served as a <u>director</u> of another entity which had an executive officer who 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 the Company? If your answer is "*YES*," please describe the relationship below.[128]

ANSWER: *YES* ☐ *NO* ☐

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[126] See Sarbanes-Oxley Act § 402. See also Cal. Corp. Code § 1502.1(a)(5) and § 2117.1(a)(5).

[127] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 407(e) and instruction thereto.

[128] Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 407(e) and instruction thereto.

Description, if applicable:

QUESTION 31. Adverse Interests

Do you or any *associate* or *family member* of yours have an interest adverse to that of the Company or any of its *affiliates* in any pending or contemplated legal proceeding (including administrative proceedings and investigations by governmental authorities) to which the Company or any of its *affiliates* is or will be a party or of which any of its or their property is or will be the subject? If your answer is "*YES*," please describe.[129]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 32. Legal Proceedings; Investigations

Do you know of any legal, regulatory or administrative proceeding brought or contemplated by any governmental authority (including but not limited to antitrust, price-fixing, tax, environmental, copyright or patent litigation) to which the Company or any *subsidiary* is or may be a party or of which the property of the Company or any *subsidiary* is subject? If your answer is "*YES*," please give the details below.[130]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 33. Compensation Consultants

(a) **[**Other than **[Insert Compensation Consultant Name]**, which the **[Insert Committee Name]** has engaged, are**]** [Are] you aware of any compensation consultant that has been engaged by the Board or any committee of the Board? If your answer is "*YES*," please give details below. For all compensation consultants engaged (including **[Insert Compensation Consultant Name**]), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the Board) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.[131]

ANSWER: *YES* ☐ *NO* ☐

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[129] Form 10-K, Item 3; Form 10-Q, Item 1; Schedule 14A, Item 7(a) and Instruction 7(d)(3) to Item 14. See Regulation S-K, Item 103, Instruction 4.

[130] Form 10-K, Item 3; Form 10-Q, Item 1; Schedule 14A, Item 7(a) and Instruction 7(d)(3) to Item 14. See Regulation S-K, Item 103, Instruction 4.

[131] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 407(e)(3)(iii).

Description, if applicable:

(b) **[**Other than **[Insert Compensation Consultant Name]**, which management of the Company has engaged, are**]** [Are] you aware of any compensation consultant that has been engaged by management of the Company? If your answer is "*YES*," please give details below. For all compensation consultants engaged (including **[Insert Compensation Consultant Name**]), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the Board) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.[132]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 34. Foreign Corrupt Practices Act

(a) In connection with your response to this question, the following instructions apply:

(i) Your answers should relate to the activities or conduct of the Company and any *affiliate* of the Company, as well as to the conduct of any person who has acted or is acting on behalf of or for the benefit of any of them. Persons who have acted or are acting on behalf of or for the benefit of any entity include, but are not necessarily limited to, directors, officers, employees, agents, consultants and sales representatives.

(ii) Your answers should relate not only to activities or conduct within the United States, but outside the United States as well.

(iii) The terms "payments" and "contributions" include not only giving cash or hard goods but also giving anything else of value (e.g., services or the use of property).

(iv) The term "indirectly" means an act done through an intermediary. Payments to sales agents or representatives that are passed on in whole or in part to purchasers, or compensation or reimbursement to persons in consideration for their acts, are examples of acts done through intermediaries.

(v) Your answers should include not only matters of which you have direct personal knowledge, but also matters which you have reason to believe may have existed or occurred (for example, you may not "know" of your own personal knowledge that contributions were made by the Company to a political party in a foreign

[132] Note, if the identity of the compensation consultant is not known, delete the bracketed language. Form 10-K, Item 11; Schedule 14A, Item 8. See Regulation S-K, Item 407(e)(3)(iii).

land, but, based upon information which has otherwise come to your attention, you may nonetheless have "reason to believe" that such a contribution was made. In that case, your response would be "*YES*.")

