

**FINAL EXECUTIVE AND DIRECTOR COMPENSATION DISCLOSURE RULES**

The Securities and Exchange Commission (the “SEC”) has now published final rules in time for the 2007 proxy season for disclosure of executive and director compensation. The rules also cover Form 8-K events, related-party transactions, director independence and corporate governance matters. The rules reflect a profound policy shift in favor of comprehensive disclosure of every element of a company’s compensation practices. They call for a level of precision in articulation of policy and quantification of pay practices that will present an enormous challenge. Companies have an opportunity now to reexamine their own practices to understand the picture next year’s disclosures will paint, but substantial time and resources will be required.

Companies must comply with the final rules relating to Form 8-K filings for events that occur on or after November 7, 2006. The final disclosure rules are applicable to Forms 10-K and 10-KSB for fiscal years ending on or after December 15, 2006, and to proxy and information statements filed on or after December 15, 2006. This memorandum proposes actions that should be considered now, identifies certain significant changes from the rules as proposed, and provides a summary of the major features of the final rules.

**What Companies Should Do Now**

**Organize Early.** Much of the new disclosure is different from and more extensive than what is currently required. For example, the new Compensation Discussion and Analysis (“CD&A”) goes into far more detail than the old Compensation Committee Report and will be subject to CEO and CFO certification. In preparation, companies should:

- Become familiar now with the type and extent of information that will have to be disclosed under the new rules.
- Arrange for preparation of draft narrative and tabular disclosure well in advance of the proxy distribution date, to uncover what is missing and what is needed, so that appropriate information and new disclosure language can be developed and reviewed.
- Establish the team of officers and executive compensation professionals (including representatives from human resources, tax, accounting, actuarial, payroll and legal) that will be responsible for collecting the information and coordinating with the directors and officers who are responsible for setting compensation policy.
- Establish procedures for gathering, tracking, valuing and ensuring the accuracy of information collected about perquisites, contributions to and distributions from deferred compensation plans, increases in pension benefits, amounts payable upon termination of employment and change in control and the details of outstanding equity awards.
- Review and amend director and officer questionnaires to elicit any new information that has to be disclosed.

**Educate Your Compensation Committee and Board of Directors.** The new disclosure rules will intensify the spotlight on executive and director compensation and will expose the thinking behind compensation decisions and what effects were intended. Compensation committees will need to evaluate whether their existing compensation policies are coherent. For example, if benchmarking is used, should the benchmarks now rank pay according to total compensation? Committees will also need to understand the disclosure implications their compensation decisions will have, when *next* year's proxy comes out. Like the current disclosure rules, the new rules will operate retrospectively, but it will be harder to rationalize decisions after the fact. The basis for decisions made in 2006 will have to be disclosed under the new rules in 2007.

With the mandate for a more forthright discussion of why compensation decisions were made, the new rules will inevitably push companies toward more process-driven decisions about compensation. Compensation committees that don't have their own advisors may wish to appoint an executive compensation professional to be available either to attend meetings in which compensation decisions or policies will be made or to call upon to help evaluate the alternatives when contracts are negotiated or renegotiated, or when new plans are implemented or annual grants are made.

**Review Current Compensation Policies and Objectives.** Most compensation decisions start with a recommendation from management. One of the main features of the new rules is the new CD&A, which will require disclosure of each company's compensation practices and policies and the role that executive officers play in the compensation process. As companies administer existing compensation arrangements and set compensation levels for the 2007 fiscal year, senior management will also need to understand how their current policies, decisions and involvement will be disclosed under the final rules and consider what structural changes may be appropriate.

**Review Tax Reporting of Compensation Paid.** Given the extent of the disclosure about what perquisites and other amounts have been paid to each named executive officer ("NEO"), and the renewed emphasis on separating what must be considered personal from what can be considered business-related, companies should confirm that all required taxes have been withheld and that tax information has been properly reported.

**Review Current Option Grant Practices.** In response to the option-backdating issues currently under investigation by the SEC, the final rules require discussion in the CD&A of a company's material practices regarding the timing and pricing of option grants. This should include any practice of selecting grant dates either before or after the disclosure of material information, and whether any such practice is intended to affect the value of the options granted, and any practice or pre-established formula for setting the option exercise price based on the stock price on a date other than the date of grant. In addition, the Grants of Plan-Based Awards Table requires the addition of a separate disclosure column if the exercise price is different from the closing price on the date of grant, or if the grant date is not the same date as the date the board or compensation committee acted to effect the grant. Companies should consider what practices and procedures for option grants have historically been followed and whether new practices should be established.

**Review Employees Covered Under Section 162(m).** The final rules require that NEOs, other than the CEO and CFO, be determined based on total compensation for the last fiscal year, rather than salary and bonus, as is currently the case. They also require disclosure for the chief financial officer, regardless of his or her level of compensation. As a result, the group of officers disclosed for securities law disclosure purposes may be different from the group disclosed in this year's proxy for 2005. Section 162(m) of the Internal Revenue Code ("IRC") limits the deductibility of compensation paid to "Covered Employees" unless the compensation is performance-based. Section 162(m) also refers back to the SEC's executive compensation disclosure rules to determine "Covered Employees," so a company's Covered Employees for 2006 may change as well. Companies should therefore try to determine now which individuals will be treated as NEOs in next year's proxy, and may want to take steps now to include those individuals in Section 162(m)-compliant plans, as they establish bonus programs for 2007.

