

# A Guide to the SEC's Revised Executive Compensation and Related Disclosure Rules

By Penny Somer-Greif<sup>1</sup>

On July 26, 2006, the Securities and Exchange Commission ("Commission") adopted new and amended rules (which were amended in December 2006) governing executive compensation and related disclosures including related party transactions, director independence, and other corporate governance matters. This article summarizes the new rules and provides guidance on what companies should do in order to prepare for and meet these heightened disclosure requirements. Understanding these new rules is important for public companies; however, these rules are also relevant to private companies who are considering going public.<sup>2</sup>

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## I. EXECUTIVE AND DIRECTOR COMPENSATION<sup>3</sup>

### A. Overview

Perhaps the most challenging portion of the new disclosure requirements is the Compensation Discussion and Analysis ("CD&A"). This section requires companies to address their objectives and implementation plans for executive compensation programs and explain the factors influencing their underlying compensation policies and decisions. Small business issuers are not required to provide a CD&A.<sup>4</sup>

After completing the CD&A, companies are required to make a number of specific disclosures intended to add transparency to executive compensation. A description of some of these disclosures and their corresponding tables follow: First, executive compensation over the last three years must be disclosed in the *Summary Compensation Table*, *Supplemental Grants of Plan-Based Awards Table*, and *Narrative Disclosure to Summary Compensation and Supplemental Grants Tables*. Second, outstanding

equity interests and amounts realized on equity compensation during the last fiscal year must be disclosed in the *Outstanding Equity Awards at Fiscal Year-End Table*, *Option Exercises and Stock Vested Table*, and *Narrative Disclosure to Outstanding Equity Awards and Option Exercises and Stock Vested Tables*. Third, retirement and other post-employment compensation disclosures must be disclosed in the *Pension Benefits Table*, *Non-qualified Deferred Compensation Table*, and other potential post-employment benefits. Finally, director compensation is disclosed in the *Director Compensation Table*. Small business issuers do not have to include the *Option Exercises and Stock Vested Table* or the

post-employment compensation tables.<sup>5</sup>

### B. Compensation Discussion and Analysis

Other than small business issuers, compensation disclosure must begin with a narrative discussion providing an overview of the company's compensation program—the CD&A.<sup>6</sup> The CD&A must provide a discussion and analysis of the material elements

of the company's compensation for the named executive officers, and should focus on the material principles underlying the company's executive compensation policies and decisions, and the most important factors relevant to an analysis of those policies and decisions.<sup>7</sup> Materiality is what investors would consider important information in making an investment decision.<sup>8</sup> Therefore, if a company knows that investors care about a certain component of compensation, it should discuss that issue even if it is not material from a quantitative standpoint.

The CD&A is principles-based disclosure, requiring companies to discuss the material elements of their own compensation programs even if such disclosure is not specifically called for in the new rules.<sup>9</sup> The CD&A should analyze the objectives of the company's compensation programs and discuss how these programs promote, or otherwise relate to, those objectives. For example, if the compensation program is designed to "attract, retain and motivate the executive officers," the CD&A should discuss how the various elements of the company's compensation

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programs accomplish those goals. A discussion of how this relates to the company's overall business objectives may also be appropriate. Therefore, what is included will vary from company to company. However, the new rules require companies to address six points in their CD&A: (1) the objectives of the company's compensation programs, (2) what the compensation programs are designed to reward, (3) each element of compensation, (4) why the company chooses to pay each element, (5) how the company determines the amount for each element, and (6) how each compensation element fits into the company's overall compensation objectives and affects decisions regarding other elements.<sup>10</sup>

While the CD&A should focus on the information required by the executive compensation disclosure rules (Item 402 of Regulation S-K), the CD&A must also cover actions taken after the end of the last fiscal year. Disclosable actions include adoption or implementation of new or modified programs and policies, as well as steps taken that could affect a fair understanding of the named executive officers' compensation for the last fiscal year.<sup>11</sup> For example, if the compensation committee takes action in early 2007 to revise its compensation program based on its review and analysis of 2006 compensation, this action should be included in the CD&A discussing 2006 compensation. For context, discussion of prior years should also be provided, and information about post-termination compensation and ongoing compensation arrangements that will apply in the future may also be required to the extent material.<sup>12</sup>