(b) Do you have any knowledge or reason to believe that any of the activities or types of conduct enumerated below have been or may have been engaged in, either directly or indirectly, at any time:

(i) Any bribes or kickbacks to government officials or their relatives, or any other payments to such persons, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

ANSWER: *YES* ☐ *NO* ☐

(ii) Any bribes or kickbacks to persons other than government officials, or to relatives of such persons, or any other payments to such persons or their relatives, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

ANSWER: *YES* ☐ *NO* ☐

(iii) Any contributions, whether or not legal, made to any political party, political candidate or officeholder.

ANSWER: *YES* ☐ *NO* ☐

(iv) Any bank accounts, funds or pools of funds created or maintained without being reflected on the corporate books of account, or as to which the receipts and disbursements therefrom have not been reflected on the books of account.

ANSWER: *YES* ☐ *NO* ☐

(v) Any receipts or disbursements, the actual nature of which has been "disguised" or intentionally mis-recorded on the corporate books of account.

ANSWER: *YES* ☐ *NO* ☐

(vi) Any fees paid to consultants or commercial agents that exceeded the reasonable value of the services purported to have been rendered.

ANSWER: *YES* ☐ *NO* ☐

(vii) Any payments or reimbursements made to the Company's personnel to enable them to expend time or to make contributions or payments of the kinds or for the purposes referred to in <u>subparts (i) – (vi)</u> above.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to any of the foregoing questions, please describe the details of the subject transaction below:

____
____
____

QUESTION 35. Description of *Associates*

Please note in the following table the full name, form (e.g., partnership, corporation, etc.), nature of business done by, and principal place of business of each *associate* of yours referred to in the answers to this Questionnaire and your relationship with such *associate(s)*, if applicable.[133]

Name	Form of Organization (if applicable)	Nature of Business	Principal Place of Business	Relationship

QUESTION 36. Change in Control

(a) Do you know of any *change in control* of the Company that has occurred during any of the Company's last three (3) fiscal years or during the Company's current fiscal year? If your answer is "*YES*," please provide a brief description of the *change in control*.[134]

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

(b) Do you know of any *arrangement*, including any pledge by any person of securities of the Company, the operation of which may at a subsequent date result in a *change in control* of the Company?[135] If your answer is "*YES*," please provide a brief description of the *arrangement(s)*.

ANSWER: *YES* ☐ *NO* ☐

[133] Form 10-K, Item 13; Schedule 14A, Items 7(b). See generally Regulation S-K, Item 404.
[134] Form 10-K, Item 11; Schedule 14A, Item 6(d). See Regulation S-K, Item 403(c).
[135] Form 10-K, Item 11; Schedule 14A, Item 6(d). See Regulation S-K, Item 403(c).

Description, if applicable:

QUESTION 37. Regulatory Investigations

(a) Have you been involved in, or has any inquiry, investigation, lawsuit or disciplinary action been initiated against you by any regulatory or professional organization, including, but not limited to, the SEC, any state securities commission, FINRA (formerly NASD) or any foreign regulatory authority?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a detailed description of the applicable inquiry, investigation, lawsuit or disciplinary action, including a chronology and current status.

Description, if applicable:

(b) Do you know of any inquiry, investigation, lawsuit or disciplinary action initiated against the Company, any of its officers, directors, principals, *associates*, *affiliates*, predecessors, or five percent (5%) stockholders by any regulatory organization including, but not limited to, the SEC, any state securities commission, FINRA (formerly NASD) or any foreign regulatory authority?

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a detailed description, to the best of your knowledge, of any applicable inquiry, investigation, lawsuit or disciplinary action, including a chronology and current status.

Description, if applicable:

QUESTION 38. Indemnification

Other than pursuant to a statutory provision or provision of the Company's charter or bylaws, do you know of any *arrangement* in which a director or officer of the Company is insured or indemnified in any manner against liability that he may incur in his capacity as such, including, without limitation, any indemnification agreement with the Company? If your answer is "*YES*," please provide a brief description of the *arrangement(s)* in the space below.

ANSWER: *YES* ☐ *NO* ☐

Description, if applicable:

QUESTION 39. Accounting Matters

(a) Do you believe that the systems of internal accounting controls of the Company in place during the Company's last fiscal year provided reasonable assurances that:

(i) Transactions were executed in accordance with management's general or specific authorization?

