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SPECIAL COMMITTEE ON MERGERS, ACQUISITIONS
AND CORPORATE CONTROL CONTESTS

May 8, 2006

Via email: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549-0609

Attention: Nancy M. Morris, Secretary

File No: S7-03-06; Release Nos. 34-53185; IC-27218
Executive Compensation and Related Party Disclosure

Ladies and Gentlemen:

This letter is submitted on behalf of the Special Committee on Mergers, Acquisitions and Corporate Control Contests of the Association of the Bar of the City of New York (the "Committee") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its January 27, 2006 release entitled "Executive Compensation and Related Party Disclosure" (the "Proposing Release"). The Committee is composed of members whose practices focus on mergers and acquisition transactions and related corporate law, corporate governance, executive compensation and securities regulation matters. The Committee includes lawyers in private practice as well as from corporate and investment bank law departments and academia.

INTRODUCTION

This letter addresses one specific issue affecting our practice: the disclosure of director compensation in connection with their service on special committees of boards of directors. The issue has arisen since the amendment of Form 8-K, effective August 23, 2004, to require disclosure of the entry into a material definitive agreement not made in the ordinary course of business within four business days after such occurrence,[1] and subsequent Commission staff commentary on that requirement, discussed below.[2] While the Proposing Release would amend Form 8-K to eliminate such requirement, it does not completely address the underlying issue, as disclosure would arguably still have to be made in a registrant's next periodic filing. We would propose that the Commission clarify, either through a new instruction to Item 601 of Regulation S-K or an FAQ in connection with the adoption of the new executive compensation and related party disclosure, that compensation arrangements with directors for service on transaction-related special committees need not be disclosed until disclosure of the transaction in connection with which the committee was formed (in which case disclosure would be as required in any filing to

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[1] Additional Form 8-K Disclosure Requirements and Acceleration of Filing Deadline; Release Nos. 33-8400; 34-49424; File No. S7-22-02 (March 16, 2004) (the "8-K Adopting Release").

[2] See Question 5, Division of Corporation Finance, "Current Report on Form 8-K Frequently Asked Questions, November 23, 2004.

report the transaction or in the next periodic report filed by the registrant) or, if no transaction is agreed or disclosed, only as part of the required disclosure of directors' total compensation without specific disclosure of the committee or the abandoned transaction.

DISCUSSION

Boards of directors often form *ad hoc* Special Committees to advise or act for the full board with respect to complex situations, extended processes or situations where some directors have actual, potential or perceived conflicts of interest. In some situations, such as an acquisition proposal by a controlling stockholder, special committee procedures are practically (although not strictly) mandatory, but they are used in other situations as well, such as mergers or business transactions between affiliated companies. More recently, many companies considering engaging in a change of control transaction will form a Special Committee where an auction is contemplated and management or other directors may be or become affiliated with possible buyers. Large boards may also decide to form such a committee in situations where no conflict exists or is expected, simply to enable the process to function more easily while assuring significant director involvement. Although oftentimes a company's decision to embark upon a particular process, or an affiliate's proposal with respect to a transaction, is publicly announced at the outset, and the formation of a Special Committee is part of such announcement, it is frequently the case – for obvious business reasons, most particularly the harm to a corporation and its business that can result from announcing the possibility of a transaction that never materializes – that there is no announcement unless and until an agreement is reached.

Item 1.01 of Form 8-K, as expanded in 2004, requires registrants to utilize, in determining the types of agreements to be disclosed, the same standard as Item 601(b)(10) of Regulation S-K. Item 601(b)(10)(iii)(A) states that "…any compensatory plan, contract or arrangement … in which any director … of the registrant … participates shall be deemed material and shall be filed …."

