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April 21, 2006

VIA E-MAIL: rule-comments@sec.gov

Nancy M. Morris,
Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, DC 20549-9303.

Re: Proposed Rules Relating to Executive Compensation and Related Party Disclosure – Release Nos. 33-8655 and 34-53185; File No. S7-03-06

Dear Ms. Morris:

We are responding to Release Nos. 33-8655 and 34-53185 in which the Commission solicits comments regarding proposed amendments to the disclosure requirements for executive and director compensation, related party transactions, corporate governance matters and security ownership of officers and directors.

ITEM 402

We support the Commission's proposal to revise comprehensively the disclosure of executive and director compensation in an effort to communicate information that is "clear, concise and meaningful." We believe the proposed amendments evidence a far-reaching effort to identify and address the limitations of the current disclosure framework.

We have set forth below comments that we believe will enhance the Proposed Rules. In particular, we believe that the Commission's goal of more clear, concise and meaningful information should be informed by two corresponding principles. First, we believe that "double counting" compensation is neither clear nor concise and therefore should be avoided to the extent possible. Second, we believe that economically equivalent compensation should be disclosed identically. Disclosure concerns should not drive compensation decisions. Otherwise, the Commission's goal of meaningful disclosure could be undermined.

A. Transition

1. *The proposed phase-in of the new Summary Compensation Table and Item 404(a) disclosure is necessary and appropriate.*

We strongly support the proposed method of phasing in the proposed Summary Compensation Table and disclosure required by proposed Item 404(a). We believe that it is appropriate both (1) not to require issuers to "restate" compensation and (2) not to mix pre-revision disclosure with post-revision disclosure. We understand that, instead, the disclosure first will be provided only for the most recent fiscal year and then phased in over the succeeding two fiscal years.

We do not believe that any other transition alternative is justifiable. On the one hand, requiring restatement would substantially increase the cost of the Proposed Rules with only a limited additional benefit and could significantly delay the ability of some issuers to comply. Issuers will incur considerable costs in preparing the first proxy statement under the Proposed Rules even without restatement. In many instances, required information may need to be prepared and/or evaluated in a new way and, in some instances, the information may not be readily available. On the other hand, mixing pre-revision disclosure with post-revision disclosure is likely to be unclear and create substantial investor confusion.

On the timing side, we believe that the 60-day period for Forms 10-K and 10-KSB and the 90-day period for proxy statements is too short. To permit issuers to properly prepare and gather data for the new rules, we believe the new rules must be in place before executive compensation decisions are made. In our experience, this typically occurs in the November-to-January timeframe for calendar-year filers. Thus, we suggest that the new rules would need to be published no later than October in order that compensation committees of these filers may take them into account when making compensation decisions. If the new rules are published later than October, we believe that it would be inappropriate to require calendar-year filers to comply with the new rules for 2006 compensation decisions.

B. Compensation Discussion and Analysis – Proposed Item 402(b)

1. *Performance targets that reflect commercially sensitive business plan information should continue to be treated confidentially.*

We support the Commission's view that issuers should be able to exclude from the proxy statement generally, and from the CD&A in particular, performance targets and other criteria involving confidential commercial or business information. In many cases, performance targets are based on business plans that are confidential and competitively sensitive. If the Commission reversed its long-standing position and require disclosure of targets based on internal business plans, issuers would be faced with a choice of either (1) disclosing business plan information that has historically been viewed both as competitively sensitive and speculative or (2) using other, likely more generic, targets (which could hinder the goal of achieving pay-for-performance).

2. *The CD&A should be furnished rather than filed.*

We respectfully suggest that the Commission's goal of clear and concise disclosure of compensation policies will not be furthered by its proposal to require the CD&A to be "filed" with the Commission. It has been our experience that the chief criticism of the current disclosure is its generality and use of boilerplate language (not its inaccuracy). We do not believe that adding potential liability will address this concern or increase the amount of meaningful information for investors.

The Commission's goal is most appropriately furthered by the more detailed instructions it is including as part of the Proposed Rules and by heightening the profile of compensation disclosure generally. The informal guidance that the Staff has provided over the past two years has already resulted in the inclusion of substantially expanded compensation disclosure in proxy statements. In addition, corporate governance developments over the same period have also resulted in a new focus by issuers on compensation disclosure. For example, exchanges now require shareholder approval of all equity-compensation plans, issuers are required to disclose equity-compensation plans not approved by shareholders and "no" vote campaigns have become more prevalent.

