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April 10, 2006

File No. S7-03-06
SEC Release Nos. 33-8655 and 34-53185

Dear Ladies and Gentlemen:

We write with respect to the proposal by the Securities and Exchange Commission (the "Commission") set forth in Release Nos. 33-8655 and 34-53185 (together, the "Proposing Release") that would amend the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters and security ownership of officers and directors. While we agree with the broad approach adopted by the Commission in the Proposing Release, we would like to address several specific issues that we believe should be considered further.

1. Overstatement of Option Compensation in Summary Compensation Table (Instruction 2 to Item 402(c)(2)(vi) and (vii))

We recommend that the Commission modify proposed Instruction 2 to Item 402(c)(2)(vi) and (vii) so that, upon the repricing or material modification of options or SARs, registrants report as compensation in the Summary Compensation Table the incremental fair value of such awards to the named executive officers as so repriced or modified, rather than the total fair value thereof as proposed.

We believe that reporting incremental fair value, rather than full fair value, in the Summary Compensation Table following a repricing or modification of options or SARs will more clearly reflect the compensation received by the named executive officers during the applicable period, and will avoid a potentially misleading overstatement of their compensation. In the Proposing Release, the Commission has generally accepted Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment ("FAS 123R") as an accurate means to estimate the fair value of options and similar instruments. FAS

123R is not limited, however, to new grants of such instruments. It applies equally well, by its express terms, to estimate the increase in value of such instruments resulting from a repricing or modification. Given the Commission's reliance on FAS 123R for most purposes relating to option valuation, we believe it would be unwise, and potentially misleading, to ignore FAS 123R in determining the amount of compensation received by named executive officers as a result of a repricing or modification, especially when FAS 123R can provide a more accurate estimate of current compensation than the proposed full value approach. Investors would benefit from the application of a consistent valuation methodology.

Existing disclosure requirements - which potentially overstate compensation by treating repriced awards as new awards, and understate it by excluding modifications other than repricings - may have been justifiable in response to the prior wave of repricings that occurred when awards had lost all or virtually all their value, especially given the lack of a broadly accepted method of valuing the fair value of such awards. In developing comprehensive disclosure requirements that would accurately convey the effect of other modifications (such as extensions of exercise periods or changes to vesting provisions), however, we believe that it is important to recognize that changes often will be made to awards that have significant existing value. In these circumstances, the effect of proposed Instruction 2, which treats all material modifications as new awards, would be to overstate greatly the compensation of named executive officers. In light of the wide variety of market conditions and other contexts in which repricings and other modifications can be expected to take place, the consistent application of FAS 123R would provide much more accurate disclosure for investors.

2. Double-Counting of Defined Benefit Pensions in Summary Compensation Table (Instruction 2 to Item 402(c)(2)(ix))

We recommend that the Commission eliminate the requirement contained in proposed Instruction 2 to Item 402(c)(2)(ix) to report benefits paid pursuant to defined benefit and actuarial plans as All Other Compensation in the Summary Compensation Table.

Proposed Item 402(c)(2)(ix) states that the All Other Compensation column of the Summary Compensation Table must include "the aggregate increase in actuarial value…of all defined benefit and actuarial plans (including supplemental plans) accrued during the registrant's covered fiscal year". Proposed Instruction 2, however, requires the same amounts to be reported again when they are actually paid. The proposed Instruction states that "[b]enefits paid pursuant to defined benefit and actuarial plans are reportable as All Other Compensation in column (i) if paid to the named executive officer during the period covered by the [Summary Compensation] Table."

We believe that proposed Instruction 2 would result in a misleading double-counting of compensation, as the same value would be reported in the Summary Compensation Table both upon accrual and then again upon payment. In this regard, it is important to note that under the Proposing Release compensation derived from equity awards will be reflected in the Summary Compensation Table only upon grant and not subsequently reported in the Summary Compensation Table upon exercise or payment.

Compensation derived from non-stock incentive plans and non-qualified defined contribution plans is likewise proposed to be reported in the Summary Compensation Table only upon accrual and not upon payment. We can see no benefit to investors in treating defined benefit pension compensation differently.

3. Definition of "Market Price on the Date of Grant" (Instruction 6 to Item 402(e))

We recommend that the Commission permit the use of methods other than closing price in determining, for purposes of proposed Item 402(e), whether options, SARs and similar option-like instruments have an exercise price less than the market price on the date of grant.