**Review Related-Party Transaction Approval Policies.** As part of the revision to related-party transaction disclosure under Item 404 of Regulation S-K, the final rules require disclosure of a company's policies and procedures for the review, approval or ratification of related-party transactions, including identification of any transactions required to be reported that were not subject to review, approval or ratification under the company's existing policies, or that involved situations where policies and procedures were not followed. Companies will need to review their current policies and procedures and adopt appropriate changes or establish new policies if none currently exist.

**Review Nonemployee Directors' Status Under Rule 16b-3.** The final rules also change the thresholds and transactions subject to disclosure under Item 404 of Regulation S-K. Since qualification as a nonemployee director for purposes of Rule 16b-3 turns in part on whether the director possesses any interest in a transaction subject to disclosure under Item 404(a), companies should reexamine their nonemployee directors' status under Rule 16b-3 in light of the changes to Item 404.

### **Changes From Proposed Rules**

Although the final rules were adopted substantially as proposed, a number of constructive modifications were made in response to the over 20,000 comments that were submitted. Major revisions include:

- Requiring that outstanding option awards be disclosed on a grant-by-grant basis for each NEO, rather than on an aggregate basis as proposed.
- Requiring a new scaled-down Compensation Committee Report, similar to the Audit Committee Report, in addition to the CD&A.
- Moving disclosure of the annual increase in an NEO's pension and earnings on nonqualified deferred compensation from the "All Other Compensation" column of the Summary Compensation Table ("SCT") to its own separate column. Disclosure of earnings on deferred compensation in the SCT will be limited to above-market or preferential earnings. Although reported, neither the pension increase nor deferred compensation earnings will count in determining the three most highly compensated executive officers.

- Changing the proposed plan-specific disclosure of estimated pension benefits payable to each NEO under defined benefit plans at early and normal retirement, so that all companies disclose the actuarial present value of pensions based on current compensation and GAAP disclosure assumptions.
- Combining into a single Grants of Plan-Based Awards Table the proposed supplemental tables meant to capture detailed information on the grant of stock and option awards and performance-based equity and non-equity awards.
- Standardizing the assumptions used in quantifying potential severance, retirement and change-in-control payments, so that all companies must assume that (i) the triggering event took place on the last day of the last fiscal year and (ii) the value of the company's securities is the closing market price on the last day of the last fiscal year, instead of having to estimate future potential payments on the basis of individual circumstances and variable assumptions.
- Retaining the Performance Graph, but moving it from the executive compensation disclosure to the disclosure item for "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters."
- Reproposing for comment the disclosure rules for up to three employees who were not executive officers during the last fiscal year but whose individual total compensation exceeded that of any NEO.

### **Executive Compensation Disclosure**

The final rules divide the executive compensation disclosure into four sections: (i) a new CD&A that discusses all material elements of a company's compensation objectives and policies; (ii) an expanded SCT that shows total compensation paid or awarded to each NEO during the fiscal year, supplemented by an additional table providing more detailed information relating to equity and performance-based awards and a narrative explanation; (iii) tabular disclosure covering holdings of equity-based awards as of the end of the last fiscal year and exercise and vesting of equity-based awards during the last fiscal year; and (iv) tabular and narrative disclosure of retirement and other post-employment compensation, including deferred compensation plans and compensation payable upon a change in control or termination of employment. Each of these sections is reviewed in detail below.

#### **I. Compensation Discussion and Analysis**

The new CD&A will replace and expand upon the disclosure required by the current Compensation Committee Report on Executive Compensation. Its purpose is to provide material information about the compensation objectives and policies for NEOs, without resorting to boilerplate disclosure or repeating the more detailed information set forth in the tables or other required narrative disclosures. The CD&A must explain all material elements of a company's compensation of NEOs and address the following six questions:

1. What are the objectives of the company's compensation programs?
2. What is the compensation program designed to reward?
3. What is each element of compensation?
4. Why does the company choose to pay each element?
5. How does the company determine the amount (and, where applicable, the formula) for each element to pay?
6. How does each compensation element, and how do the company's decisions regarding that element, fit into the company's overall compensation objectives and how do they affect decisions regarding other elements?

The rules acknowledge that material information disclosed in the CD&A will vary from company to company and should be tailored to each reporting company's specific objectives and policies. A discussion of years prior to the last fiscal year may be appropriate to give context to the disclosure provided. The rules provide the following nonexclusive examples of issues that could potentially be appropriate for a company to address. If an example is not applicable to a particular company, no disclosure is required.