Adding the risk of personal liability has the potential to reverse the steps that have been taken to date and to limit the potential benefit of the Proposed Rules. The addition of potential liability is likely to limit creative compensation disclosure and increase the use of boilerplate language. Moreover, we believe it would be particularly inappropriate for the CD&A to be subject to the certification requirements under the Sarbanes-Oxley Act of 2002, because corporate governance principles limit the involvement of the Principal Executive Officer and Principal Financial Officer in the compensation process.

To the extent that the CD&A is to be filed, we agree with the Commission that it is no longer appropriate to have the disclosure made over the names of the compensation committee. At that point, the CD&A would be equivalent to all other issuer disclosure, for which no group of individuals is allocated particular responsibility or potential liability.

3. *The CD&A should serve as a framework for the issuer to describe its compensation philosophy and practices.*

We have noted that some other commenters have suggested that the CD&A include a reference to specific compensation practices, such as an internal pay equity review, wealth accumulation review or tally sheet review. We agree with the Commission's goal that the CD&A should serve as a framework for clear and concise disclosure of the issuer's compensation philosophy and practices. We do not believe it is appropriate for the CD&A to require issuers to accept or address any particular compensation philosophy other than their own.

C. Summary Compensation Table – Proposed Item 402(c)

1. *The Summary Compensation Table should not include increases in the value of defined benefit pension plans.*

We support the Commission's proposal to include a "total compensation column" in the Summary Compensation Table. However, we believe the proposed disclosure would be enhanced by excluding changes in the value of defined benefit pension plans from the Summary Compensation Table and the proposed column. Including defined benefit changes results in the proposed disclosure being less meaningful and clear than would otherwise be the case.

First, we believe the disclosure is not meaningful. Changes in defined benefit pension value are affected significantly by interest rates, by investment returns and by the age and the length of service of the executive officer and are not driven by yearly compensation decisions. As an example, the same benefit can have substantially different year-to-year accrual value depending on the executive officer's age or the current interest-rate environment. In some cases, the value of a benefit can actually decrease, such as when interest rates increase or when an executive continues to work after normal retirement age. Including this value in the total compensation column and the Summary Compensation Table will make it difficult for investors to compare yearly compensation decisions across issuers in a meaningful way.

Second, disclosing pension accruals both in the Summary Compensation Table and in proposed Item 402(i) raises the potential of double-counting the same benefit. We believe it is clearer to disclose defined pension benefits separately in Item 402(i) as a compensation decision that is primarily viewed as allocated over an executive's expected employment term. Viewing defined benefit values on a yearly basis undervalues the benefit while an executive is younger and overvalues it as an executive nears retirement age. The proposed Summary Compensation Table disclosure would, therefore, provide an incentive for issuers to cease providing defined pension benefits as its executives age. In our view, proposed Item 402(i) provides disclosure that is clearer and does not result in these incentives.

We do not believe there would be any confusion in excluding pension accrual from “total compensation.” Any potential confusion could be eliminated by changing the name of the new column to “total current compensation.”

2. *All awards subject to performance conditions should be disclosed similarly.*

We believe it is appropriate to disclose all awards subject to performance conditions similarly. As proposed, option and other stock awards subject to performance conditions will be included in the Summary Compensation Table when granted but non-stock performance-based awards would be included in the Summary Compensation Table only when earned.

We do not believe that proposed bifurcation will help provide clear or meaningful disclosure. The approach will make it difficult for investors to compare compensation among similar issuers. Instead, similar compensation opportunities will be disclosed differently, depending on whether a stock component is included. We believe the Commission’s goal of meaningful disclosure suggests that it would be more appropriate to disclose both types of performance compensation similarly.

Reporting both types of performance awards in the Summary Compensation Table and the total compensation column in the year earned also allows investors to easily compare an executive’s total compensation with the issuer’s historic performance. Reporting performance awards when granted will make this comparison much less straightforward and significantly reduce the benefit of a total compensation column. Reporting awards when earned also will remove any variability introduced by the need to make subjective assumptions in valuing performance-based stock awards at the date of grant.

Reporting performance-based stock awards in the year earned would also remove a potential for double-counting. As proposed, performance-based stock awards would appear both in the Summary Compensation Table and in the Grants of Performance-Based Awards Table in the year awarded. Non-stock performance-based awards would appear only in the latter table in the year of grant and therefore would not result in double-counting.