ANSWER: *YES* ☐ *NO* ☐

(ii) Transactions were recorded as necessary (a) to permit preparation of financial statements in conformity with generally accepted accounting principles (or other applicable criteria) and (b) to maintain accountability for assets?

ANSWER: *YES* ☐ *NO* ☐

(iii) Access to assets was permitted only in accordance with management's general or specific authorization?

ANSWER: *YES* ☐ *NO* ☐

(iv) The recorded accountability for assets was compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any differences?

ANSWER: *YES* ☐ *NO* ☐

If you answered "*NO*" to any of subparts (i)–(iv), please explain your response on a separate sheet of paper and attach it to the Questionnaire.

(b) Do you know of any changes in the systems of internal accounting controls of the Company or any *subsidiary* that would result in a negative answer to any of the questions set forth in paragraph (a) above when applied to the Company's last three (3) fiscal years or to the Company's current fiscal year?

ANSWER: *YES* ☐ *NO* ☐

(c) Are you aware of any disagreements between the Company and its accountants?[136]

ANSWER: *YES* ☐ *NO* ☐

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[136] Schedule 14A, Items 9(d), 13(a)(4) and 14, and Instruction 7(d)(9) to Item 14; Form 10-K, Item 9. See Regulation S-K, Item 304.

(d) Are you aware of any management letters prepared by the accountants for the Company identifying any reportable conditions?

ANSWER: *YES* ☐ *NO* ☐

QUESTION 40. Director Independence and Qualifications[137] ***(Directors and Director Nominees Only)***

(a) Have you been employed within the past three (3) years by the Company or any parent or *subsidiary* of the Company?[138]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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____

(b) **[Have you or has any *family member* accepted, either directly or indirectly, compensation in any form from the Company or any parent or *subsidiary* of the Company in excess of $120,000 during any period of twelve (12) consecutive months within the past three (3) years? <u>Do not</u> include compensation for board or committee service, compensation paid to a *family member* who is a non-executive employee of the Company or any parent or *subsidiary* of the Company, benefits under a tax-qualified retirement plan, and non-discretionary compensation. Note that excluded compensation to family members should still be disclosed in Question 27.[139]] [Have you or any family**

[137] This question covers only Nasdaq and NYSE director independence requirements. If the Company is listed on another exchange, please supplement with other relevant requirements accordingly. Please note that pursuant to Schedule 14A, Item 7(d) and Item 407(d)(2) of Regulation S-K, if the Company's board of directors has appointed a "non-independent" director as a member of the Company's audit committee, the Company is required to disclose the nature of the relationship that makes such director not independent and the reason for the board of directors' determination to appoint such person to the Company's audit committee.

[138] Rule 5605(a)(2) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto; and Exchange Act Rule 10A-3(b)(1)(ii). See also Schedule 14A, Item 7(c); Regulation S-K, Item 407(a); and Nasdaq Marketplace Rule 5605(c)(2)(A) (applicable to audit committee members). Note that service as an interim executive officer of the listed company does not disqualify a director from being considered independent. See IM 5605 Definition of Independence – Rule 5605(a)(2) of the Nasdaq Marketplace Rules and NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto.

[139] Rule 5605(a)(2)(B) of the Nasdaq Marketplace Rules. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

member received during any twelve-month period within the last three (3) years, more than $120,000 in direct compensation from the Company or any parent or *subsidiary* of the Company (other than director and committee fees and pension or other forms of deferred compensation for prior service, provided that such compensation is not contingent in any way on continued service)? You need not consider compensation received by a director for former service as an interim executive officer. Also, do not consider compensation received by immediate family members for service as a non-executive employee of the Company or any parent or *subsidiary* of the Company. You need not consider individuals who are no longer *family members* as a result of legal separation or divorce, or those who have died or become incapacitated.[140]]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to either question, please describe:

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(c) Is any *family member* currently, or has any *family member* been within the past three (3) years, employed by the Company or by any parent or *subsidiary* of the Company as an *executive officer*?[141] [**You need not consider individuals who are no** longer ***family members*** **as a result of legal separation or divorce, or those who have died or become incapacitated.[142]]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please name such *family member* and indicate the *executive officer* position.