Prior to this expansion of Form 8-K, registrants did not customarily file (and their counsel did not suggest filing) information with respect to any compensation paid to directors under Item 601(b)(10). Director compensation was simply disclosed in proxy statements as required by Item 8 of Schedule 14A, referencing the disclosure mandated by Item 402(g) of Regulation S-K, including "standard arrangements … pursuant to which directors of the registrant are compensated for any services provided as a director, including any additional amounts payable for committee participation or special assignments." Formation of a special committee and any compensation of directors for their service on the committee were disclosed in filings required with respect to the transaction involved.

However, the Division of Corporation Finance, in its "Current Report on Form 8-K Frequently Asked Questions, November 23, 2004" noted the following question and response:

> Question 5
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> **Q :** Must a "summary sheet" that is given to directors that sets forth meeting fees and basic compensation information be disclosed as a material definitive agreement under Item 1.01 of Form 8-K?
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> **A:** Item 1.01 applies to both written and unwritten material definitive agreements. In this regard, refer to Telephone Interpretation I.85. in the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 1997), which notes that where a registrant is party to an oral contract that would be required to be filed as an exhibit

> pursuant to Item 601(b)(10) if it were written, the registrant should provide a written description of the contract as an exhibit similar to the requirement in Item 601(b)(10)(iii).
>
> If the "summary sheet" memorializes or sets forth terms of what is in fact an agreement between the registrant and the director as to the compensation and other terms, it would be subject to filing under Item 601(b)(10) of Regulation S-K and Form 8-K disclosure. The Form 8-K describing the agreement should be filed within 4 business days after the agreement is entered into, rather than within 4 business days after the summary sheet is provided to the director. This is because Item 601(b)(10)(iii)(A) of Regulation S-K specifically indicates that any contract or compensatory plan with a director is material and must be filed, and if the plan or contract is not set forth in a formal document, then a written description of the plan must be filed.

In response, registrants began to file Item 1.01 Form 8-Ks whenever there was a change in director compensation, on the basis that once such a change had been approved, whether by resolution or otherwise, it "memorialize[d] or set forth" terms agreed between the parties for continued service. Similar filings were made in connection with certain salary changes, approval of incentive plans and setting of bonuses for named executive officers, as a result of the above and other FAQs stating that such matters were "agreements" requiring disclosure outside the proxy statement process.

This result was noted in the Proposing Release,[3] to introduce proposed amendments to Form 8-K that would eliminate certain compensation disclosures, which the Commission does not believe, are necessary on a "real time" basis. The Commission is thus proposing to amend Item 1.01 of Form 8-K to add Instruction 1, stating that "[a]n agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) need not be disclosed under this item."[4] However, despite this salutary change, it would appear that such information would still be required to be disclosed, absent additional comment or rule-making by the Commission, in a registrant's next Form 10-Q or Form 10-K.

This is not a significant issue with respect to regular directors' compensation and changes in such compensation, although we would respectfully submit that requiring such disclosure other than in annual proxy statements is not of particular benefit to investors. However, in November 2005, then-Director of the Division of Corporation Finance, Alan Beller, stated at a session of the 37th Annual Institute on Securities Regulation that the Item 1.01 requirements mandate disclosure of new compensation arrangements for directors serving on Special Committees of boards within the four business day period. (If Item 1.01 is amended as proposed, we presume that such disclosure would be deemed by the staff to be required by Form 10-Q or Form 10-K.) Prior to this, we do not believe that any practitioners in the area of mergers and acquisitions believed that disclosure of Special Committee compensation was required except in the filings made with respect to the transaction in connection with which the Special Committee was formed. Otherwise, the formation of the Special Committee, which frequently is not made public unless and until the transaction itself is publicly announced (with committees often formed in connection with transactions that do not ultimately proceed), would force premature disclosure of the possibility of the transaction unless the registrant's standard compensation arrangements were sufficient to compensate the directors. This often is not the case, even where companies provide for extra pay for

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[3] See Part III, beginning at page 101, of the Proposing Release.

[4] See page 361 of the Proposing Release.

committee meetings or serving as chair of a committee, as Special Committee assignments often entail far more work, and commitment of time, than regular committee assignments.