We appreciate that the Commission is proposing to distinguish between stock and non-stock performance-based compensation because of the availability of a grant-date fair value under FAS 123R. However, we believe that the benefits of consistent treatment far outweigh any benefit of an inherently speculative, grant-date valuation.

3. *Disclosing dividends on stock awards as compensation is double-counting.*

We suggest that dividends (or dividend equivalents) paid on unvested stock awards should not be treated as yearly compensation and should not be disclosed in the Summary Compensation Table. As proposed, stock awards would be reported at their fair value under FAS 123R. This fair value includes the value of future dividends. Disclosing the value of dividends again when paid results in double-counting and would disadvantage equity-based compensation relative to cash compensation.

As an example, an award of time-vested restricted stock would be reported at the market price on the date of grant. That price is the price at which the employee could go out and purchase the stock on the open market and receive all future dividends at no additional cost. If one were to treat the award of stock and the award of expected dividends separately, FAS 123R would require that the grant-date value of the stock award be determined net of the present value of foregone dividends and therefore reported at below market value. We believe the current approach is the clearest: disclosing the fair value of restricted stock awards at grant without double-counting future dividends.

Reporting dividends on unvested stock as yearly compensation also disadvantages issuers that impose long vesting requirements. An issuer that imposed no vesting requirement would report only the grant-date value of a stock award. An issuer that imposed a long-term vesting requirement, which presumably reduces the value of the award to the executive and is viewed favorably from a pay-for-performance perspective, would report a higher compensation amount because dividends would be included each year. We do not believe this outcome is consistent with the Commission's goals.

4. *Disclosing market earnings on deferred compensation as compensation is double-counting.*

For the reasons we have described above, we believe that including market earnings on previously disclosed deferred compensation as compensation in the Summary Compensation Table is double-counting. As proposed, both a deferred and a non-deferred award would be disclosed at the current full value. The non-deferred award could then be used by the executive to earn market earnings without additional compensation disclosure. Market earnings on the deferred award, however, would result in additional compensation.

We do not believe that reporting market earnings in the Summary Compensation Table would aid in meaningful compensation disclosure. An issuer that imposed long-term vesting requirements to aid in retention would report higher compensation expense than an issuer who pays exactly the same amount to executives without restriction. This would be the case notwithstanding that the issuer with the vesting requirements may ultimately expect to pay much less compensation because not all executives will satisfy the retention requirements. Similar disparities in disclosure would occur on an executive-by-executive basis. An executive who defers more compensation would have higher reported compensation than an identically-paid executive who does not; an executive making good investment choices would have higher reported compensation than an executive making bad choices.

5. *If an award is modified, only the incremental compensation should be included in the Summary Compensation Table.*

The Proposed Rules would require that awards that are materially modified or repriced during the previous fiscal year be disclosed based on their total value as modified. We believe this approach double-counts the value of the award before the modification. Instead, it would be clearer and more meaningful to include only the incremental compensation attributable to the modification. This would be consistent with FAS 123R.

D. Perquisites –
Proposed Item 402(c)

We support the Commission's effort to provide interpretive guidance as to the determination and quantification of perquisites and other personal benefits. In our experience, issuers have adopted divergent views on what constitutes a perquisite and how perquisites should be valued. The same is true of securities practitioners. We encourage the Commission to provide additional interpretive guidance in this area to ensure consistent disclosure.

1. *The Commission should clarify the scope of the exception for the provision of an item on a "non-discriminatory basis to all employees."*

In the release, the Commission indicated that an item need not be considered a perquisite if the item was "generally available on a non-discriminatory basis to all employees." We believe this exclusion was meant to apply so long as the benefit was provided to those employees who may lawfully be offered the item. For example, there may be a legal impediment to the provision of a benefit to a class or category of employees. Such a legal restriction could be jurisdictionally based or based on the attributes of the employees. A typical example in the latter category is that the offering of employee funds may be made available only to employees who are "accredited investors" or "qualified purchasers." We believe the Commission should confirm that these types of restrictions do not prevent the item from being deemed to have been made available to "all employees." Similarly, we would not think that the grading of the benefit by pay scale or category should affect the non-discriminatory nature of the benefit so long as all employees are provided the benefit at a level consistent with their pay scale. It is not unusual in our experience for the amount of a perquisite to increase with salary level. For example, the higher the employee's salary, the more suitable an investment opportunity may become. We encourage the Commission to clarify this as well.

