BRIAN FOLEY & COMPANY, INC.
EXECUTIVE COMPENSATION CONSULTANTS

Via Internet Comment Form

April 10, 2006

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

Re: **File # S7-03-06 – Proposed Changes in Proxy Statement and 8-K Disclosure Rules regarding Executive Compensation**

Dear Ms. Morris:

The following submission sets forth in detail specific comments regarding the newly proposed rules on proxy statement and 8-K disclosures regarding executive compensation.

I submit these comments as an executive compensation consultant and attorney with almost 30 years of experience regarding executive compensation design and disclosure issues, and as a frequently cited commentator on, and critic of, poor compensation design and disclosure practices.

These comments are a follow-up to the comments presented by me at the Stanford University Rock Center for Corporate Governance conference just held on April 3 in Washington DC, at which Chairman Cox was the lead-off speaker.

As I stated at the Rock Center conference, I very much appreciate the scope and quality of the efforts that went into coming up with the new proposals. In my view, these new proposals, taken as a whole, represent a quantum step forward in ensuring that the investing public has direct access to clear, complete and timely information as to the total compensation provided to key senior executives – both in terms of new amounts paid and new opportunities provided, and in terms of items still "on the table" at year-end by way of long-term incentives, employment agreement rights, change of control protections, etc.

I therefore join other commentators in applauding this new proposed mandate for greater transparency and simple old-fashioned straight talk and unvarnished facts.

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The above have been said, I respectfully submit that some aspects of the new proposals should be revisited, and I offer for your consideration the following points:

1. Who is Advising Who about What?

Each Proxy Statement Should Be Required to Fully Identify the Outside Advisors to the Compensation Committee & Quantify the Fees & Expenses Charged If Other Work Is Done for Management

I agree with, and fully endorse, the proposed rule that each proxy statement should be required to identify any compensation consultant retained by the Committee to advise it on executive compensation matters. However, I urge the Commission to take three additional steps to make the disclosure more meaningful:

a. **All of the Compensation Consultants Involved Should Be Named**.

The new rules should state that, (i) where more than one consultant is engaged by the Committee, or (ii) where the Committee gets inputs from one or more executive compensation consultant(s) hired by and working for Management separately from, or together with, the inputs it gets from the consultant(s) it hires, all of the compensation consultants involved should be identified by name in the CD&A.

b. **If Other Work Is Done, the Existence and Nature of Such Other Work, and the Size of Any Fees Earned for that Work Relative to the Fees for Executive Compensation Advice Should Be Fully Disclosed**

Where the executive compensation consultant(s) identified as advising the Committee (in any capacity) -- or any colleague, parent, subsidiary, or affiliate of such consultant – also has advised (within the last 2-3 years), currently advises, and/or has been engaged to advise (i) Management or any individual NEO on some or all of the same matters, and/or (ii) the Company (or any parent, subsidiary or affiliate of the Company) in any other capacity (e.g., actuarial work, general employee compensation matters, plan administration, asset management, risk management, other outsourcing, etc.), the CD&A should be required:

► to describe the nature and scope of that other work in reasonable detail, and

► to quantify the fees and expenses involved currently and for the last 2-3 years, as well as any contractual commitments going forward (e.g., outsourcing commitments)

c. **The CD&A Should Also Be Required to Provide Similar Identity and Fee Information on Any Other Third Party Advisors to the Compensation Committee (or the Board) on Executive Compensation or Related Matters**

Where the Compensation Committee receives advice or other inputs from other third party advisors (including, without limit, outside attorneys, actuaries, accountants and financial advisors), the CD&A should be required to also (i) identify each of those other service providers by name, (ii) briefly describe the nature of the work done for the Committee, and (iii), in each case, separately itemize their fees if any non-executive-compensation work is also done for the Company (or any parent, subsidiary or affiliate of the Company), or Management or any individual NEO, by such outside advisor (or any colleague, parent, subsidiary, or affiliate of such advisor).

I note in this regard that, in our experience, particularly with respect to new and existing employment agreements, severance arrangements and Change in Control protections, outside legal counsel often is as involved as the outside compensation consultant in the Compensation Committee deliberation and decision process and related final drafting and implementation decisions.

2. The Things that Go Bump in the Night after Q4

Each Issuer Should Be Required to Disclose in Summary Form All NEO Compensation Actions Taken after the Last Fiscal Year-End and Prior to the Proxy Mailing Date

In our experience, there are a number of compensation actions that frequently occur in the first 3-4 months of a new fiscal year (base salary increases, new bonus targets, maximums, thresholds and/or guarantees, new stock option grants and/or exercises, new restricted stock and/or RSU grants and/or vesting, new long-term cash incentive opportunities, new employment agreements, etc.) that are often not disclosed in a proxy until the proxy filing in the following year – 12-15 months later, and, under current rules, are often not fully disclosed in Form 8-K and Form 4 filings filed in the interim.