The new rules provide a list of fifteen non-exclusive examples of the kind of information that may be considered material and should be addressed in the CD&A. However, the Adopting Release and the instructions to Item 402 of Regulation S-K stress that



the CD&A should reflect each company's individual circumstances. Companies should avoid boilerplate disclosures or disclosures repeating the information that follows the CD&A.<sup>13</sup> Each company must discuss the material elements of its compensation policies that it applies regardless of whether it is included in the list of examples.<sup>14</sup> Conversely, some of the examples may not be material to a particular company, in which case no disclosure about such element would be required.<sup>15</sup> The new rules may require the disclosure of other elements, including policies regarding compensation allocation and structure, the effect of corporate performance on compensation decisions, and other factors that influence compensation decisions, such as stock options, taxes, and other agreements.<sup>16</sup>

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Generally, companies should discuss any performance measures on which incentive compensation is or will be based, including how and why those measures were chosen, why such measures were chosen instead of other measures, and what those performance targets are.<sup>17</sup> However, companies are not required to disclose specific target levels with respect to quantitative and qualitative performance-related factors if such disclosure involves confidential trade secrets or confidential commercial or financial information and would result in competitive harm to the company.<sup>18</sup> The Commission may require companies to demonstrate that any undisclosed performance-related factors satisfy such standard. If the Commission determines that the standard has not been satisfied it may require public disclosure of such information.<sup>19</sup> Companies that choose not to disclose specific performance-related factors must discuss how difficult it will be for the executive, or how likely it will be for the company, to achieve such undisclosed target levels.<sup>20</sup>

Unlike the Compensation Committee Report, the CD&A is considered “soliciting material,” and must be filed, not furnished.<sup>21</sup> The CD&A falls under Regulation 14A or 14C, and is subject to the liabilities of Section 18 of the Securities Exchange Act of 1934 (“Exchange Act”), and covered by the certifications provided by the company’s CEO and CFO with its annual report filed with the Commission.<sup>22</sup>

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**i. Disclosure Regarding Option and Other Equity-Based Compensation Grant Practices**

The CD&A must discuss the company’s practices regarding option grants, and in particular, the timing and pricing of stock options.<sup>23</sup> This requirement is a response to recent revelations that some companies granted, and did not properly disclose or account for, stock options with an exercise price lower than the closing price of the underlying security on the date of the grant, or that these companies otherwise timed option grants to ensure a low exercise or base price. Even absent timing issues such as these, the CD&A should address all equity-based compensation (including restricted stock and other forms of non-option equity awards)<sup>24</sup> practices to the extent material, including practices that might develop in the future.

**C. Compensation Committee Report**

The new rules have substantially modified the Compensation Committee Report. Companies must report whether its compensation committee has reviewed the CD&A with management and, based on such review and discussions, has recommended to the board that the CD&A be included in the company’s annual report on Form 10-K and, as applicable, the company’s proxy or information statement.<sup>25</sup> The Compensation

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Committee Report is furnished, not filed, and appears over the names of the members of the compensation committee.<sup>26</sup> Since small business issuers do not need to include the CD&A, they also do not need to include a compensation committee report.<sup>27</sup>

**D. Executive Compensation Over the Last Two or Three Years**

The *Summary Compensation Table* remains the principal disclosure vehicle for executive compensation<sup>28</sup> by showing compensation for each named executive officer over the last two years for small business issuers and over the last three years for other reporting companies.<sup>29</sup> Accompanying the *Summary Compensation Table* is narrative disclosure and, excluding small business issuers, a *Grants of Plan-Based Awards Table*, explaining the compensation information presented in the *Summary Compensation Table*.<sup>30</sup>

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**i. Named Executive Officers**

Compensation disclosure is required for a company’s “named executive officers.”<sup>31</sup> For small business issuers, the named executive officers are the company’s principal executive officer (“PEO”), the two most highly compensated executive officers (other than the PEO) who served as executive officers at the end of the last fiscal year, and up to two additional individuals for whom disclosure would have been required except that the individual was not serving as an executive officer at the end of the last fiscal year.<sup>32</sup> For other issuers, the named executive officers are the company’s PEO, the principal financial officer, the three most highly compensated executive officers (other than the principal executive and financial officers) serving as executive officers at the end of the last fiscal year, and up to two additional individuals for whom disclosure would have been required except that the individual was not serving as an executive officer at the end of the last fiscal year.<sup>33</sup>

Similar to the prior rules, disclosure must be provided for any individual who served as the company’s principal executive officer and, excluding small business issuers, the principal financial officer during the past fiscal year.<sup>34</sup> As under the prior rules, disclosure need not be provided for any other executive officer whose com-