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(d) **[Are you, or is a *family member*, a partner, controlling shareholder or *executive officer* of any entity or organization (including law firms[143] and charitable entities) to which the Company or any parent or *subsidiary* of the Company made, or from which the Company or any parent or *subsidiary* of the Company**

[140] NYSE Listed Company Manual § 303A.02(b)(ii) and commentary thereto.

[141] Rule 5605(a)(2) (C) of the Nasdaq Marketplace Rules and NYSE Listed Company Manual § 303A.02(b)(i) and commentary thereto. See Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

[142] NYSE Listed Company Manual, General Commentary to Section 303A.02(b).

[143] See IM-5605 of the Nasdaq Marketplace Rules.

received, payments in the current or in any of the past three (3) fiscal years for property or services (other than payments which arose solely from investments in the securities of the Company or any parent or *subsidiary* of the Company and payments under non-discretionary charitable contribution matching programs) that exceed five percent (5%) of the recipient's consolidated gross revenue for that year, or $200,000, whichever is greater?[144]] [(1) Are you currently an employee of another entity (including any charitable organization) that has made payments to, or has received payments from, the Company or any parent or *subsidiary* of the Company for property or services in an amount which, in any of the last three (3) fiscal years, exceeds the greater of $1,000,000 or 2% of such other entity's consolidated gross revenues; (2) is any *family member* currently an *executive officer* of another entity (including any charitable organization) that has made payments to, or has received payments from, the Company or any *subsidiary* for property or services in an amount which, in any of the last three (3) fiscal years, exceeds the greater of $1,000,000 or 2% of such other entity's consolidated gross revenues?[145] You need not consider individuals who are no longer *family members* as a result of legal separation or divorce, or those who have died or become incapacitated.]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to either question, please describe:

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(e) **[Are you or is a *family member* presently employed as an *executive officer* of another entity where any of the *executive officers* of the Company or any parent or *subsidiary* of the Company have served on the compensation committee (or other body performing similar functions) of such other entity in the current year or any of the past three (3) years?[146]] [Are you or is any *family member* currently, or within the last three (3) years have you or has any *family member* been, an *executive officer* of another entity where any of the present *executive officers* of the Company or any parent or *subsidiary* of the Company at the same time serve or served on the other entity's compensation committee (or board of directors or**

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[144] Rule 5605(a)(2)(D) of the Nasdaq Marketplace Rules. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

[145] NYSE Listed Company Manual § 303A.02(b)(v) and commentary thereto. See also Schedule 14A, Item 7(c). See also Regulation S-K, Item 407(a).

[146] Rule 5605(a)(2)(E) of the Nasdaq Marketplace Rules. See also Regulation S-K, Item 407(e).

other committee performing similar functions)?[147] You need not consider individuals who are no longer *family members* as a result of legal separation or divorce, or those who have died or become incapacitated.]

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

____

____

____

(f) **[Are you or is any *family member* a current partner of the outside auditor of the Company or any parent or *subsidiary* of the Company, or have you or has any *family member* been a partner or employee of the outside auditor in the past three (3) years and worked on the audit of the Company or any parent or *subsidiary* of the Company during that time?[148]] [(1) Are you or a *family member* a current partner of a firm that is the internal or external auditor of the Company or any parent or *subsidiary* of the Company; (2) are you a current employee of such a firm; (3) do you have a *family member* who is a current employee of such a firm and personally works on the audit of the Company or any parent or *subsidiary* of the Company; or (4) were you or a *family member* within the last three (3) years (but no longer) a partner or employee of such a firm and personally worked on the audit of the Company or any parent or *subsidiary* of the Company during that time?[149]]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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____

(g) Except as already noted elsewhere in the Questionnaire, to assist the Company in determining your independence pursuant to the Exchange Act, have you accepted at any time, or is there any proposed *arrangement* for you to accept, either directly or indirectly, any consulting, advisory or other compensatory fee from the Company or any of its *subsidiaries*? Please ***do not*** include compensation received in your capacity