We see no reason why the new proxy rules shouldn't require the addition of a separate section in the CD&A or elsewhere entitled "Compensation Actions Taken Since the Last Fiscal Year-End" that would fully address this disclosure gap so that the proxy statement as of the mailing date in fact presents a complete and up-to-date picture.

Alternatively, we respectfully submit that, if the above suggestion is not adopted, each issuer should at least be required (i) to fully disclose in 8-K filings made prior to the proxy mailing date the existence and dollar value of any actions involving NEO compensation taken after the end of the last fiscal year and prior to the proxy mailing date, and (ii) to cross-reference such filings and any related Form 4 filings for the same period in the current proxy statement.

3. What Some Merger Proxy Statements Forget to Mention

Real-Time Disclosure of Last Minute NEO Compensation Changes and Improvements Should Be "Required Reading" in Merger Proxy Statements

We respectfully submit that the new rules should also be clarified to also require, in the case of merger proxy disclosures, a full straight-forward itemization (by item) of the nature and value/cost of all improvements, adjustments or other recent actions (since the end of last fiscal year covered by a regular proxy statement) affecting the existence, size, and/or timing of any compensation and/or benefit amounts payable to or on behalf of NEOs and other executive officers on or after the closing of the merger transaction, and a cross-reference to any related 8-K, Form 4 or 10Q filings.

4. To 8-K or Not to 8-K?

Rather than Being Narrowed and Relaxed, the 8K Disclosure Rules Should Be Tightened, Toughened & More Vigorously Enforced

We continue to see 8-K filings by major companies (and others) that do not fully itemize the nature and value/cost of the items payable to retiring and other departing CEOs and other NEOs, including, for example, (i) one recent case in which more than $50M in apparent defined contribution account balances were omitted, (ii) another recent case where the nature of apparently all of the payout streams was described, but without any quantification of the dollar amounts involved except for one category of payments, and (iii) a third recent case where little detailed information was provided at the time of, or during the first three months following, a CEO's retirement.

We therefore urge the Commission to revisit enforcement of the 8-K filing requirement to re-emphasize the need for full and timely compliance focusing on the disclosure of both the nature of, and itemized value/cost of, any compensation/benefit items involved in reporting both new exits (retirements, terminations without cause, etc.) and new entrances – on an NEO-by-NEO basis.

We also respectfully submit that the 8-K filing requirement should be retained for all other NEO compensation and benefit actions taken (other than NEO exits and entrances), including in particular, but not limited to, any actions taken after the end of the last fiscal year and prior to the filing of the first proxy statement covering such year. For actions taken after the proxy statement is filed (i.e., those taken in Q2-Q4), we submit that meaningful real-time disclosure is in fact important (particularly as it relates to PEO and PFO compensation and benefits), and should not be under-estimated.

At an absolute minimum, if the 8-K filing requirement is whittled down as proposed, we submit that the 10-Q filings for Q1-Q3 should be required to briefly describe the nature and amount of any actions taken with respect to NEO compensation and benefits on an NEO-by-NEO item-by-item basis

5. Who's on First; What's on Second?

The Definition of Who is an "Executive Officer" Should Be Tightened, and the Test for NEO Status Should Be Adjusted

We also submit that the definition of "executive officer" should be tightened to provide or clarify that that term includes all heads of groups, subsidiaries, divisions and major operating units.

If this is done, we would question the need for any new disclosures (however limited) on the three highest paid non-NEOs.

We also recommend that you consider basing the test of who qualifies as an NEO (after the PEO and PFO) on both:

(i) the aggregate of base salary and annual bonus paid or deferred for the last completed fiscal year – without sign-on and other special one-time bonuses (the current approach), and

(ii) the sum of that number, plus the amount of any sign-on and other special one-time bonuses, plus the total value at grant of stock options, SARs, restricted stock, and RSUs granted in the issuer's last completed fiscal year, and the target value of any stock-based or cash-based performance-conditioned awards made in such year

-- with any executive officer who is among the three highest paid on either basis after the PEO and PFO being treated as an NEO for proxy disclosure purposes.

This approach would have the advantage of maintaining substantial continuity/comparability with past proxies (which have focused on salary plus bonus), while also using a more inclusive definition of compensation to test for NEO status so that fewer NEO situations slip through the cracks.