- Policies for allocating (i) between immediate and long-term compensation, (ii) between cash and non-cash compensation and (iii) among different forms of non-cash compensation.
- For long-term compensation, the basis for allocating compensation to each different form of award.
- How the determination is made as to when an award is granted. A company must address matters relating to option compensation and the timing and pricing of option grants, including any practice of selecting grant dates either before or after the release of material information and whether any such practice is intended to affect the value of the options granted, and any practice or pre-established formula for setting the option exercise price based on the stock price on a date other than the date of grant.
- The specific items of corporate performance that are taken into account in setting compensation policies and making compensation decisions. Companies will not be required to disclose target levels with respect to specific quantitative or qualitative performance-related factors, or any other factors or criteria involving confidential commercial or financial information, if the disclosure would result in competitive harm to the company. The standard for determining that such information does not have to be disclosed is the same standard currently used to exclude confidential trade secrets or confidential commercial or financial information from public filings. However, when a company relies on this exception, additional disclosure is required regarding the significance of the undisclosed performance factors, including the difficulty of meeting them and the likelihood that they will be achieved.

- How specific elements of compensation are structured and implemented to reflect corporate and individual performance, including whether discretion can be or has been exercised to waive or modify performance goals, either in individual cases or for all NEOs.
- Policies and decisions regarding the adjustment or recovery of awards or payments where the relevant performance measures are restated or otherwise adjusted in a manner that would reduce the size of an award or payment.
- Factors considered in decisions to materially increase or decrease compensation.
- How prior compensation or amounts realizable from prior compensation are considered in setting other elements of compensation.
- The impact of the accounting and tax treatment for a particular form of compensation, including whether the compensation would be deductible under IRC Section 162(m).
- The company's equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership.
- Whether the company engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and its components and, if applicable, component companies.
- The basis for selecting particular events as payment triggers in compensation arrangements, including the rationale for selecting a single trigger for payment following a change in control.
- The role of executive officers in the compensation process.

The CD&A will be considered "filed" with the SEC, unlike the current Compensation Committee Report which is simply "furnished," and will therefore be subject to Regulations 14A and 14C under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and to potential liability under Section 18 of the Exchange Act. In addition, to the extent that the CD&A and any other disclosure regarding executive officer and director compensation or other matters is included or incorporated by reference into a periodic report, the disclosure will be subject to the certifications that CEOs and CFOs are required to make under the Sarbanes-Oxley Act of 2002.

In addition to the CD&A, a new scaled-down Compensation Committee Report will be required that is similar to the Audit Committee Report. The company's compensation committee will be required to indicate whether it has reviewed the CD&A with management and whether it recommended to the board of directors that the CD&A be included in the company's annual report and proxy statement. Like the existing Compensation Committee Report, the new report will be furnished rather than filed.

## II. Summary Compensation Table and Supplemental Table

### A. Summary Compensation Table

The SCT will continue to serve as the focal point for disclosure of executive compensation. When fully phased in, it will require disclosure of compensation for NEOs for each of the last three completed fiscal years. However, under a transition rule, compensation for the two years prior to the 2006 fiscal year will not have to be restated in the new format. As a result, for the 2007 proxy season, disclosure will cover only the 2006 fiscal year. All compensation is to be reported in the appropriate column when earned, regardless of whether deferred, pursuant to a 401(k) plan or otherwise.

SUMMARY COMPENSATION TABLE

Name and Principal Position	Year	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Non-qualified Deferred Compensation Earnings (\$)	All Other Compensation (\$)	Total (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)

**Named Executive Officers Column.** The revised SCT will cover the principal executive officer, the principal financial officer and the three other most highly compensated executive officers. The addition of the principal financial officer, regardless of compensation level, is a change from current requirements. Anyone who served as a principal financial officer at any time during the fiscal year, even if he or she is not serving in that capacity at the end of the fiscal year, must be included in the SCT. As under the current rules, up to two additional executive officers for whom disclosure would have been required but for the fact that they were no longer serving as executive officers at the end of the fiscal year must also be included when applicable.

The most highly compensated executive officers are identified on the basis of “total compensation” for the last fiscal year (excluding the compensation attributable to the increase in pension values and earnings on nonqualified deferred compensation) and not solely on annual salary and bonus, as is currently the case. The current \$100,000 threshold used to determine whether any of the three most highly compensated executive officers needs to be disclosed has been retained, but the determination will also be based on total compensation (less increased pension and nonqualified deferred compensation values) rather than just salary and bonus, as under current rules. The final rules eliminate the current exclusion for compensation that is “non-recurring and unlikely to continue,” but retain the exclusion for cash compensation relating to overseas assignments. Such nonrecurring compensation will be included in determining whether an executive was one of the highest-paid executive officers.

**Salary and Bonus Columns.** The Salary column (column (c)) has been retained substantially in its current form. The Bonus column (column (d)) has some changes. The final rules now distinguish between discretionary bonuses and true performance-based compensation. Bonus compensation not subject to any pre-established targets must be disclosed in the Bonus column when earned. Compensation intended to serve as an incentive for performance over a specified period (whether for one or more fiscal years), where the performance targets are pre-established and communicated to the executive at a time when the outcome is substantially uncertain, must be disclosed in the Non-Equity Incentive Plan Compensation column (column (g)) for the fiscal year in which the performance measure is satisfied. Typical performance-based compensation arrangements meant to qualify under IRC Section 162(m) would be reported in column (g). These amounts are not subsequently reported when paid. Where salary or bonus cannot be calculated in time to include these amounts in the SCT, the final rules require the company to disclose in a footnote when the calculation is expected to be made and to report both the calculated amounts, as well as the revised total compensation amount, on a timely Form 8-K.