2. *The Commission should provide additional guidance on the valuation of perquisites.*

Although we appreciate that the incremental cost method for valuing perquisites has been in existence for over 20 years, in our experience, aspects of this standard have been applied inconsistently.

Spouses' or family members' use of aircraft. It is not uncommon for a spouse to accompany a director to a board meeting or an executive on a business trip. The "incremental cost" of the spouse's trip may be viewed in several different ways. On the one hand, the incremental cost may be considered to be close to zero because the plane would be traveling to the destination regardless of the presence of the spouse and only the cost of any food or beverage consumed by the spouse is truly an incremental cost to the issuer. On the other hand, recognizing the difficulty in determining incremental cost, it may be appropriate to look to commercial airfares for guidance on the basis that airlines take added fuel/food consumption into account in setting ticket prices. However, this method appears to take account of the "value" of the spouse's plane trip to the director or executive in addition to any "incremental cost" to the issuer. We request that the Commission provide additional guidance on this issue to ensure more consistent reporting and greater comparability among issuers.

The provision of a car and driver for an executive. It is common for issuers to provide a car and driver for their senior executives, many times based on security concerns. These cars and drivers are used by the executives for commuting as well as business. Under the Commission's current guidance, there is a question as to how to treat "waiting time" or "down time." On the one hand, it could be viewed as appropriate to view all waiting time as work-related because the car would have been waiting for the executive's use during the day whether or not the executive used the car for commuting purposes. On the other hand, one could treat the waiting time as a personal benefit or look to whether the car and driver are primarily for business or personal use (treating the waiting time not as a personal benefit if the former but as a personal benefit if the latter). We request the Commission provide additional guidance on this issue to ensure more consistent reporting and greater comparability among issuers.

Additional guidance for other "mixed use" situations. Like the use of cars and drivers for both commuting and business purposes, other perquisites raise similar issues. This type of "mixed-use" question frequently arises with country club and lunch club memberships. In these cases, there is ostensibly no additional incremental cost associated with the personal use because the membership fees are not based on usage. On the other hand, one could allocate fees based on the percentage of business and personal use (although again, this seems to include a "value" component, as opposed to true incremental cost).

Use of a secretary or assistant to perform personal work. We believe that the release may have created confusion as to the proper treatment of secretarial services. In our experience, it is not unusual for a secretary to provide assistance in personal matters; however, the primary purpose of the secretary is still to perform business-related work. It does not appear to us that the personal work done by a single secretary for an executive should be deemed a perquisite where the principal purpose of the secretary is to perform business-related tasks. Some practitioners, however, have read the release to require apportionment between business and personal use even in the context of a single secretary. We request that the Commission clarify its position in the context of a single secretary.

E. Disclosure of Non-Executive Compensation – Proposed Item 402(f)(2)

To be meaningful and concise, disclosure should be focused on executive officers and directors.

We believe that compensation disclosure should be focused on named executive officers and directors and should not extend to non-executive officers. First, compensation information regarding non-executive officers is of little value to investors, and, in many cases, the compensation of these non-executives is not approved or considered by the compensation committee.

Second, the disclosure of this information could competitively disadvantage U.S. public companies relative to private companies and non-U.S. companies that are not required to make their compensation decisions public. In many cases, the affected employees would be highly valued producers, such as media stars, star athletes or star traders. Compensation information regarding these individuals is commercially sensitive and would assist competitors in adjusting their business strategies or compensation practices and in potentially luring these producers from the issuer. Disclosure of this information would also disadvantage the issuer in negotiating with other similarly-situated employees.

We also note that the proposed additional disclosure requirement would impose significant costs on large, complex issuers. These issuers would be required to design and implement systems to track the total compensation of non-executive officers. Although payroll systems may track compensation for tax purposes, calculation of total compensation for Commission reporting purposes is substantially different. It is our view that many issuers currently do not have systems to track total compensation for employees who are not executive officers.

F. Potential Payments on Termination or Change in Control – Proposed Item 402(k)

It is not possible to quantify potential change-in-control payments in a way that is clear and meaningful.

We support the Commission's attempt to improve disclosure with respect to potential termination payments to named executive officers. However, we do not believe it is possible to quantify change-in-control payments in a clear and meaningful way in the absence of an actual change in control. Without an actual change in control as a reference, the disclosure would be speculative and subject to manipulation. We believe that narrative disclosure best addresses the Commission's goal.