[147] NYSE Listed Company Manual § 303A.02(b)(iv) and commentary thereto. See also Regulation S-K, Item 407(e).
[148] Nasdaq Marketplace Rule 5605(a)(2)(F).
[149] Section 303A.02(b)(iii) of the NYSE Listed Company Manual.

as a member of the board of directors or any board committee, or fixed amounts of compensation received under a retirement plan (including deferred compensation) for prior service with the Company if such compensation is not contingent in any way on continued service.[150] For purposes of this question, "indirect" includes acceptance of such a fee by your spouse, minor children or stepchildren, and any of your children and stepchildren that share a home with you.[151] It also includes acceptance of such a fee by any entity that provides accounting, consulting, legal, investment banking or financial advisory services to the Company or any of its *subsidiaries* <u>and</u> in which you are a partner, member or officer, or in which you occupy a similar position; provided, however, that it does <u>not</u> include entities in which you are a limited partner or non-managing member, or those for which you occupy similar positions where you have no active role in providing services to the entity.

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please provide a description, including amounts paid or payable on your behalf:

____
____
____

(h) Please indicate whether any of the following relationships exist:[152]

(i) Do you own or control, directly or indirectly, more than 10% of any class of the Company's voting securities?

ANSWER: *YES* ☐ *NO* ☐

(ii) Are you an *executive officer*, employee, general partner or managing member of the Company or any of its *affiliates*?

ANSWER: *YES* ☐ *NO* ☐

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[150] Exchange Act Rule 10A-3(b)(1)(ii)(A). Nasdaq Marketplace Rule 5605(c)(2)(A)(ii) makes compliance with this SEC rule, along with all of the independence requirements of Exchange Act Rule 10A-3(b)(1), an explicit requirement for all audit committee members.

[151] See SEC Release No. 34-47654, Section I.A.2.

[152] Rule 5605(c)(2)(A)(ii) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.06; Exchange Act Rules 10A-3(b)(1)(ii)(B) and 10A-3(e)(1)(iii). Please note that Nasdaq "recommends" that a listed company disclose in its proxy statement if any director is deemed independent but falls outside the safe harbor provisions of Exchange Act Rule 10A-3(e)(1)(ii). <u>See</u> IM-5605-4 of the Nasdaq Marketplace Rules. NYSE Listed Company Manual § 303A.06(b) requires that all audit committee members meet both the requirements of Exchange Act Rule 10A-3(b)(1) and the requirements of NYSE Listed Company Manual § 303A.02.

(iii) Are you otherwise an *affiliate* of the Company or any of its *affiliates* (other than in your capacity as a member of the Company's board of directors)? (Please consider any current or past relationship, circumstance, agreement or *arrangement* pursuant to which you or an entity in which you are an officer, general partner or managing member could be deemed to be an *affiliate* of the Company or any of its *affiliates*.)

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*" to any of these questions, please state the reason(s):

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____

____

(i) **[Have you participated in the preparation of the financial statements of the Company or any of its current *subsidiaries* at any time during the past three (3) years?[153]]**

ANSWER: *YES* ☐ *NO* ☐

If your answer is "*YES*," please describe:

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____

(j) Please identify and describe any material relationship you or any of your *family members* currently have (or have had within the past three years) with any charitable organization or other non-public entity. Such relationships may include, but are not limited to, relationships as a partner, controlling shareholder, director or *executive officer* of the applicable organization or entity. Please include in your response the name of the applicable organization or entity, your relationship thereto and the applicable dates of such relationship.[154]

[153] Rule 5605(c)(2)(A)(iii) of the Nasdaq Marketplace Rules.

[154] This question permits the Company to inquire about overlapping affiliations as a component of its general independence review. See, e.g., the concerns raised in *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206 (Del. Ch. 2002), *summary judgment granted for defendant directors by*, *In re Oracle Corp. Derivative Litig*., 2004 Del. Ch. LEXIS 177 (Del. Ch. Nov. 24, 2004). Alternatively, the Questionnaire could be revised to provide to the respondents with a list of entities to which the Company donates funds, with a question to the respondents inquiring whether they have any relationships with any of the listed entities.