**Stock Awards Column.** The Stock Awards column (column (e)) must disclose the dollar value of awards without “option-like” features that derive their value from the company’s equity securities or permit settlement by issuance of the company’s equity securities, such as restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units and other similar instruments. The dollar value for these awards will be based on their grant date fair value as determined for financial reporting purposes pursuant to FAS 123R rather than on the product of the closing price of the company’s stock underlying the award multiplied by the number of shares or units granted, as is currently required. Equity-based awards subject to performance-based conditions must also be included in this column. Where earnings on these equity-based awards such as dividends or dividend equivalents are included in the grant date fair value, their subsequent receipt will not have to be reported. However, where earnings are not included in the grant date fair value, disclosure will be required in the All Other Compensation column (column (i)), when paid.

**Option Awards Column.** The Option Awards column (column (f)) must disclose options, stock appreciation rights and similar equity-based compensation awards with option-like features. However, instead of reporting the number of securities underlying the awards, as is currently required, this column will require disclosure of the grant date fair value of the award as determined for financial reporting purposes pursuant to FAS 123R. The disclosure requirements for earnings on option awards are the same as for stock awards. This column will also include the value of any options or stock appreciation rights that are repriced or materially modified during the fiscal year. However, only the incremental fair value at the time of repricing or modification over the previously reported grant date fair value must be disclosed.

**Non-Equity Incentive Plan Compensation Column.** The Non-Equity Incentive Plan Compensation column (column (g)) reports the dollar value of all non-equity-based amounts *earned* during the fiscal year (*i.e.*, in the year when the performance criteria are satisfied, whether or not payment is actually made) pursuant to performance-based incentive plans. *Grants* of these awards will not be reported in the SCT but rather will appear in the Grants of Plan-Based Awards Table in the year of grant. This column will include all performance-based incentive awards not required to be included in the Stock Awards or Option Awards columns. Earnings on non-stock incentive compensation must also be included in this column.



**Change in Pension Value and Nonqualified Deferred Compensation Earnings Column.** The Change in Pension Value and Nonqualified Deferred Compensation Earnings column (column (h)) shows, for each NEO for the last fiscal year, the aggregate increase in actuarial value of all defined benefit and actuarial plans (including nonqualified supplemental defined benefit plans), but only the preferential or above-market earnings on nonqualified deferred compensation. The identification and quantification of each element must be disclosed in a footnote.

**All Other Compensation Column.** The All Other Compensation column (column (i)) requires disclosure of all items of compensation not required to be included in another column. In response to comments, distributions pursuant to defined benefit and actuarial plans (unless accelerated on account of a change in control) and nonqualified deferred compensation plans are not reportable as All Other Compensation. Any reportable item with a value in excess of \$10,000 (other than perquisites, discussed below) must be separately identified and quantified in a footnote. All such items having a value of less than \$10,000 (other than perquisites) will be included in the column, but footnote disclosure will not be required. Items reported in column (i) include:

- Amounts paid or accrued in connection with any termination of employment or a change in control;
- Company contributions or other allocations to vested and unvested defined contribution plans;
- The dollar value of any life insurance premiums;
- Tax gross-ups and other tax reimbursements, which must be separately identified and quantified in a footnote, regardless of whether the item for which the reimbursement is paid is a perquisite that does not have to be separately identified;
- Discounts on the purchase of company securities, unless generally available to all salaried employees; and
- The dollar value of any dividends or other earnings paid or accrued on stock and option awards, unless that value was factored into the grant date fair value reported in the stock and option awards columns.

Perquisites are also disclosed in column (i) but the rules for disclosure are different.

- If the aggregate value of an NEO's perquisites and other personal benefits is less than \$10,000, no disclosure is required. If perquisite disclosure is required, each separate type of perquisite and personal benefit must be identified in a footnote. If the value of any perquisite or personal benefit of an NEO is more than the greater of \$25,000 or 10% of the total perquisites, then each such perquisite or personal benefit must be quantified in a footnote. These same perquisite disclosure thresholds apply to director compensation disclosure as well.
- The value of a perquisite or personal benefit must be determined based on the company's incremental cost of providing the benefit to the executive and not on the fair market value of the item or the value attributed for Federal income tax purposes. Disclosure of the valuation methodology is required in a footnote.

- The SEC offers a somewhat helpful two-pronged approach in determining what is and is not a perquisite. First, if an item is integrally and directly related to the performance of an executive's duties, regardless of whether it conveys some benefit that has a personal aspect (*e.g.*, office space at a company business location, a reserved parking space that is closer to business facilities but not otherwise preferential, additional clerical or secretarial services devoted to company matters and a blackberry or laptop computer), it is not a perquisite or personal benefit and that is the end of the analysis. If an item is not integrally and directly related to the performance of an executive's duties, however, the 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 (*e.g.*, use of company-provided aircraft, yachts or other watercraft, commuter transportation services, additional clerical or secretarial services devoted to personal matters and personal financial or tax services), unless it is generally available on a nondiscriminatory basis to all employees.