Change-in-control payments can be substantially influenced by a variety of factors. These may include (1) whether the transaction is a merger, tender offer or sale of assets, (2) whether the purchaser is a public or private company, (3) whether the purchase price is being paid in cash, stock or a combination thereof, (4) the timing of the executive's termination following a change in control, (5) the executive's personal tax position, (6) optional elections the issuer and buyer may make (such as whether to declare a transaction as a change in control for certain purposes or whether to continue or cash out equity awards), (7) the timing during a year of the change in control or employment termination, (8) issuer results during the year, (9) the age of the executive, and, of course, (10) the price of the transaction. Depending on the design of the program, changes in any one assumption could materially alter change-in-control termination payments.

As a result, we do not believe many issuers will be able to present simple numerical and/or tabular disclosure of change-in-control termination payments. The proposed instruction to use "reasonable estimates" and disclose "material assumptions" underestimates the potential difficulty of producing neutral and meaningful disclosure. Calculating estimates yearly in a manner that is sufficiently accurate for inclusion in public reports is also likely to add considerable expense.

It is our view that detailed narrative disclosure is more meaningful and more likely to convey to investors the range of possible outcomes. Those issuers that attempt to produce numerical estimates could face potential legal challenges if an actual transaction deviates from the assumptions underlying the proxy disclosure in a way that changes termination amounts. We believe this would be the case even if the Commission established "safe harbor" assumptions or similar protection (because issuers would likely be required to describe each of the factors that could affect the estimate). However, if the Commission requires a numerical estimate, we believe it is imperative that issuers be required to use a cash acquisition price (such as the market price at year end) and that estimates be strongly protected as forward-looking statements.

G. Additional Comments

1. *The "named executive officers" should be determined on the basis of total salary, bonus and earned equity and cash incentive compensation. (Item 402(a))*

We suggest that some compensation components are not appropriate for determining an issuer's highest-paid executive officers. In particular, we believe the determination should exclude compensation components that are less related to issuer compensation decisions than to individual circumstances. For example, we do not believe pension accruals represent annual issuer compensation decisions. We also do not believe unearned performance awards, one-time awards or separation payments should be included. We believe it would be more appropriate to base the determination of the named executive officers on total salary, bonus and earned equity and cash incentive compensation.

2. *The Outstanding Equity Awards at Fiscal Year-End table should not include unearned performance-based awards. (Item 402(g))*

The instructions to the Outstanding Equity Awards at Fiscal Year-End table should clarify that unearned performance-based awards should not be included in the table. It will be difficult, if not impossible, for issuers to disclose in a meaningful way the value of these awards before the performance conditions are satisfied.

3. *The Option Exercises and Stock Vested table should not include a comparison to grant-date fair value. (Item 402(h))*

We do not believe that the proposed comparison to grant-date fair value in the Option Exercises and Stock Vested table is meaningful. The value achieved on exercise or vesting is affected substantially by increases in stock price and the length of the vesting period. In a rising market, awards with longer vesting periods will show a larger increase in value over the grant-date value relative to awards with shorter vesting periods. However, the actual amount of compensation is identical (if not lower for the award that imposed longer vesting requirements).

4. *The Retirement Plan Potential Annual Payments and Benefits table could be simplified.*

We believe the Retirement Plan Potential Annual Payments and Benefits table could be simplified in three respects. First, we suggest showing the potential total annual retirement benefit under all plans to each named executive. The division of the total benefit among various plans does not appear likely to be of interest to investors. Second, the table should include the age of each executive, which will assist investors in evaluating the amounts shown in the table. Third, unless the executive is currently eligible for early retirement, we believe that early retirement information is not sufficiently material to include in the table.

ITEM 404

As noted above, we strongly support the Commission's efforts to improve the quality and usefulness of disclosure concerning executive compensation and related party matters. We also believe that most of the proposed changes to the related party transaction disclosure rules are well conceived. We do, however, have some suggestions on these proposals.

A. Interaction with Rule 16b-3

We have a conceptual issue with respect to the proposed revisions to Item 404 and their potential impact on Rule 16b-3. The Commission correctly notes that its proposals move toward a more principles-based approach, rather than a rules-based model. While we generally agree that a principles-based disclosure regime is likely to enhance the quality of disclosure, we believe that the definition of Non-Employee Director must be de-linked for Item 404 disclosure.