Proposed Item 402(e) requires tabular disclosure of options, SARs and similar option-like instruments if the exercise price of the instrument is less than the market price of the underlying security on the date of grant. For purposes of determining the market price on the grant date, proposed Instruction 6 to Item 402(e) states that "the registrant may use … the closing price per share of the security on an established trading market on the date of grant…." In our experience, many registrants use methods other than closing price to determine the market price of their securities in connection with setting the exercise price of options and similar instruments. For example, many registrants use an average of the high and low trading price on the date of grant or, in the case of awards made prior to the beginning of trading, the closing price on the day prior to the grant date. In certain circumstances, registrants even use an average of the closing prices over a period of several days either before or after the date of grant. It is also our experience that these registrants are applying such methods in a good faith attempt to accurately set the exercise price at the security's then-current fair market value. [1]

While we agree that the grant of discount or "in-the-money" options, SARs and similar instruments is sufficiently unusual to warrant special disclosure, we believe that measuring market price solely on the basis of grant date closing price will result in a significant number of registrants reporting ordinary course "at-the-money" awards as though they were extraordinary "in-the-money" awards, which will also tend to increase the burden on investors to identify truly "in-the-money" awards. Consequently, we recommend that the Commission modify proposed Instruction 6 to Item 402(e) to permit registrants to use any reasonable and consistently applied method of determining the market price of its securities for purposes of proposed Item 402(e), and further

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[1] We note that, under recently enacted Section 409A of the Internal Revenue Code and the proposed regulations promulgated thereunder, significant tax penalties apply to recipients of options, SARs and similar option-like instruments that have an exercise price less than the fair market value of the underlying stock on the date of grant. Consequently, there are presently significant disincentives to granting discounted options. Under the proposed regulations, publicly traded companies are permitted to measure fair market value on any reasonable basis using prices derived from actual transactions on the public market, consistently applied. See Prop. Treas. Reg § 1.409A-1(b)(5)(iv)(A).

suggest that the Commission require disclosure in a footnote or narrative discussion of the method employed or any modifications thereto.

4. Confidentiality of Target Levels and Performance Criteria (Instruction 4 to Item 402(b) and Item 402(f)(1)(iii))

We recommend that the Commission clarify that registrants are not required to disclose (i) target levels with respect to performance-related factors considered by their compensation committees or boards of directors or applicable to compensatory awards, regardless of whether disclosure would have an adverse effect on the registrant, or (ii) any factors or criteria involving confidential commercial or business information if disclosure would have an adverse effect on the registrant.

The Proposing Release addresses the disclosure of target levels and performance criteria in three instances: (i) Instruction 4 to Item 402(b), which relates to the Compensation Disclosure & Analysis, (ii) Item 402(f)(1)(iii), which relates to the narrative discussion that follows the Summary Compensation Table, and (iii) Section II.A.2 of the Commission's description of the Proposing Release. In each instance, however, a different standard for determining the required disclosure is used. For example, Instruction 4 to Item 402(b) refers to disclosure that would have an "adverse effect on the registrant", while Item 402(f)(1)(iii) refers to disclosure that would have an "adverse effect on the registrant's competitive position". In all events, it is not clear whether the adversity condition (however defined) applies to target levels or whether it is limited to performance criteria. Given the sensitive nature of these matters, we believe it advisable to adopt a single clear standard for disclosure that would exclude, consistent with current practice, target levels in all instances and performance criteria if disclosure would involve confidential commercial or business information the disclosure of which would have an adverse effect on the registrant.

5. Disclosure of Total Compensation of Three Non-Executive Officers (Instruction 2 to Item 402(f)(1))

We recommend that the Commission eliminate the requirement in proposed Instruction 2 to Item 402(f)(1) to report the total compensation and job description, but not the identity, of up to three employees of the registrant who were not executive officers but whose total compensation exceeded that of any named executive officer.

We believe that the proposal will impose a significant administrative burden on registrants, will require registrants to reveal commercially sensitive information to competitors and will create significant internal employee morale issues, all without any corresponding benefit to investors. Under the proposal, registrants would be required to track the total compensation (including FAS 123R values of equity awards, earned amounts under non-stock incentive plans, contributions to 401(k) and other defined contribution retirement plans, actuarial present values of defined benefit retirement plan accruals and perquisites) of all their employees, regardless of title, duties