**Total Compensation Column.** The final column (column (j)) shows the total dollar amount of compensation for each NEO. This column simply aggregates the total dollar value of each form of compensation quantified in the columns that precede it (columns (c) through (i)).

## **B. Grants of Plan-Based Awards Table**

The Grants of Plan-Based Awards Table is intended to complement the disclosure of stock, option and non-equity incentive awards in the SCT by disclosing the grant date, the number of shares or units underlying the award, the exercise price for options and the estimated future payouts for each equity and non-equity incentive award granted during the last fiscal year. This table requires disclosure on a grant-by-grant basis. Although option repricings are treated as new option grants in the SCT, with only the incremental value required to be disclosed, they are not required to be separately disclosed in this table. Where the per-share exercise price for option-like instruments is less than the closing price of the company's stock on the date of grant, a separate column must be added to show the closing price on the date of grant and footnote or narrative disclosure is required describing the methodology for determining the exercise price. In addition, where the compensation committee takes action, or is deemed to take action, to grant equity-based awards on a date that is different from the grant date for FAS 123R purposes, a separate column must be added to disclose the date the committee took action. Finally, if a non-equity incentive award is denominated in units, a separate column must be added to disclose the number of units subject to the awards.

## GRANTS OF PLAN-BASED AWARDS

Name	Grant Date	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Future Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or Units (#)	All Other Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards (\$/sh)
		Threshold (\$)	Target (\$)	Maximum (\$)	Threshold (#)	Target (#)	Maximum (#)			
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)

**C. Narrative Disclosure to SCT and Grants of Plan-Based Awards Table**

The final rules require additional narrative disclosure following the SCT and the Grants of Plan-Based Awards Table intended to give context to the tabular disclosure. This narrative disclosure must include any additional material information necessary to an understanding of the information disclosed in the tables. This may include disclosure of the following:

- The material terms of the company's compensation plans and/or employment agreements with the NEOs.
- Any material modification of any outstanding option or other stock-based award during the last fiscal year, including the extension of exercise periods, any change of vesting and forfeiture conditions and any change in or elimination of performance criteria or the bases upon which returns are determined. This disclosure will replace the current Ten-Year Option/SAR Repricings Table.
- The terms of equity and non-equity incentive awards granted in the last fiscal year, which could include a general description of the formula or criteria to be applied in determining the amounts payable, the vesting schedule, a description of any performance-based conditions, whether dividends or other amounts will be paid or accrued with respect thereto, any applicable rate of return and whether that rate is preferential and any other material conditions applicable to the awards.
- Companies will not be required to disclose any information that involves confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm to the company. The same standard used with respect to nondisclosure of confidential information in the CD&A will be applied here, including the requirement that the company disclose the difficulty and likelihood of achieving any such confidential goals.

**D. Reproposal for Disclosure of up to Three Additional Employees**

The SEC did not adopt, but has again requested comments on, the proposed rule that total compensation and job description be disclosed for up to three employees who were not executive officers during the last fiscal year but whose total individual compensation exceeded that of any NEO. The new proposal would include only employees with responsibility for significant policy decisions and may be limited to large companies. Given that the comment period will end on October 23, 2006, the SEC may adopt a final rule on this proposal in time for the 2007 proxy season.

**III. Outstanding and Exercised Equity Awards****A. Outstanding Equity Awards at Fiscal Year-End**

The Outstanding Equity Awards at Fiscal Year-End Table requires disclosure, in the following format, of all equity awards outstanding as of the end of the last fiscal year for each NEO where the ultimate outcome has not yet been realized. This table applies to all stock options, stock appreciation rights, restricted stock, restricted stock units and other equity awards, including those subject to performance benchmarks, identified in the table as “incentive plan awards.” It must also cover option-like awards that have been transferred by an executive other than for value (*e.g.*, options transferred for estate planning purposes), which will need to be identified in a footnote.

**OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END**

	Option Awards					Stock Awards			
Name	Number of Securities Underlying Unexercised Options Exercisable (#)	Number of Securities Underlying Unexercised Options Unexercisable (#)	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price (\$)	Option Expiration Date	Number of Shares or Units of Stock That Have Not Vested (#)	Market Value of Shares or Units of Stock That Have Not Vested (\$)	Equity Incentive Plan Awards: Number of Unearned Shares, Units or Other Rights That Have Not Vested (#)	Equity Incentive Plan Awards: Market or Payout Value of Unearned Shares, Units or Other Rights That Have Not Vested (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)

Option-like awards must be reported on a grant-by-grant basis, except for awards with identical expiration dates and exercise prices, which can be aggregated. Stock awards can be aggregated. Vesting conditions for all awards must be reported in footnotes to the appropriate columns. The number of shares or units reported in columns (d) and (i) and the payout value reported in column (j), with certain exceptions, should assume that threshold performance goals are attained. Awards subject to performance goals are initially to be disclosed in the appropriate “equity incentive plan” column (columns (d), (i) and (j), respectively). Once the performance goals have been achieved, option awards are thereafter to be disclosed in column (b) or (c), as appropriate, until the options have been exercised or expire, and stock awards are to be disclosed in columns (g) and (h) until they vest.