Our reservation arises from the interplay between Item 404 and Rule 16b-3. Rule 16b-3 provides a critical exemption for issuances of equity-based compensation for executives. Generally, the exemption is available if the issuance has been approved by the issuer's board of directors, its shareholders or a board committee consisting solely of two or more "Non-Employee Directors." Most companies rely upon the approval of equity awards by a board committee consisting exclusively of Non-Employee Directors.[1]

One requirement for a director to qualify as a Non-Employee Director is that the director must not possess an interest in any transaction or have a relationship for which disclosure would be required pursuant to Item 404. Because *every* director on the committee must meet these requirements, it is imperative that issuers know with certainty what the applicable requirements are. If a director fails to meet any of these requirements, the Rule 16b-3 exemption for equity awards would be lost. The potential impact to individual officers from the loss of this exemption could be draconian. Accordingly, we urge that the Commission de-link the definition of "Non-Employee Director" from Item 404 disclosure.

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[1] In our experience, most public companies rely upon approval of equity awards by a committee of Non-Employee Directors rather than upon full board approval for three reasons. First, the New York Stock Exchange corporate governance listing standards require the compensation of the chief executive officer to be established by a committee of independent directors (rather than the full board). Second, Section 162(m) of the Internal Revenue Code requires approval of compensation by "outside directors" in order to avoid the disallowance of the deduction for executive compensation exceeding $1 million. Third, it is far more efficient to have all compensation decisions made by a dedicated committee rather than to have some compensation decisions made by the full board.

First, it would allow the Commission to mandate, and allow issuers to provide (whether voluntarily or by rule), additional disclosure about director transactions without the risk or effect of disqualifying independent directors from service as Non-Employee Directors. This flexibility is particularly desirable in a principles-based disclosure regime.

Second, it would recognize the significant changes in corporate governance that have occurred since the adoption of the Non-Employee Director definition in 1996. Today, each of the NYSE, Nasdaq and AMEX mandates the formation of a compensation committee comprised of independent directors.[2] In addition, issuers have adopted their own categorical standards to assess the independence of directors. In the context of these changes, it appears to us unnecessary and inappropriate to tie "independence" to the presence or absence of Item 404 disclosure. Our specific suggestion is to modify Rule 16b-3(b)(3)(i) by replacing existing subsections (A) – (D) with the following: "meets the independence standards under the rules of the principal national securities exchange or national securities association on which the registrant's securities are traded or, if the issuer has no securities so traded, the director would be eligible to serve on the audit committee of the registrant under Section 10A(m) of the Securities Exchange Act and Rule 10A-3." Our approach is consistent with proposed Item 407(a)(1)(ii).

B. Transactions Covered

1. *There should be no requirement to report indebtedness held by five percent beneficial owners.*

We support the proposal to delete Item 404(c) and bring the subject of management indebtedness under Item 404(a). We note that one result of this approach will be to require disclosure of direct and indirect interests in indebtedness held by persons known by the issuer to beneficially own more than five percent of a class of voting securities. We question whether such disclosure as to five percent beneficial owners will be particularly useful to investors. We also question whether issuers are likely to have access to the information necessary to comply with this requirement.[3]

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[2] *See* NYSE Listed Company Manual § 303A.05(a); NASD Rule 4350(c)(3)(A) (requiring the compensation of officers to be made by either an entirely independent compensation committee or a majority of the independent directors on the board); and AMEX Company Guide § 805(a) (requiring the compensation of the chief executive officer to be made by either an entirely independent compensation committee or a majority of the independent directors on the board).

[3] Schedules 13D and 13G, which are the most common sources of information on five percent beneficial owners, do not generally require disclosure about debt security holdings of the person or group making the filing.

2. *The effect of changing "party" to "participant" should be clarified.*

While we have no objection to changing the test of issuer involvement from being a "party" to being a "participant," we believe that the Commission should explain in the final release how it believes this change should impact the analysis of related party transactions. If the conclusion is that this change is not intended to be a substantive change, it would be helpful for issuers and practitioners to know that.