or work location. The companies at issue frequently employ tens of thousands, or even hundreds of thousands, of individuals, who may reside in dozens of countries.[2] To ensure compliance with the proposal, we believe that many registrants would be forced to implement costly and time consuming changes to their internal reporting systems and devote considerable resources to maintaining such systems. Moreover, we do not believe that these costs will be mitigated by the production of useful disclosure for investors. On the contrary, we expect that the disclosure produced by the proposal will be viewed mostly as a curiosity by investors. The individuals whose total compensation and job description would be disclosed under the proposal are not executive officers and therefore, by definition, do not perform a policy making or similar function. The employment and compensation of such individuals is typically not subject to the direct oversight of the registrant's board of directors or, in many cases, even its named executive officers. As a result, we believe that the compensation of such individuals is analogous to the registrant's payments to third-party vendors and suppliers, which typically would not be separately identified and quantified for investors. To the extent the compensation of such individuals represents a significant transfer of corporate assets, the financial consequences will be reflected in the registrant's financial statements.

While we doubt that many registrants' investors will find the proposed disclosure useful, we do expect that many registrants' competitors will find such disclosure to be quite valuable. In particular, the identity of the individuals whose compensation is disclosed will likely be easily determined by competitors, especially in the case of registrants in single or distinct lines of business. For these companies and others, even describing the job position of the individual in a generic manner (e.g., "programmer", "research scientist", "investment manager", or "artist") will not prevent competitors from identifying the individuals in question. In all events, competitors will likely find the disclosed compensation information useful, even if they are unable to determine the names of the individuals in question, because the disclosure of total compensation will indicate the maximum amount the registrant has paid to any employee in the covered fiscal year thereby making it easier to "poach" employees. For the same reasons, the proposed disclosure will likely result in significant internal employee morale issues within a registrant's business, as employees compare their compensation to that of their peers. Thus from an investor's standpoint, requiring such disclosures will likely have a substantive detrimental impact on a registrant's business without any corresponding benefit to the investor.

6. Implementation of the Proposing Release

We recommend that the Commission modify the proposed implementation timetable for the Proposing Release so that the revised disclosure requirements would be applicable to registrants' first proxy statement (or annual report or registration statement,

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[2] Based on a review of public filings, we found that more than 100 U.S. public companies employ more than 50,000 individuals and that more than 50 of those companies have in excess of 100,000 employees.

as the case may be) filed after the first full fiscal year that follows publication of the adopting release.

We believe that the new rules and amendments contained in the Proposing Release will require registrants to overhaul substantially both their internal controls and their compensation decision-making processes. If the effective date is not deferred to the start of their next fiscal year, registrants will be required to incur significant effort and expense to locate retroactively data they could much more efficiently track on an ongoing basis. Moreover, many registrants and their compensation committees will already have made significant compensation decisions for the current year.[3] For these companies and their compensation committees, the decision-making process and related procedures (including record-keeping) were conducted in the context of, and in reliance upon, existing disclosure requirements. Consequently, we expect that the proposed implementation timetable will result in confusing disclosure, as registrants will attempt to explain, within the context of the new disclosure rules, decisions that were made under the old disclosure rules.

More fundamentally, we believe that implementing the new rules and amendments in the middle of a fiscal year, and thereby bifurcating the compensation process and related disclosures, would significantly diminish the opportunity and incentive for registrants to effect significant governance improvements in response to the changing disclosure environment. For example, under the Proposing Release, registrants will be required to disclose the compensation committee's answer (or lack thereof) to a variety of very specific questions relating to their compensation objectives and philosophy. If these rules are applied prospectively, registrants can be expected to carefully and thoroughly consider these issues in making the next fiscal year's compensation decisions. By contrast, if registrants were required to answer these questions with respect to prior decisions to which the new requirements did not in fact apply, there would be no opportunity to respond constructively to the rule changes. Registrants would instead be unfairly required to make potentially embarrassing disclosures, and they would be more reluctant to make changes for fear of bolstering the argument that their prior compensation practices were deficient.

In short, we respectfully submit that the Commission can much more fully realize its objective of improving compensation practices and disclosure for the benefit of investors by providing registrants a full fiscal year to adapt to the new rules and amendments being proposed.

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[3] Registrants often set salaries and annual bonus opportunities and grant long-term incentive awards and equity compensation awards within the first three to four months of the fiscal year. Indeed, U.S. Federal tax law conditions the deductibility of certain executive compensation on its being granted or otherwise established within the first 90 days of the applicable performance period, which is typically one or more fiscal years. <u>See</u> Internal Revenue Code Section 162(m).

We would be happy to discuss any of the above issues further with the Commission. Please feel free to direct any inquiries to Eric W. Hilfers, LizabethAnn R. Eisen or Faiza J. Saeed.

Sincerely,

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