(k) Please identify and describe any relationships you have with any other director or *executive officer* of the Company (other than serving as a director of the Company), whether personal or professional. This could include serving in some capacity in a charitable organization or other non-public entity, overlapping membership in an association or club and any other relationship in which you periodically interact with such person.[155]

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(l) Please provide any additional information that would be relevant, appropriate or helpful for the Company's board of directors to consider when evaluating your ability to exercise independent judgment in carrying out the responsibilities of a director and when determining whether you qualify as "independent" within the meaning of that term under the federal securities laws and the rules of **[Nasdaq] [the NYSE]**.[156]

Please include in your response any information regarding relationships between you, your *family members* or your *associates* on one hand, and the Company or any of its *affiliates* on the other hand, that has not been fully described elsewhere in the Questionnaire. Such relationships may be either direct or as a partner, member, shareholder or officer of an organization or entity that has a material relationship with the Company or any of its *affiliates*. Further, such relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others.

QUESTION 41. Financial Experience and Expertise (Directors and Director Nominees Only)

The Company is required pursuant to the Exchange Act to determine and disclose whether it has at least one "audit committee financial expert" (as defined by the SEC)

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[155] This question also addresses concerns raised in *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206 (Del. Ch. 2002), *summary judgment granted for defendant directors by*, *In re Oracle Corp. Derivative Litig.*, 2004 Del. Ch. LEXIS 177 (Del. Ch. Nov. 24, 2004).

[156] Rule 5605(a)(2) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.02 and commentary thereto. See also Regulation S-K, Item 407(a)(3), which requires disclosure of the types of transactions, relationships or arrangements, if any, that were not disclosed pursuant to Item 404(a) but which the board considered in determining that the particular director was independent under the relevant listing standards.

serving on its audit committee.[157] Additionally, the Company's audit committee members must meet certain minimum financial experience and expertise thresholds pursuant to **[Nasdaq] [NYSE]** rules. Please respond to the following questions and requests if you are currently a member of the Company's audit committee or if you may be eligible to serve on the audit committee in the future.

(a) Are you able to read and understand fundamental financial statements, including the Company's balance sheet, income statement, and cash flow statement?[158]

ANSWER: *YES* ☐ *NO* ☐

(b) Please describe any past employment experience in finance or accounting or any other comparable experience, education or background in finance or accounting (including whether you have previously served as a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities).[159]

(c) To assist the Company's board of directors in determining whether you meet the definition of an "audit committee financial expert," please list below any experience that may be helpful in the board's determination. Pursuant to SEC rules, an "audit committee financial expert" is a person who has <u>each</u> of the following attributes[160]:

(i) An understanding of generally accepted accounting principles and financial statements;

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[157] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 407(d)(5) and instructions thereto (which clarify that the disclosure is only required in a registrant's annual report). NYSE Listed Company Manual § 303A.12(c) requires the Company to submit an executed Written Affirmation to the NYSE annually and each time there is a change in the board or in any of these committees: nominating/corporate governance, compensation and audit. Nasdaq Marketplace Rule 5605(c)(4) requires the Company to provide notice to Nasdaq immediately upon learning of noncompliance with audit committee requirements; Rule 5625 requires prompt notification to Nasdaq when an executive officer becomes aware of material noncompliance with the Rule 5600 Series.

[158] Rule 5605(c)(2)(A)(iv) of the Nasdaq Marketplace Rules. Although this qualification is only required for members of the Company's audit committee, it is advisable for the board to know which members would be eligible to serve on the Company's audit committee if the need arose. Additionally, the commentary to NYSE Listed Company Manual § 303A.07(a) states that each member of the audit committee must become financially literate (if not already financially literate) within a reasonable period of time after his or her appointment to the audit committee.

[159] Rule 5605(c)(2)(A) of the Nasdaq Marketplace Rules; NYSE Listed Company Manual § 303A.07(a) and commentary thereto.

[160] Form 10-K, Item 10; Schedule 14A, Item 7(b). See Regulation S-K, Item 407(d)(5)(ii) and (iii). Note that the safe harbor described by Regulation S-K, Item 407(d)(5)(iv) emphasizes that a designation of audit committee financial expert does not impose additional duties, obligations or liability on the director; this information may be important to the directors filling out the Questionnaire.

(ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) 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 Company's financial statements, or experience actively supervising one or more persons engaged in such activities;

(iv) An understanding of internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

In your response, please address whether the above-listed qualifications were obtained through any of the following means:

(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 that would be appropriate for the Company's board of directors to consider in determining your financial literacy or sophistication.

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(d) **[Do you currently serve, or have you been selected for future service, on an audit committee of any public company besides the Company?]**[161]

ANSWER: *YES* ☐ *NO* ☐

[161] NYSE Listed Company Manual § 303A.07(a) and commentary thereto.

If your answer is "*YES*," please list the name of each public company on whose audit committee you currently or will serve.

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____
____

REPORTING OBLIGATIONS

QUESTION 42. Reporting Obligations[162]

If you are an *executive officer*, director or owner of 10% of any class of the Company's equity securities, you are subject to the reporting requirements of Section 16(a) of the Exchange Act and the rules promulgated thereunder. These rules may require you to file, within forty-five (45) days of the end of the Company's fiscal year, an Annual Statement of Changes in Beneficial Ownership on Form 5 with the SEC reflecting certain of your transactions in the Company's equity securities.

It is not necessary to make this annual Form 5 filing if: (i) you have not engaged in any transactions in the Company's equity securities during the past year which require annual reporting on Form 5, or if you have made a prior, voluntary disclosure of such transactions on Form 4 prior to the date the Form 5 is due; and (ii) you have no holdings or transactions which you were otherwise required to report during Fiscal Year **[Insert Last Fiscal Year]** and which were not reported to the SEC.

NOTE: If you have already returned a separate Form 5 Certification or provided a Form 5 to the Company, you do not need to complete this question.

(a) On the basis of a review of all transactions in the Company's equity securities during Fiscal Year **[Insert Last Fiscal Year]** and all filings made by you or on your behalf with the SEC during such period, are you required to file a Form 5 with the SEC for the past fiscal year? **(Answering "No" shall constitute your representation that no Form 5 filing is required, and your agreement that the Company may retain this Questionnaire and provide it to the SEC upon request.)**

ANSWER: *YES* ☐ *NO* ☐

If you answered "*YES,*" please state the transactions that should be reported to the SEC.

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[162] Form 10-K, Item 10; Schedule 14A, Item 7(b). Regulation S-K, Item 405.

(b) Did you file any reports on Form 3 or Form 4 later than the deadline for filing such reports during Fiscal Year **[Insert Last Fiscal Year]** or any prior fiscal year (excluding any late reports that have previously been disclosed in the Company's proxy statements)?

ANSWER: *YES* ☐ *NO* ☐

If you answered "*YES*," please state the details of the transaction or provide the date on which the late Form 3 or Form 4 report was filed with the SEC.

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If any information furnished by me in this questionnaire becomes inaccurate, incomplete <u>or otherwise changes</u>, I will promptly advise the Company to that effect and furnish any supplementary information that may be appropriate as a result of any developments, including the passage of time and any new relationships that may develop in the future.

The foregoing answers are correctly and fully stated to the best of my knowledge, information and belief after a reasonable investigation.

____________________	____________________________
Date	*Signature of Officer or Director*
	*Print Name:*____________________

DEFINITIONS

An *affiliate* is a person or entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, another person or entity. The Company's *executive officers* would be considered *affiliates* of the Company.

Arrangement includes any contract, arrangement, agreement or understanding, whether written or oral.

Associate includes: (i) any corporation or entity (other than the Company) of which you are an officer, director or partner or of which you are, directly or indirectly, the beneficial owner of 10% or more of any class of equity securities; (ii) any trust or other estate in which you have a substantial beneficial interest or as to which you serve as trustee or in a similar capacity; (iii) your spouse; (iv) any relative of your spouse or any relative of yours who has the same home as you or who is a director or officer or key executive of the Company; and (v) any partner, syndicate member or person with whom you have agreed to act in concert with respect to the acquisition, holding, voting or disposition of shares of the Company's securities.

A *beneficial owner* of a security includes:

(i) any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

  (a) voting power, which includes the power to vote, or to direct the voting of, such security; and/or

  (b) investment power, which includes the power to dispose, or to direct the disposition of, such security.