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compensation does not exceed \$100,000.<sup>35</sup> However, unlike the prior rules, this figure is based on total compensation (including any severance benefits paid or accrued during the year), not solely on salary and bonus.<sup>36</sup> In a shift from the proposed rules, changes in defined benefit and pension plans and above-market or preferential earnings on non-qualified deferred compensation need not be considered in figuring total compensation for this purpose.<sup>37</sup> In addition, while companies can continue to exclude executive officers whose cash compensation comes from overseas assignments in making this determination, they can no longer exclude amounts that are “non-recurring and unlikely to continue.”<sup>38</sup> Together, these revisions mean that, for some companies, the officers who are deemed the named executive officers may vary year to year, and companies may have to keep track of compensation information for a greater pool of executive officers.



**The proposed rules required disclosures for up to three employees who were not executive officers of the company and whose compensation for the last completed fiscal year was greater than any of the named executive officers.**

The proposed rules required disclosures for up to three employees who were not executive officers of the company and whose compensation for the last completed fiscal year was greater than any of the named executive officers.<sup>39</sup> The Commission has re-proposed and asked for comment on this proposal.<sup>40</sup> As re-proposed, employees who do not have responsibility for significant policy decisions, such as athletes, entertainers and

salespeople, would be excluded.<sup>41</sup> If adopted, the Commission is considering limiting this disclosure to large accelerated filers.<sup>42 43</sup>

## **ii. Summary Compensation Table**

The *Summary Compensation Table* continues to serve as the principal executive compensation disclosure vehicle under the new rules.<sup>44</sup> While the table requires disclosure for the past three fiscal years—two fiscal years for small business issuers—companies are not required to re-state compensation disclosures previously provided under the prior rules. Instead, the new requirements will be phased in so that during the first year in which the requirements are applicable only 2006 compensation disclosure will be required, while in 2008, companies will be required to disclose both 2006 and 2007 executive compensation data, with three years of data for non-small business issuers included in proxy statements disclosing 2008 compensation.<sup>45</sup> As under the prior rules, companies will not have to provide disclosures in the *Summary Compensation Table* for years prior to the last fiscal year completed before they were a reporting company.<sup>46</sup>

Under the prior rules, only the salary or bonus amounts executive officers chose to defer were included in the table.<sup>47</sup> Under the new rules, this treatment applies to all forms of deferred compensation.<sup>48</sup> Excluding small business issuers who are not required to specifically provide the post-employment compensation tables, these amounts will generally be reflected as a contribution in the deferred compensation presentation.<sup>49</sup>

In addition to those changes discussed above, other material changes to the summary compensation table include: (1) a new total compensation column disclosing aggregate compensation for the year;<sup>50</sup> (2) dividing cash bonuses between a “bonus” column and a new “non-equity incentive plan compensation” column, the latter of which is for bonuses that are based on the attainment of specific performance factors communicated to the named executive officer;<sup>51</sup> (3) with respect to stock and option awards, disclosure of the compensation expense taken by the company in the relevant year instead of the number of shares or options granted;<sup>52</sup> (4) a new column disclosing above market or preferential earnings on non-qualified deferred compensation for small business issuers<sup>53</sup> and the change in pension values and above market or preferential earnings on non-qualified deferred compensation for all other issuers;<sup>54</sup> and (5) disclosure of all other compensation in one column instead of two separate columns.<sup>55</sup>

### iii. Grants of Plan-Based Awards Table

Companies other than small business issuers must include this new table to provide detailed information about all plan-based equity awards granted to the named executive officers during the fiscal year.<sup>56</sup>

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### iv. Narrative Disclosure

Companies must provide narrative disclosures following the *Summary Compensation Table* and, if applicable, the *Grants of Plan-Based Awards Table*, in order to provide context for the information in the tables.<sup>57</sup>

#### (a) Small Business Issuers

The new rules require small business issuers to include a narrative description of any material factors necessary to understand the information disclosed in the *Summary Compensation Table*,<sup>58</sup> including, but not limited to: (1) the material terms of each named executive officer's employment arrangement, whether written or unwritten;<sup>59</sup> (2) a description of any re-pricing or other material modification to any outstanding equity-based award;<sup>60</sup> (3) the waiver or modification of any specified performance target, goal, or condition to payout;<sup>61</sup> (4) the material terms of each grant, including the exercise date, any conditions to exercisability, any tandem, reload or tax reimbursement feature, and any provision that could lower the exercise price;<sup>62</sup> (5) the material terms of any non-equity incentive plan award made to a named executive officer during the last fiscal year, including a general description of the formula or criterion to be applied in determining the amounts payable and the vesting schedule;<sup>63</sup> (6) the method of calculating earnings on nonqualified deferred compensation plans;<sup>64</sup> and (7) identification to the extent material of any item included in the "All Other Compensation" column of the *Summary Compensation Table*.<sup>65</sup>