## B. Option Exercises and Stock Vested

The Option Exercises and Stock Vested Table requires disclosure for each NEO of the amounts realized upon the exercise of stock options and similar equity-based compensation with option-like features and upon the vesting of stock and similar equity-based compensation during the last fiscal year. For amounts deferred upon exercise or vesting, footnote disclosure will be required quantifying the amount and disclosing the terms of the deferral.

### OPTION EXERCISES AND STOCK VESTED

Name	Option Awards		Stock Awards	
	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise (\$)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting (\$)
(a)	(b)	(c)	(d)	(e)

## IV. Post-Employment Compensation

The final rules significantly change the disclosure of post-employment compensation. The current Pension Plan Table will be replaced by a new table for defined benefit plans and another new table will be required to disclose information regarding nonqualified deferred compensation plans. In addition, narrative disclosure and quantification of payments and benefits of all other potential post-employment compensation arrangements will be required, including compensation payable upon a change in control.

**A. Pension Benefits**

The new Pension Benefits Table requires disclosure of the actuarial present value of each NEO's accumulated benefit, broken out separately for each tax-qualified and nonqualified defined benefit pension plan or arrangement. In allocating benefits between a qualified and an excess plan, companies are to use the applicable IRS limits. The table must also show the years of credited service under each plan, and all payments or distributions made during the last fiscal year. If an NEO's years of credited service differ from actual years of service, footnote disclosure of the difference is required and any resulting benefit increase must be quantified. Companies must use the same assumptions for calculating the present value as are used for financial reporting purposes under GAAP for the last completed fiscal year, but must assume that retirement age is normal retirement age.

## PENSION BENEFITS

Name	Plan Name	Number of Years Credited Service (#)	Present Value of Accumulated Benefit (\$)	Payments During Last Fiscal Year (\$)
(a)	(b)	(c)	(d)	(e)

In addition to the table, a succinct narrative description must be provided of the valuation method and all material assumptions used to calculate the accrued benefit. This requirement can be satisfied by cross-reference to the discussion of those assumptions in the company's financial statements. Narrative disclosure must also be provided of the material factors necessary to understand each plan disclosed, such as the benefit formula, eligibility and vesting standards, early retirement features (if any NEO is currently eligible for early retirement), what years of service and deemed extra years of service are taken into account and the elements of compensation considered in calculating benefits.

**B. Nonqualified Deferred Compensation**

A new table will require, for each NEO, disclosure of contributions, earnings and distributions during the last fiscal year and the aggregate balances as of the end of the last fiscal year under all nonqualified deferred compensation plans. Required footnote disclosure to the table, quantifying the extent to which amounts were previously reported in the SCT for the last fiscal year or prior fiscal years, may help mitigate the appearance of "double counting."

## NONQUALIFIED DEFERRED COMPENSATION

Name	Executive Contributions in Last FY (\$)	Registrant Contributions in Last FY (\$)	Aggregate Earnings in Last FY (\$)	Aggregate Withdrawals/ Distributions (\$)	Aggregate Balance at Last FYE (\$)
(a)	(b)	(c)	(d)	(e)	(f)

Again, a succinct narrative description is required of the material factors necessary to understand each plan covered by the tabular disclosure. This should include, for example:

- The type of compensation permitted to be deferred, and any percentage or other limitations on permitted deferrals.
- The measures for calculating interest and other plan earnings, whether they are selected by the executive and, if so, how often they can be changed, and quantifications of the earnings credited for the last fiscal year.
- Material terms with respect to payouts, withdrawals and other distributions.

### **C. Potential Payments on Termination or Change in Control**

The final rules require a description of each written or unwritten contract, agreement, plan or arrangement that provides for payments at, following or in connection with (i) the resignation, severance, retirement or other termination (including constructive termination) of an NEO, (ii) a change in his or her responsibilities or (iii) a change in control of the company. All payments and benefits need to be disclosed, unless they are nondiscriminatory and generally available to all salaried employees. Perquisites and personal benefits may be excluded only if their aggregate value is less than \$10,000. If a payment is fully disclosed in the Pension Benefits or Nonqualified Deferred Compensation Table, it may be cross-referenced, and disclosure for these items can be limited to any enhanced payments or accelerated vesting that result under the circumstances.

The disclosure must be quantitative, even where uncertainties exist as to amounts payable, in which case the company will be required to make reasonable estimates and disclose material assumptions underlying such estimates. However, the quantitative disclosure will be calculated by assuming that the triggering event took place on the last business day of the last fiscal year and the price per share of the company's securities is the closing market price as of such date. In particular, disclosure of the following information will be required:

- The specific circumstances that trigger payments.
- A description and quantification of the estimated payments and benefits and of any related tax gross-ups that would be provided in each circumstance, and disclosure of their duration, and whether the payments and benefits would or could be paid in a lump sum or in annual installment payments and of the entity responsible for payment.
- The specific factors used to determine the appropriate payment and benefit levels under the various circumstances.
- Any material conditions applicable to the receipt of payments or benefits, including non-compete, non-solicitation, non-disparagement and confidentiality covenants, their duration and provisions regarding waiver and breach.
- Any other material features necessary to understand the arrangements disclosed, such as whether an NEO can simultaneously receive severance and retirement benefits.