Finally, we recommend that the miscellaneous forms of compensation to be identified in the Summary Compensation Table not be included at least for now in testing for NEO status – at least until the impacts and wrinkles involved are fully worked out. We note in this regard our concern about the potentially odd impacts of including for NEO testing purposes, e.g., the actuarial value of accrued pension benefits and the total earnings on deferred compensation – which, under various circumstances could catapult an older, longer-tenure executive above a younger shorter-service executive who is in fact in a more significant position with higher annual and long-term compensation.

6. Total Compensation Is in the Eye of the Beholder

The Proposed Total Compensation Column Is Too Limited a Snapshot, & Should Be Modified to Provide a More Complete Picture

We submit that shareholders should be told (i) how much was newly banked during the last fiscal year (paid, exercised, etc. and taxed), (ii) how much was newly vested but not paid out (and thus not taxed), and (iii) how much was newly awarded in terms of new award opportunities. In addition, shareholders need information about what was already on the table and still on the table at year-end, and, in our view, some historical perspective – particularly on the long-term compensation side.

For these reasons, we believe that the proposed "Total Compensation" column (which, as proposed, would include actual salary and annual bonus paid or deferred, plus the at-grant value of all new options, SARs, restricted-stock, RSUs, and performance share awards, and the total of all cash-based LTIP payouts, plus miscellaneous compensation items) is not fully representative of the actions taken in the year in question.

We would instead propose also reporting in the Summary Compensation Table:

(i) the total amounts realized on option and SAR exercises during the last fiscal year, and on restricted stock vesting in such year, plus the total value of RSUs that vest in such year (whether or not paid out);

(ii) the target value of all cash-based performance-based awards; and

(ii) the payout value of all stock-based performance-based awards;

and then reporting either no overall single total compensation number, or reporting two total compensation numbers side-by-side:

(A) the same "total compensation" column now proposed – but substituting the target value of all stock-based and cash-based performance-conditioned long-term incentive opportunities for the cash-based LTIP payout and the FAS 123R stock-based LTIP at grant value currently included, and

(B) a total paid column -- the total of annual cash compensation paid or deferred (salary plus bonus), plus the total amounts realized on option and SAR exercises during the last fiscal year, and on restricted stock vesting in such year, plus the total value of RSUs that vest in such year (whether or not paid out), plus all stock-based and cash-based performance-conditioned awards paid out (or deferred) in such year.[1]

In either case, the totals could include the miscellaneous compensation items, or those could - at least for now - be separately reported (our preference), pending working out all of the issues raised by such items.

7. **The Need for a Better, More Comprehensive Year-End Look**

The proposal substantially improves the nature and amount of year-end data to be provided to shareholders with respect to long-term equity-based incentive awards.

However, in our view, several additional disclosures are needed, including the following

a. **The Value of Underwater Options**

We think that it is critical for shareholders to have an opportunity to understand and take into account the magnitude of the upside play/leverage not only on currently in-the-money stock options and SARs, but also on currently underwater options and SARs, in the event of a price spike (due to M&A or other developments).

We therefore strongly urge that each proxy statement be required to fully itemize (grant date, number of shares, pricing, vested status) all under-water options and SARs still outstanding as of the last year-end – since both the current rules and the new proposed rules provide no information in this regard.

[1] One open issue is whether and how to address changes in value of vested but unexercised options.

In this regard, we would also support a requirement that the full history/inventory of all option and SAR grants made in the last 10 years to the NEO be disclosed.

b. **Share Retention Post-Exercise/Vesting**

We also believe that it is important for shareholders to be told, where options or SARs have been exercised or restricted stock or RSUs have vested during the last completed fiscal year, how many of the shares involved in such transactions are in fact still held by the NEO at year-end.

We therefore urge the Commission to require such year-end retained share disclosures.

c. **Deferred Share Recap**

We also submit that shareholders should be told how many vested but deferred shares (from prior RSU, performance share, stock option and other transactions) were still in deferred mode as of the end of the last completed year, and when such shares are scheduled to pay out.

d. **Status of Outstanding LTIPs**

Finally, we submit that the year-end summary should also include an update on all performance-conditioned LTIP opportunities and cycles then in progress, including the target payouts involved, and current estimated status.

8. The Importance of Providing Some Historical Perspective on the Long-Term Side

Neither the current rules nor the new proposals require any “recap”-type disclosures of how much has already been paid out in connection with prior stock option and SAR exercises, restricted stock vesting, RSU payouts, and stock-based or cash-based performance-conditioned LTIP payouts.

We see no reason why shareholders should have to dig back through years of prior proxy statements to see the full picture.

Therefore, we submit that issuers should be required to identify by category the amount of accumulated income/gains from option and SAR exercises, restricted stock vesting, RSU payouts, and performance-conditioned LTIP payouts that have occurred during the last five years preceding the most recent proxy-reported year. (As noted above, we separately urge that the value of all vested but unpaid RSU and performance share awards be identified as of the end of the last completed fiscal year.)