#### (b) Other Issuers

The new rules require a narrative description of any material information necessary to understand the information in the *Summary Compensation* and *Grants of Plan-Based Awards Tables*, including, but not limited to:<sup>66</sup> (1) the material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten;<sup>67</sup> (2) a description of any re-pricing or other material modification of an outstanding option or other equity-based award;<sup>68</sup> (3) the material terms of any award disclosed in the *Grants of Plan-Based Awards Table*, including a general description of the formula or criteria to be applied in determining amounts payable and the vesting schedule, a description of any performance-based or other material conditions applicable to the award, whether dividends or other amounts will be paid, the applicable dividend rate, and whether that rate is preferential;<sup>69</sup> and (4) an explanation of the amount of salary and bonus in proportion to total compensation.<sup>70</sup>

Pursuant to the new rules all reporting companies, including small business issuers, must provide a *Director Compensation Table* that reports all fees and other payments paid to each director.

### E. Director Compensation

Pursuant to the new rules all reporting companies, including small business issuers, must provide a *Director Compensation Table* that reports all fees and other payments paid to each director.<sup>71</sup> The table is similar to the *Summary Compensation Table* but requires disclosure only for a company's most recent fiscal year.<sup>72</sup>

All cash fees paid for services as a director, such as retainer fees, committee fees, meeting fees, and chairmanship fees, should be disclosed in column (b), "Fees Earned or Paid in Cash."<sup>73</sup> Otherwise, the directions and instructions applicable to the *Summary Compensation Table* generally apply to the analogous columns in the *Director Compensation Table*.<sup>74 75</sup> Companies must also provide footnote disclosure of (i) the aggregate



number of stock awards and option awards outstanding for each director at year-end,<sup>76</sup> and (ii) the total dollar amount payable under legacy and similar charitable award programs and the material terms of such programs.<sup>77</sup> Two or more directors may be grouped in a single row if their compensation is identical and all are clearly named.<sup>78</sup>

A narrative description of any material factors necessary to understand the information in the table must follow the *Director Compensation Table*.<sup>79</sup> Examples include a description of standard compensation arrangements and a description of any different compensation arrangement applicable to a specific director.<sup>80</sup>

## II. DIRECTOR INDEPENDENCE AND OTHER CORPORATE GOVERNANCE MATTERS

The new rules update and consolidate existing disclosure requirements regarding director independence and committees of the board of directors, as discussed below.<sup>81</sup>

### A. Director Independence and Related Matters

The new rules require disclosure whether each director and, if applicable, nominee for director, is independent, and a description of any transactions, relationships or arrangements not otherwise disclosed that were considered in determining independence.<sup>82</sup> Companies that are listed on or (when the information is included in a registration statement) that have applied for listing on a national securities exchange or national securities association must use the definition of independence prescribed by the Exchange's or Association's applicable listing standards.<sup>83</sup> Companies that are not so listed must choose an independence definition of one of such Exchanges or Associations for this purpose.<sup>84</sup>

The new rules require disclosure whether each director and, if applicable, nominee for director, is independent, and a description of any transactions, relationships or arrangements not otherwise disclosed that were considered in determining independence.



In addition, the new rules require additional disclosures about the company's compensation committee, including: (1) whether it has one, and if not, why it is reasonable not to;<sup>85</sup> (2) its composition and whether or not it has a charter;<sup>86</sup> (3) a narrative description of the company's processes and procedures for consideration and determination of executive compensation;<sup>87</sup> (4) the scope of the committee's authority and the extent to which it may delegate such authority;<sup>88</sup> (5) the role of any executive officers in determining or recommending the amount or form of executive and director compensation;<sup>89</sup> and (6) the role of any compensation consultants in determining or recommending the amount or form of executive and director compensation, whether such consultants are engaged directly by the compensation committee or by any other person, the nature and scope of such consultants' assignment and any material instructions or directions given to such consultants with respect to the performance of their duties.<sup>90</sup>

## III. PREPARING FOR COMPLIANCE WITH THE NEW RULES

In preparation for the CD&A, companies should work with their compensation committees to clarify, formalize, and document their compensation processes and procedures. In particular, companies should review the link between pay and performance, the company's total rewards strategy, perquisites, and change in control and severance arrangements. It should be determined in advance who will be involved in drafting the compensation disclosure and the CD&A. Importantly, the CD&A rules are principles-based and need to address the material elements of the company's compensation programs. In addition, the drafters of the revised disclosure, especially with respect to the CD&A, may need to gather information from more people than was necessary in the past, including human resource officers, relevant departments, compensation consultants, outside advisers and the compensation committee and chairman, as well as prior compensation committee chairmen with respect to prior compensation determinations.