3. *The proposed increase in the dollar threshold is appropriate.*

We agree with the proposal to increase the transaction threshold from $60,000 to $120,000. We believe the higher figure is more likely to be within the range investors would consider to be material. We are, however, troubled by the statement in footnote 257 to the release to the effect that, "as is the case today," the size of the transaction is to be computed without regard to the amount of profit or loss in the transaction. No authority is cited for the proposition that this is the current requirement. Although we agree that profit or loss may be irrelevant in many cases, there are cases in which the net revenue or "profit" generated from the transaction would be the correct measure. For example, if a publicly held bank or broker-dealer enters into an interest rate swap with an entity in which a director has a material interest, we believe that the correct measure of the size of the transaction for purposes of Item 404 is not the notional amount of the swap but rather is the revenue actually booked or the fee received by the bank or broker-dealer for entering into the transaction. Likewise, in the case of an underwriting by a publicly held broker-dealer for an entity in which a director has a material interest, the amount of the transaction is not the public offering price of the securities sold, but rather the amount of revenues actually booked in connection with the underwriting. We are concerned that, particularly in light of the statement in footnote 257, it could be concluded that the gross amount of the swap or securities underwritten rather than the net revenue or fee must be disclosed.

4. *The bright-line tests of Item 404(b) should be retained if the link between Item 404 and Rule 16b-3 is retained.*

The Commission is proposing to delete Item 404(b) and to subsume within Item 404(a) the subject matter of the 404(b) relationships. Although we agree that this is a desirable proposal from a disclosure standpoint, it again creates a problem under Rule 16b-3 as issuers have relied upon the bright-line tests in Rule 404(b).[4] For the reasons discussed above, we believe it is undesirable to eliminate bright-line tests under Item 404 if the linkage with Rule 16b-3 is maintained.

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[4] Registrants and practitioners have historically relied upon the Staff's position that "if a transaction is permitted to be excluded pursuant to Item 404(b), disclosure under 404(a) is not required." Item 25, Section J, Item 402 of Regulation S-K, Manual of Publicly Available Telephone Interpretations (July 1997).

5. *Instruction 1 to Item 404(a), which provided guidance on materiality, should be retained.*

We note that the Commission is deleting Instruction 1 to Item 404(a) as being repetitive of the general materiality standard. The release goes on to state that the "materiality" standard for disclosure would be retained and proceeds essentially to recite what is now set forth in Instruction 1. As practitioners, we have found Instruction 1 to Item 404(a) to be quite helpful in establishing the proposition that materiality of the interest turns upon the significance of the information to investors in light of all the circumstances of the particular case. This guidance has been important because it makes clear that materiality is not tested solely on the basis of the significance of the matter to the related person, which would be a possible reading of Item 404(a) without the Instruction. The release confirms the Commission's agreement with the principle. We believe good practice would argue in favor of retaining the instruction.

Consistent with our view on the purpose of the Non-Employee Director definition in Rule 16b-3, we could add to Instruction 1 text to the effect that, in the case of transactions with directors, issuers should also take into account whether the transaction could reasonably be expected to influence the director's independence from management.

C. Exceptions

For the reasons discussed above, we believe it is undesirable to amend Item 404(a) to remove bright-line exceptions. These rules provide necessary certainty for issuers in making disclosure decisions and in determining whether a director meets the standards for Non-Employee Director status under Rule 16b-3.

1. *The exception for pro rata treatment as a shareholder of the issuer should be retained.*

The proposed rule eliminates the existing exception for *pro rata* treatment as a shareholder of the issuer. Thus, for example, if a director, an officer or a five percent beneficial owner receives over $120,000 in dividends on issuer stock in a year, separate disclosure of this will be required notwithstanding the required disclosure of share ownership pursuant to existing Item 403. We believe that this express exception should be retained. We also believe it should be extended to other *pro rata* payments on all issuer securities, such as debt securities, and should extend to ownership of securities of subsidiaries.

2. *An exception for ordinary course transactions should be added.*

We believe it would be useful to registrants, executive officers and directors to adopt an express exception for any transaction between the registrant and a related party that is (1) undertaken in the ordinary course of the business of the registrant, and (2) conducted on terms substantially similar to the terms the registrant offers generally in transactions with persons who are not related persons. Without this exception, there will be an open question any time that a related person does business with the registrant in an amount exceeding $120,000. While this problem can come up in many industries, it is a particular issue in the financial services industry. The absence of a bright-line exception causes some directors to conduct business with competitors of the issuer in order to avoid Item 404(a) disclosure of transactions that are likely to be of little interest to investors. While we appreciate the Commission's emphasis of its position that transactions above $120,000 will still require a materiality analysis, we would submit that very few issuers are likely to rely on a general materiality analysis to avoid disclosure. Finally, we note that proposed Instruction 7 to Item 404(a) clearly accepts this rationale insofar as loans are concerned. We do not see a reason why this exception should not apply to other issuers who happen to be selling a "product" other than loans.