(ii) any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership; and

(iii) a person who has the right to acquire beneficial ownership of such security, as defined in clause (i) above, within sixty (60) days, including but not limited to any right to acquire: (a) through the exercise of any option, warrant or right, (b) through the conversion of a security, (c) pursuant to the power to revoke a trust, discretionary account, or similar arrangement, or (d) pursuant to the automatic termination of a trust, discretionary account or similar arrangement.

Shares *beneficially owned* by you include not only securities you hold for your own benefit, but also securities others hold for your benefit (regardless of whether or how they are registered) such as, for example, securities held for you by custodians, brokers, relatives, trustees, and securities held for your account by pledgees, securities owned by a partnership in which you are a general or limited partner, and securities owned by any corporation which is or should be regarded as a personal holding corporation of yours. Bonus award shares held by a plan trustee, but as to which you cast votes and/or receive dividends, are deemed beneficially owned notwithstanding whether or not your complete rights in such shares have vested.

Change in control means a change in the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person or the Company, whether through the ownership of voting securities, by contract or otherwise.

A *control person* of a specified person or entity is a person who, directly or indirectly, through one or more intermediaries, controls the specified person or entity.

Equity Incentive Plan means any Incentive Plan or a portion of an Incentive Plan under which awards are granted that fall within the scope of Accounting Standards *Codification Topic 718, Compensation – Stock Compensation*, as modified or supplemented. Such awards generally would include stock awards (restricted or otherwise), stock option awards and any other equity instruments.

Executive officer means the president, principal financial officer, principal accounting officer or controller, any vice president 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 Company (or other entity that may be indicated).

Family member **[means a person's spouse, parents, children and siblings, whether by blood, marriage (including "in-law" relationships) or adoption, and anyone residing in the person's home.[163]] [means a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares the person's home. *Family member* does not include those who are legally separated or divorced, who are incapacitated, or who have died.[164]]** Please note that due to differences between SEC rules and the rules of Nasdaq **[the NYSE],** the definitions of *family member* and *immediate family member* are slightly different.

Immediate family member means a person's child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law,

[163] Rule 5605(a)(2) of the Nasdaq Marketplace Rules.
[164] General commentary to NYSE Listed Company Manual § 303A.02(b).

brother-in-law or sister-in-law of such person, and any other individual (other than a tenant or employee) sharing the person's household. *Immediate family member* includes (1) only individuals who are currently related to the primary reporting person (e.g., a person who is divorced from a director's daughter would no longer be a son-in-law whose transactions must be reported) and (2) only those persons who are related by blood or step relationship to the primary reporting person or his or her spouse.[165] Please note that due to differences between SEC rules and the rules of Nasdaq **[the NYSE]**, the definitions of *family member* and *immediate family member* are slightly different.

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 Company or an *affiliate*, the Company's stock price, or any other performance measure.

Non-Equity Incentive Plan means any incentive plan or portion of an incentive plan that is not an *Equity Incentive Plan*.

Promoter includes:

(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or

(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10% or more of any class of securities of the issuer or 10% or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a *promoter* within the meaning of this paragraph if the person does not otherwise take part in founding and organizing the enterprise.

Related person means any director or executive officer of the Company, any director nominee, any *immediate family member* of a director or executive officer of the Company, any security holder who owns more than 5% of any class of the Company's voting securities (i.e., common stock and preferred stock are treated as separate classes), and any *immediate family member* of such a security holder.

SARs are stock appreciation rights payable in cash or stock, including *SARs* payable in cash or stock at the election of the Company or the holder.

[165] SEC Staff Guidance, Item 404 of Regulation S-K, Interpretation 230.01.

Stock options includes all options, warrants, or rights to purchase securities of the Company, other than those issued to security holders as such on a pro rata basis.

Subsidiary includes any company of which more than 50% of the voting shares are owned by the Company.

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.

Underwriter includes an underwriter, underwriters' counsel, financial consultants and advisers, finders, members of the selling or distribution group, any *member* participating in the public offering and any and all other persons associated with or related to the foregoing.

NOTES

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