### Director Compensation Disclosure

Compensation for each nonemployee director must be disclosed in a Director Compensation Table (“DCT”) similar to the SCT. Instructions and guidance with respect to the SCT also apply to the DCT. Disclosure is required only for the last completed fiscal year. Grouping of two or more directors in a single row is permitted if all elements of their compensation are identical.

#### DIRECTOR COMPENSATION

Name	Fees Earned or Paid in Cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Nonqualified Deferred Compensation Earnings	All Other Compensation (\$)	Total (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)

The aggregate number of outstanding stock awards and the aggregate number of outstanding option awards held at fiscal year-end by each director need to be disclosed in a footnote.

The “All Other Compensation” column for directors must include the following items:

- All perquisites and other personal benefits, unless their aggregate value is less than \$10,000.
- All tax gross-ups or other tax reimbursements.
- Unless generally available to all salaried employees, the compensation expense attributable to the value of discount stock purchases.
- Any amount paid or accrued to any director in connection with his resignation, retirement or other termination or a change in control of the company.
- Annual company contributions or other allocations to defined contribution plans.
- Consulting fees paid by the company or its subsidiaries or joint venture partners.
- Awards under director legacy or charitable award programs.
- The dollar value of any insurance premiums paid by, or on behalf of, the company for life insurance for the director’s benefit.
- The dollar value of dividends or other earnings paid on stock or option awards, unless factored into the grant date fair value shown in column (c) or (d) above.

Any material factors necessary to understand the DCT must be separately described at the end of the tabular disclosure. Examples might include a breakdown of the types of fees and a discussion of option timing and dating practices.



### **Executive and Director Compensation Disclosure for Small Business Issuers, Foreign Private Issuers and Business Development Companies**

Acknowledging that the executive and director compensation arrangements of small business issuers (*i.e.* U.S. or Canadian issuers with revenue and public float of less than \$25,000,000 that are not investment companies or asset-backed issuers) are generally much less complex than larger issuers and recognizing that the regulatory burdens of more extensive disclosure could be disproportionate for small business issuers, the final rules require scaled-back disclosure for these issuers. Disclosure for small business issuers will include a Summary Compensation Table (without the pension plan disclosure), an Outstanding Equity Awards at Fiscal Year-End Table and a Director Compensation Table. Disclosure will cover only the principal executive officer and the two other most highly compensated officers, and the SCT would cover only the last two fiscal years. Also, no Compensation Discussion and Analysis or related Compensation Committee Report will be required of small business issuers.

Executive and director compensation disclosure for Foreign Private Issuers will not change. Foreign Private Issuers will continue to be deemed to comply with Item 402 of Regulation S-K by providing the information required by their home country, unless the required information is otherwise made publicly available.

Business development companies will now be required to fully comply with Item 402 of Regulation S-K in all of their public filings, including proxy statements, where action is to be taken with respect to the election of directors or with respect to compensation arrangements and certain other matters, and registration statements. As a result, all public filings of business development companies will be required to provide disclosure of all compensation for the same officers as for operating companies, rather than just the three highest paid officers with aggregate compensation in excess of \$60,000. In addition, registration statements of these companies will no longer be required to disclose compensation for members of their advisory boards and certain affiliated persons and disclosure of compensation from the “fund complex” will no longer be required in registration statements or proxy statements.

### **Form 8-K Disclosure**

The 2004 amendments to Form 8-K were overbroad and resulted in too many accelerated disclosures of nonmaterial items. The final rules revise Items 1.01 and 5.02 of Form 8-K to limit the information required and consolidate the Form 8-K reporting of executive compensation matters into one item. As such, a company’s annual proxy statement will continue to be the primary vehicle for disclosure of executive and director compensation information, unless information is “unquestionably or presumptively material.”

Form 8-K disclosure will be revised as follows:

- Disclosure of a company's entry into or material amendment of executive compensation arrangements will be shifted from Item 1.01 to Item 5.02(e), and the concept that all compensatory arrangements with NEOs are deemed material will be eliminated. This disclosure will now cover only compensation arrangements with a company's current principal executive officer, principal financial officer and NEOs for the previous fiscal year, and will be limited to a brief description of any material compensatory arrangement or material amendment. Grants or awards or modifications that are materially consistent with the previously disclosed terms of such compensatory arrangement need not be disclosed under Item 5.02(e), provided they are properly disclosed in the proxy statement, or other filing, when required.
- Expanded relief is provided for failure to make a timely Form 8-K filing required by Item 5.02(e), so that a safe harbor will protect against liability under Section 10(b) of the Exchange Act and loss of Form S-3 eligibility, provided the information is included in the required periodic report for the period during which the applicable event occurred.
- The disclosures required under Item 5.02 pertaining to NEOs are provided for officers who were NEOs for the prior fiscal year.
- The disclosures required under Items 5.02(c) and (d) upon the appointment of a new principal officer or director will be expanded to include a brief description of any other material plan, contract or arrangement with such principal officer or director that is entered into or materially amended, and any grant or award under any such arrangement in connection with such appointment.
- Where the salary or bonus of any NEO cannot be calculated in time to be included in the SCT, disclosure will now be required under new Item 5.02(f) on Form 8-K when the amounts become calculable. This disclosure must also include a recalculation of the total compensation disclosed in the SCT to reflect the new salary or bonus.