Once the necessary information is compiled, those involved in drafting the CD&A should: (1) review the CD&A requirements discussed above and determine how the company will answer the required questions and prepare its CD&A disclosure; (2) consider which of the examples provided in the new rules are relevant to the company's compensation programs and what other material elements of compensation should be addressed;

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**In particular, companies should review the link between pay and performance, the company's total rewards strategy, perquisites, and change in control and severance arrangements.**

(3) think about the reasons, goals, and justification for each element of the company's compensation programs; (4) determine what are the company's philosophy, objectives and goals of its compensation programs; and (5) how each element of its compensation programs further its compensation objectives.

Companies should consider whether changes should be made in their current compensation programs to avoid potentially embarrassing disclosure. This includes programs for which the original purposes and reasons for adoption no longer apply. This may require amendments to employment contracts or involve circumstances where the named executive officers may be required to relinquish a benefit to which they are technically entitled.

**Companies should consider whether changes should be made in their current compensation programs to avoid potentially embarrassing disclosure.**

The committee must further its familiarity with the new executive and director compensation reporting requirements that will be applicable to the company and begin reviewing all of the compensation arrangements and gathering the information necessary to compile the disclosures. Determining in advance which elements of compensation each named executive officer and director receives, particularly perquisites and change in control and severance payments, is particularly beneficial. A company should consider putting together a mock-up of the required compensation tables and related disclosures using the previous year's compensation data. This ensures that the needed information and other processes are in place to prepare the required disclosure, and that unexpected problems or delays do not stymie the process when this information is prepared for the first time.

Prior to the completion of the CD&A draft, the committee should review the company's employment procedures and

determine what post-employment or change in control payments and benefits are payable to the named executive officers, and estimate amounts (or ranges) payable under each triggering event. In addition, it is important that a company review its stock option, equity incentive compensation, and similar plans, as well as its option and equity-based compensation grant practices in light of

the new disclosure requirements. If such plans use a price other than the closing market price on the grant date to determine the fair market value of the company's securities, companies should consider whether it may be appropriate to amend the plan to use the closing market price as "suggested" by the Commission. Any differences may require disclosure of the use of a different formula in the CD&A, or potentially, different closing price values on the grant date from the exercise or base price of options granted in the *Grants of Plan-Based Awards Table*.<sup>91</sup> Although this disclosure is not required for small business issuers, such companies might consider whether a change could be advisable in light of the Commission's guidance in this area.

With respect to granting options, a company should consider reviewing its practices to ensure that there are no potential "backdating" issues. This includes ensuring that an option's stated grant date is its actual grant date pursuant to applicable accounting and tax regulations. Companies should also review their option and other equity compensation granting practices in light of the new rules regarding the timing of grants in order to clarify what disclosures might be necessary in this regard, or revise their procedures to avoid any such disclosures.

In addition, a company should ensure that any standard re-pricing, material modification provisions, or any formulas the company routinely uses to modify options or other equity-based awards are included in the company's option, incentive and similar plans in order to limit or avoid disclosure of any such modifications in the narrative to the *Summary Compensation Table*.

Putting aside general recommendations for CD&A drafting committees, there are also a number of specific actions that companies of differing size and structure should undertake. For example, companies other than small business issuers should clarify and document their procedures for approving related-party transactions.<sup>92</sup> Small business issuers may also want to consider their procedures in the context of required disclosures regarding related-party transactions.<sup>93</sup>

Boards of directors of non-listed companies, which were previously not required to determine and disclose director independence, need to consider which definition of independence they will use and what other types of transactions they believe

may affect independence. Boards should start considering which directors are independent and whether or not new or additional independent directors are needed.