9. Are the New Retirement Plan Disclosures Enough?

The new rules should substantially improve the overall quality of defined benefit and defined contribution plan disclosures with respect to NEOs.

We submit, however, that the several modifications are in order:

a. Across-the-Board Defined Benefit Lump Sum Numbers

The lump sum equivalent of all tax-qualified and non-qualified defined benefit plan benefits at normal and early retirement should be disclosed - whether or not a lump sum is payable - since, in our view, that information would provide a clearer snapshot of the value of annual benefits in question.

b. Increase in Benefit Accrual vs. Increase in Actuarial Value

While we understand the desirability (from a technical standpoint) of using actuarial values to report the annual increase in the value of defined benefit pension accruals, we submit that the annual benefit accrual numbers should also be provided in the footnotes.

In our view, the increase in benefit accruals is an easier number for many shareholders to understand. It is also useful for shareholders to understand that two executives with the same annual benefit accrual for the last completed fiscal year will often have different actuarial values due, e.g., to differences in age, or age and service.

c. Tax-Qualified Defined Contribution Account Balances -- MIA ?

We strongly question why the new proposed rules do not appear to require issuers to disclose the employer-funded portion of tax-qualified defined contribution account balances. We are aware of long service executives who have tax-qualified defined contribution account balances exceeding $5M and in some cases $10M, and see no valid reason why the employer-funded portion of such account balances should not be disclosed along with the bookkeeping account balances of any non-qualified defined contribution plans or arrangements, and any other deferred compensation.

d. **Earnings and Gains/Losses on Tax-Qualified Defined Contribution Account Balances**

We also question why, if all earnings have to be reported on non-qualified defined contribution arrangements, the same should not also be true at least with respect to the employer-funded portion of tax-qualified defined contribution account balances. In this regard, we again note that there certainly are long-service executives who have 7-figure and in some cases 8-figure tax-qualified defined contribution account balances.

e. **Keeping Some of the Other Details**

Issuers should still be required to disclose the general benefit accrual formula in narrative or tabular form, together with a description of how pensionable compensation is determined, and what subsidies (if any) apply, e.g., in terms of unreduced or subsidized early retirement benefits and subsidized joint & survivor benefits.

10. **The Untold Story in Many Earnings Restatements**

We take note of the considerable gap between the number of earnings restatements reported by U.S. public companies in recent years, and the number of such companies who report in their proxy statements having made substantial changes to prior NEO compensation as a result of a prior earnings restatement.

In this regard, we submit that, in the event of an earnings restatement covering any prior proxy-reported or Form S-1 reported year, both Management in the CD&A and the Compensation Committee (in a separate furnished signed report) should be required to state:

(i) whether the Company and the Compensation Committee (or Board) reviewed the impact of such restatement on all previously awarded annual bonus awards, long-term incentive plan payouts and the vesting and exercise of prior stock-based grants (e.g., options, SARs, restricted stock and RSUs) and other Compensation Committee actions) – in each case relating to years restated; and

(ii) whether any action was taken to adjust prior PEO, PFO and NEO compensation awards and payouts and related benefit accruals or contributions to take such restatement into account, and, if not, why not, and, if so, how so (for whom, to what extent, etc.)

11. **<u>The Proposed CD&A vs. an Enhanced Compensation Committee Report</u>**

We understand the perceived need for a CD&A that is PEO and PFO certified. At the same time, we are concerned about relying solely on a management-prepared CD&A, and not hearing separately from the Compensation Committee.

We therefore recommend that the "filed" CD&A requirement be retained as to those items that senior management can in fact certify, but that a "furnished", signed Compensation Committee report requirement be added back for those items within the Committee's purview.

In particular, we believe that the Compensation Committee should be required to report on and fully discuss any PEO and PFO compensation and benefit actions taken in any given year, and the impacts of any earnings restatements on the compensation and benefits previously paid or provided to any current and prior NEOs in the years affected by such restatement(s).

12. **<u>Effective Date</u>**

We think that moving forward on better proxy disclosure requirements on a timely basis is critical, and, if necessary or appropriate to adopting the new rules by Labor Day of 2006, we would encourage the Commission and Staff to consider prompt adoption of those items not substantially questioned or disputed, and delayed consideration/adoption of any items requiring substantial additional review.

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I appreciate the opportunity to submit the above comments, and again salute the Commission's and the Staff's efforts to bring about substantial improvements in the disclosure process and the actual disclosures.

Sincerely,

Brian T. Foley
Managing Director