D. Specific Issuers

The reorganization of disclosures for registered investment companies is appropriate.

We support the Commission's proposed reorganization of the disclosures that registered investment companies are currently required to make under Item 7 of Schedule 14A. We also recommend that the Commission clarify the interaction of Items 6(d) and 22(b) of Schedule 14A. While other Items in Schedule 14A clearly state that registered investment companies are not required to comply with such items and are instead subject to Item 22(b), for reasons not apparent to us, Item 6(d) does not include such an exception. We request that the Commission clarify that, to the extent registered investment companies are required to disclose beneficial ownership under Item 22(b), they are not also required to disclose beneficial ownership under Item 6(d).

ITEM 407

Disclosure should not be required for matters that are consistent with an issuer's independence standard <u>*and*</u> *are not required to be disclosed under Item 404(a) of Regulation S-K.*

The proposal would require disclosure of any transactions, relationships or arrangements not otherwise disclosed under Item 404(a) that the board of directors considered when determining the independence of directors. This could result in the disclosure of numerous immaterial transactions and further limit any benefits of establishing categorical independence standards under NYSE and NASD listing standards. We do not believe that the Commission's goals of meaningful and concise disclosure are consistent with requiring the disclosure of immaterial matters.

FORM 8-K

E. Executive Compensation Disclosure

1. *The proxy statement should be the primary vehicle for the disclosure of executive and director compensation information.*

We strongly support the Commission's effort to limit the disclosure regarding employment compensation matters on Form 8-K to matters that are "unquestionably or presumptively material." The proxy statement should be the primary vehicle for the disclosure of executive compensation information. The disclosure regime proposed by the Commission will permit issuers to provide investors with a comprehensive and meaningful review of its compensation policies and decisions. Although "real-time" disclosure of isolated compensation decisions may interest the public or the media, disclosure of these decisions often fails to provide meaningful information to investors.

2. *The Commission should clarify that salary adjustments do not require real time disclosure on Form 8-K.*

The proposal continues the conceptual framework of the FAQs issued by the staff of the Division of Corporation Finance regarding the Form 8-K requirements (Nov. 23, 2004). In particular, it requires the disclosure of material compensation plans and agreements (if a named executive participates) but does not require that actual awards under the plans be disclosed on Form 8-K if they are consistent with the previously disclosed plan. The awards themselves are then presented in the proxy statement, together with related discussion of compensation practices.

Although the FAQs adopted a similar framework, we understand that many issuers have adopted a policy of disclosing salary increases on Form 8-K. This practice has contributed substantially to the increase in Item 1.01 Form 8-K disclosure. We believe it would further the Commission's goals to clarify that salary increases need not be disclosed on Form 8-K. In our view, changes in salary are analogous to awards under a plan. The plan (in this case, the payment of salary) has been disclosed and the award (in this case, the amount of salary) is not required to be disclosed because it is consistent with the terms of the plan. In the absence of a clarification, bonuses, equity grants and long-term awards would not require From 8-K disclosure once the plans have been disclosed to investors but salary increases (including salary changes as a result of promotions) could continue to require disclosure. We do not believe this result would be consistent with the Commission's goal of limiting Form 8-K disclosure to items that are "presumptively material."

F. Director Compensation Disclosure

1. *The proxy statement should be the primary vehicle for the disclosure of director compensation information.*

We note that the proposal does not require the disclosure of director compensation information on Form 8-K. We strongly support this approach. As with executive compensation, director compensation is best presented in a comprehensive manner in the proxy statement.

In some cases, the current framework could require the disclosure of compensation arrangements for special committees. Special committees are often formed to consider matters with respect to which independence is critical, and, in many cases, the matters under consideration are confidential and historically have not been disclosed until a conclusion was reached. Requiring the disclosure of compensation arrangements, and therefore the existence of a special committee, would result in premature disclosure. The proposal addresses this significant issue by providing that director compensation disclosure be included in the proxy statement and not on Form 8-K.

* * *

We appreciate the opportunity to comment to the Commission on the Proposed Rules, and would be pleased to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Marc Trevino (212-558-4239), Bob Reeder (212-558-3755) or Andrew Lund (212-558-3123).

Very truly yours,

SULLIVAN & CROMWELL LLP