Companies that do not have separate audit, nominating and compensation committees should consider whether it might now be prudent to form such committees in light of company practice in these areas and the new disclosure requirements.<sup>94</sup> Companies that do not form separate committees should clarify the board's reasons, especially with regard to nominating and compensation committees for which disclosure of such reasons will be required.<sup>95</sup> Also, such companies should ensure they document which directors perform the functions of such committees and whether they are independent.<sup>96</sup> Non-listed companies that have non-independent directors sitting on the audit, nominating and compensation committees, or performing the functions of such committees should consider whether such persons should be removed from these committees, or be prepared to disclose that non-independent directors sit on these committees.

All companies that are current or future reporting companies should carefully consider the reasons, purposes, and philosophy involved when entering into new compensation arrangements and adopting new compensation programs. Companies should document the adoption of such arrangements and programs, the reasons for doing so, and how the actions fit within the company's compensation philosophy, so that if such actions need to be explained in a CD&A, the records exist that will allow current management to draft the required disclosure.

Finally, pursuant to the required disclosures regarding compensation committee processes, the company should review its processes and procedures for considering executive and director compensation. If necessary, consider formalizing and documenting such procedures.

Companies without a director nominations policy<sup>97</sup> or a process for stockholders to communicate with the board of directors<sup>98</sup> should consider whether it would be appropriate to adopt one. In addition, companies that do not adopt such policies should be prepared to disclose why their board believes it is appropriate for the company not to have such policies. Companies that have not done so should clarify whether they have a formal policy regarding director attendance at the annual meeting of stockholders and/or consider whether to adopt one pursuant to the disclosure requirements.<sup>99</sup>

Companies that have not recently reviewed and/or updated their audit, nominating and compensation committee charters should review such charters to ensure they are up to date and conform to the current standards of accepted practice. This

also includes the committee's actual functions and operation. In particular, the compensation committee charter may need to be revised to schedule extra compensation committee meetings or eliminate references to a set number of meetings that may no longer be adequate. Companies without such committee charters should consider whether it might be appropriate to adopt them.

Finally, it is essential that companies continue to monitor developments in this area to see how "best practices" develop under the new rules. It will take some time for companies and others to get used to the new disclosure requirements, and best practices are likely to continue to evolve in this area over the next few years. **BLB**



## ENDNOTES: Penny Somer-Greif

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<sup>2</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53158 (September 8, 2006) (to be codified as TBD). Other than the amendments to Current Report on Form 8-K (which are not discussed herein), effective November 7, 2006, the new rules are applicable for disclosure about fiscal years ending on or after December 15, 2006.

<sup>3</sup> See 17 C.F.R. §§ 228.402, 229.402. The revised disclosure rules regarding executive and director compensation continue to be located in Item 402 of Regulation S-B and Regulation S-K.

<sup>4</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53192.

<sup>5</sup> See generally 17 C.F.R. § 229.402 (2006).

<sup>6</sup> See *id.* at 53160.

<sup>7</sup> See 17 C.F.R. § 229.402(b) (2006).

<sup>8</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53165.

<sup>9</sup> See *id.* at 53165.

<sup>10</sup> 17 C.F.R. § 229.402(b)(1) (2006).

<sup>11</sup> See Instruction 2 to 17 C.F.R. § 229.402(b) (2006); see also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53166.

<sup>12</sup> See 17 C.F.R. § 229.402(b) (2006); see also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53166.

<sup>13</sup> See Instruction 3 to 17 C.F.R. § 229.402(b) (2006); see also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53164-66.

<sup>14</sup> See 17 C.F.R. § 229.402(b)(2) (2006); see also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53165.

<sup>15</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53165.

<sup>16</sup> See 17 C.F.R. § 229.402(b)(2) (2006).

<sup>17</sup> See *id.* at §§ 229.402(b)(2)(v) – (viii).

<sup>18</sup> See *id.* at instruction 4 to § 229.402(b).

<sup>19</sup> See *id.*; see also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53166-67.