The amount of Special Committee compensation is rarely if ever material in relation to the companies and transactions for which they are formed. Thus, we believe that any value of disclosure of such compensation to investors in advance of an announcement of the transaction (or, if no announcement is made, as part of the required proxy statement disclosure, without description or elaboration), is more than off-set by the detriment to companies (and disruption of the market for their securities) of premature announcement or indication of potential transactions which may never come to pass.

COMMENT

The Commission has recognized in various circumstances that premature disclosure of change of control events may be detrimental to the parties involved and has drafted regulations accordingly. For example, in adopting amendments expanding the scope of disclosures required on Form 8-K to require disclosure under Item 1.01 of entry into material agreements, the Commission eliminated a proposed requirement to disclose letters of intent and other non-binding agreements, in response to commentators' concerns that such disclosure "could cause significant competitive harm to the company and create excessive speculation in the market."[5] Similarly, the Commission has permitted companies to limit disclosure under certain circumstances when they may be engaged in sensitive negotiations the disclosure of which could be detrimental to the issuer's interests. Item 1006(d)(1) of Regulation S-K requires a subject company to disclose in its Schedule 14D-9 in response to a tender offer whether the company "is undertaking or engaged in any negotiations in response to the tender offer that relate to" a tender offer, merger, consolidation, acquisition, election of directors or sale of a material amount of assets. However, the Instruction to that item states that if an agreement in principle has not been reached at the time of filing the Schedule, no disclosure is required of possible terms and parties to a transaction if the subject company's board of directors determines that disclosure would jeopardize continuation of the negotiations. Disclosure "indicating that negotiations are being undertaken or are underway and are in the preliminary stages" is sufficient.

We therefore respectfully suggest that the Commission specifically exempt from the disclosure requirements of Item 601 of Regulation S-K compensation arrangements with directors with respect to their service on "special" or other *ad hoc* committees of boards, where the registrant's board of directors determines that premature disclosure would jeopardize the registrant's interests, unless and until the public announcement of a transaction for which the committee was constituted. Upon announcement, disclosure would be required in any related filing (proxy or registration statement, or Schedule 14D-9, as applicable), or, if no such filing will be made in connection with the transaction, in the first periodic report filed by the registrant post-announcement. If no announcement were ever made, disclosure of amounts paid would be included in the table of directors' compensation required by the Proposing Release, without further description or breakdown.

We note that a similar issue often exists with respect to severance agreements, retention payments and other change of control arrangements, particularly those put into place by companies prior to engaging in a sale process or exploration of strategic alternatives in order to stabilize key management

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[5] See text accompanying fn 36 of the 8-K Adopting Release, which cites, as examples, the letters of Compass Bancshares, Inc. , the New York City Bar Association and Hogan & Hartson.

or employees during such process.[6] We would also urge the Commission to consider taking the same approach with respect to disclosure of such arrangements, with the modification that, unless the arrangement terminates if a transaction is not announced – in which case there would no longer be any agreement to disclose – disclosure of such arrangements could be delayed at the option of the registrant (again based upon a determination by its board of directors that premature disclosure would jeopardize the registrant's interests) until the registrant's first public announcement of a transaction or proposed transaction or process. Disclosure would be required in a Form8-K or periodic report filed within four business days after the date of such announcement or, if a sale or exploration process is terminated, in the next required 10-Q or 10-K following such termination.

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We hope the Commission finds these views and suggestions helpful. We would be happy to meet to discuss any questions the Commission may have with respect to this letter.

Respectfully submitted,

Special Committee on Mergers, Acquisitions and
Corporate Control Contests

By: Daniel S. Sternberg, Committee Chair

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[6] See, *e.g.*, Jerry Knight, Tiny SEC Filing Gave a Big Hint to Vastera's Plans, Wash. Post, Jan. 24, 2005, at E1, http://www.washingtonpost.com/wp-dyn/articles/A31586-2005Jan23.html.