### **Beneficial Ownership Disclosure**

The final rules require footnote disclosure to the beneficial ownership table of the number of shares pledged as security by each NEO, director and director nominee. The final rules also require disclosure of the beneficial ownership of directors' qualifying shares.

### **Related-Party Transaction Disclosure**

The final rules revise and reorganize the disclosure of related-party transactions under Item 404 of Regulation S-K as follows:

- Item 404(a) will contain the general disclosure requirement for related-party transactions, including those involving indebtedness (previously in Item 404(c)).
- Item 404(b) will require disclosure of a company's policies and procedures for the review, approval or ratification of related-party transactions.
- Item 404(c) will require disclosure regarding promoters.

New Item 404(a) will combine current Items 404(a) and (c) and require disclosure of any transaction since the beginning of the company's last fiscal year, or any proposed transaction in which the company was or is a *participant*, if the amount involved exceeds \$120,000 and in which any related person had, or will have, a direct or indirect material interest. The current threshold is \$60,000. It eliminates certain bright line disclosure requirements in favor of a principles-based materiality analysis. A person is not deemed to have an indirect "material" interest within the meaning of Item 404(a) if that interest arises only from the person's position as a director of a related party or if the person's direct or indirect interest is less than a 10% equity interest in a related party other than a partnership.

Item 404(b), which currently requires disclosure of certain business relationships, will be amended to require a description of the policies and procedures established by the company and its board of directors for the review, approval or ratification of any related-party transaction required to be reported in Item 404(a). This disclosure should include:

- The types of transactions covered.
- The standards to be applied.
- The persons on the board of directors responsible for applying such policies and procedures.
- A statement of whether the policies and procedures are in writing and, if not, how they are evidenced.

In addition, companies will be required to identify any transaction required to be reported pursuant to Item 404(a), where the company's policies and procedures do not require review, approval or ratification or where they were not followed.

New Item 404(c) will require registrants filing a registration statement on Form S-1 or Form 10 to identify any promoter during the past five fiscal years and indicate the nature and amount of anything of value received by each promoter from the registrant and the nature and amount of any assets, services or other consideration received by the registrant.

### **Corporate Governance**

The final rules create new Item 407 of Regulation S-K, which consolidates and updates existing disclosure requirements regarding director independence and corporate governance. Specifically, Item 407 will consolidate the disclosure of (i) director independence, (ii) information relating to the number of board meetings and attendance thereof and (iii) information relating to the composition, policies and procedures of the nominating, audit and compensation committees. Among the significant new disclosure requirements are the following:

- Director Independence. New Item 407 will require the identification of each director, or director nominee, as appropriate, who is independent under the independence standards applicable to the company and each nonindependent director who is a member of the compensation, nominating or audit committee. Certain companies that are exempt (or that would qualify for exemption) from the director independence requirements pursuant to the rules of the stock exchange or quotation system with respect to which their shares are listed or traded must disclose such exemption and explain the company's basis for the exemption. Item 407 also requires that each company post on its web site or attach to its proxy the definition of director independence applicable to it. In addition, companies will be required to disclose relationships or arrangements not otherwise disclosed pursuant to Item 404(a) that were considered when determining the independent status of a director or director nominee.
- Compensation Committee. The final rules will require disclosure about the compensation committee similar to that currently required with respect to the nominating and audit committees. Specifically, the final rules will require disclosure of the identity of each committee member, whether the committee has a charter and a narrative description of the processes, and procedures for consideration and determination of executive and director compensation, including (i) the scope of authority of the committee, (ii) the committee's ability to delegate that authority, specifying what authority may be delegated and to whom, (iii) the name and role of any compensation consultant who advised the committee with respect to executive and director compensation decisions, including whether such consultant was engaged by the committee or another person and (iv) the role any executive officer played in determining or recommending the amount or form of executive or director compensation.

#### **Plain English Rule**

Finally, companies will now be required to prepare their executive and director compensation, related-party transactions, beneficial ownership and corporate governance disclosures using the plain English principles currently required for prospectuses.

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The foregoing is a summary of the principal provisions of the final rules. If you wish to obtain additional information, please contact Frank A. Daniele (212-728-8216, fdaniele@willkie.com), Stephen T. Lindo, (212-728-8242, slindo@willkie.com), J. Pasco Struhs (212-728-8109, pstruhs@willkie.com) or the partner who regularly works with you.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).

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IRS Circular 230 disclosure:

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