<sup>20</sup> See *id.*

- <sup>21</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53167-68.
- <sup>22</sup> See *id.* at 53167.
- <sup>23</sup> See *id.* at 53163-64.
- <sup>24</sup> See Item 402 of Regulation S-K – Executive Compensation, U.S. Securities and Exchange Commission, Division of Corporation Finance, Guidance replacing the Item 402 of Regulation S-K interpretations in the Manual of Publicly Available Telephone Interpretations, Question 3.01 (February 12, 2007).
- <sup>25</sup> See 17 C.F.R. § 229.407(e)(5)(i) (2006).
- <sup>26</sup> See *id.* at § 229.407(e)(5)(ii); See also *id.* at instruction 1 to (e)(5).
- <sup>27</sup> Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53192
- <sup>28</sup> See *id.* at 53169.
- <sup>29</sup> See 17 C.F.R. § 228.402(b)(1) and § 229.402(c)(1) (2006).
- <sup>30</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53169.
- <sup>31</sup> See 17 C.F.R. § 228.402(a)(2) and § 229.402(a)(3) (2006).
- <sup>32</sup> See *id.* at § 228.402(a)(2).
- <sup>33</sup> See *id.* at § 229.402(a)(3).
- <sup>34</sup> See *id.* at § 228.402(a)(2)(i) and § 229.402(a)(3)(i) - (ii).
- <sup>35</sup> See Instruction 1 to 17 C.F.R. § 228.402(a)(2) and Instruction 1 to § 229.402(a)(3) (2006).
- <sup>36</sup> See Instruction 1 to 17 C.F.R. § 228.402(a)(2) and Instruction 1 to § 229.402(a)(3) (2006); Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 51390.
- <sup>37</sup> See Instruction 1 to 17 C.F.R. § 228.402(a)(2) (2006); See also Instruction 1 to § 229.402(a)(3) and Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 51390.
- <sup>38</sup> Instruction 3 to 17 C.F.R. § 228.402(a)(2) (2006); See Instruction 3 to § 229.402(a)(3); See also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53190.
- <sup>39</sup> See Executive Compensation and Related Party Disclosure; Proposed Rule, 71 Fed. Reg. 6542, 6544, 6558, 6563, 6599 (February 8, 2006).
- <sup>40</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53267.
- <sup>41</sup> See *id.*
- <sup>42</sup> See *id.*
- <sup>43</sup> Large accelerated filer generally include SEC reporting companies that have been subject to the reporting requirements of the Exchange Act for at least 12 months and have an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more.
- <sup>44</sup> See 17 C.F.R. § 228.402(b) and § 229.402(c)(2006).
- <sup>45</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53210.
- <sup>46</sup> See Instruction 1 to 17 C.F.R. § 228.402(b) (2006) and Instruction 1 to 17 C.F.R. § 229.402(c).
- <sup>47</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53171.
- <sup>48</sup> See Instruction 4 to 17 C.F.R. § 228.402(b) and § 229.402(c) (2006).
- <sup>49</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53171.
- <sup>50</sup> See 17 C.F.R. § 228.402(b)(2)(x) and § 229.402(c)(2)(x) (2006).
- <sup>51</sup> See *id.* at § 228.402(b)(2)(iv) and (vii) and § 229.402(c)(2)(iv) and (vii); See also Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53178-79
- <sup>52</sup> See 17 C.F.R. § 228.402(b)(2)(v) and (vi) and 229.402(c)(2)(v) and (vi) (2006).
- <sup>53</sup> See *id.* at § 228.402(b)(2)(viii).
- <sup>54</sup> See *id.* at § 229.402(c)(2)(viii).
- <sup>55</sup> See *id.* at § 228.402(b)(2)(ix) and § 229.402(c)(2)(ix).
- <sup>56</sup> See *id.* at § 229.402(d).
- <sup>57</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53180.
- <sup>58</sup> See 17 C.F.R. § 228.402(c) (2006).
- <sup>59</sup> See *id.* at § 228.402(c)(1).
- <sup>60</sup> See *id.* at § 228.402(c)(2); See also Instruction to § 228.402(c) (noting that this does not include re-pricings pursuant to a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of option or stock appreciation right (“SAR”) exercise or base prices, anti-dilution provisions in a plan or award, or a recapitalization or similar transaction affecting equally all holders of the class of securities underlying the options or SARs).
- <sup>61</sup> See 17 C.F.R. § 228.402(c)(3) (2006).
- <sup>62</sup> See *id.* at § 228.402(c)(4).
- <sup>63</sup> See *id.* at § 228.402(c)(5).
- <sup>64</sup> See *id.* at § 228.402(c)(6).
- <sup>65</sup> See *id.* at § 228.402(c)(7) (directing that identification of an item will not be considered material if it does not exceed the greater of \$25,000 or 10% of all items included in the specified category in question).
- <sup>66</sup> See *id.* at § 229.402(e)(1).
- <sup>67</sup> See *id.* at § 229.402(e)(1)(i).
- <sup>68</sup> See *id.* at § 229.402(e)(1)(ii); See also Instruction 1 to § 229.402(e)(1) (stating that these do not include repricings pursuant to a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of option or SAR exercise or base prices, antidilution provisions in a plan or award, or a recapitalization or similar transaction affecting equally all holders of the class of securities underlying the options or SARs).
- <sup>69</sup> See 17 C.F.R. § 229.402(e)(1)(iii) (2006); See also Instruction 2 to § 229.402(e)(1) (including both performance conditions and market conditions as defined in FAS 123R, the discussion in Section I.B of this article regarding disclosure of target levels with respect to quantitative and qualitative performance-related factors, and certain other confidential commercial or financial information applies here as well).
- <sup>70</sup> 17 C.F.R. § 229.402(e)(1)(iv) (2006).
- <sup>71</sup> See *id.* at § 228.402(f) and § 229.402(k).
- <sup>72</sup> See *id.* at § 228.402(f)(1) and § 229.402(k)(1).
- <sup>73</sup> See *id.* at § 228.402(f)(2)(ii) and § 229.402(k)(2)(ii).
- <sup>74</sup> See generally *id.* at § 228.402(f)(2) and § 229.402(k)(2); Instructions to § 228.402(f) and § 229.402(k) (for example, the calculation of the dollar value of stock and option awards and the amounts to include in each column of the table).
- <sup>75</sup> See 17 C.F.R. § 228.402(f)(2)(vii)(G) and § 229.402(k)(2)(vii)(G) (2006) (noting, however, that consulting fees and the annual costs of payments and promises of payments pursuant to director legacy and similar charitable award programs must be included as “all other compensation”).
- <sup>76</sup> See Instruction to *id.* at § 228.402(f)(2)(iii) and (iv) and Instruction to § 229.402(k)(2)(iii) and (iv).
- <sup>77</sup> See Instruction to 17 C.F.R. § 228.402(f)(2)(vii) and Instruction 1 to § 229.402(k)(2)(vii) (2006).
- <sup>78</sup> See Instruction to 17 C.F.R. § 228.402(f)(2) and Instruction to § 229.402(k)(2) (2006).
- <sup>79</sup> See 17 C.F.R. § 228.402(f)(3) and § 229.402(k)(3) (2006).
- <sup>80</sup> See 17 C.F.R. § 228.402(f)(3) and § 229.402(k)(3) (2006).
- <sup>81</sup> See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53158.
- <sup>82</sup> 17 C.F.R. § 228.407(a) and § 229.407(a) (2006).
- <sup>83</sup> *Id.* at § 228.407(a)(1)(i) and (iii) and § 229.407(a)(1)(i) and (iii).
- <sup>84</sup> *Id.* at § 228.407(a)(1)(ii) and § 229.407(a)(1)(ii).
- <sup>85</sup> *Id.* at § 228.407(e)(1) and § 229.407(e)(1).
- <sup>86</sup> *Id.* at § 228.407(e)(1) and (2) and § 229.407(e)(1) and (2). See also Instruction 2 to § 228.407 and Instruction 2 to § 229.407 (indicating such charter must be posted on the company’s website or filed as an appendix to its proxy statement at least once every three years).
- <sup>87</sup> 17 C.F.R. § 228.407(e)(3) and 17 C.F.R. § 229.407(e)(3) (2006).
- <sup>88</sup> *Id.* at § 228.407(e)(3)(i) and § 229.407(e)(3)(i).
- <sup>89</sup> *Id.* at § 228.407(e)(3)(ii) and § 229.407(e)(3)(ii).
- <sup>90</sup> *Id.* at § 228.407(e)(3)(iii) and § 229.407(e)(3)(iii).
- <sup>91</sup> See 17 C.F.R. § 229.402(d)(2)(vii) and Instruction 3 to 17 C.F.R. § 229.402(d) (2006).
- <sup>92</sup> See 17 C.F.R. § 229.404(b) (requiring disclosure of the company’s policies and procedures for the review, approval, or ratification of related-party transactions).
- <sup>93</sup> Set forth in 17 C.F.R. § 228.404 (2006).
- <sup>94</sup> See generally 17 C.F.R. § 228.407 and 17 C.F.R. § 229.407 (2006).
- <sup>95</sup> See *id.* at § 228.407(c)(1) and (e)(1) and § 229.407(c)(1) and (e)(1).
- <sup>96</sup> See *id.* at § 228.407(a) and § 229.407(a).
- <sup>97</sup> See *id.* at § 228.407(c)(2)(ii) and (iii) and § 229.407(c)(2)(ii) and (iii).
- <sup>98</sup> See *id.* at § 228.407(f) and § 229.407(f).
- <sup>99</sup> See *id.* at § 228.407(b)(2) and § 229.407(b)(2).