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By Email

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549-9303

Re: Proposed Amendments to the Executive Compensation and Related-Party Disclosure Rules
File No. S7-03-06; Release Nos. 33-8655, 34-53185; IC-27218

Dear Ms. Morris:

This letter is submitted in response to the request of the Securities and Exchange Commission (the "Commission") for comments on its release entitled "Executive Compensation and Related-Party Disclosure" (the "Release") dated January 27, 2006. The Release contains proposals to amend the Commission's disclosure requirements in a wide range of areas, including executive compensation, related-party transactions, director compensation, director independence and securities ownership of officers and directors. This letter will focus on a limited number of matters and will not attempt to address the full range of policy and technical issues presented by the proposals contained in the Release. This letter represents the views of the lawyers at this firm who participated in its preparation. It does not purport to reflect the views of all of the lawyers at this firm or any of its clients.

Comments

Requirement to Disclose Compensation Information Relating to Employees who are not Executive Officers

The Release includes a proposal that would, if adopted, require issuers to disclose total compensation paid to, and the job positions of, up to three non-executive officers whose total compensation for the last completed fiscal year exceeded that of any of the named executive officers. We suggest that the Commission not adopt this proposed requirement. We are in agreement with those commenters who have observed that disclosure relating to compensation paid to employees who are not executive officers is of limited use to investors because non-executive officer employees do not set policy for the issuer. We also are in agreement with commenters who have noted that requiring disclosure of this sort may have considerable unintended adverse consequences and will in many instances impose a substantial administrative burden on issuers.

Clarification of Requirements Under Form 8-K for Disclosure of Compensation-Related Information

The section of the Release relating to the proposed changes to Form 8-K includes the statement that Item 1.01 of Form 8-K, in the period following its adoption, has elicited "executive compensation disclosure regarding types of matters that do not appear always to be unquestionably or presumptively material, which is the standard we set for the expanded Form 8-K disclosure events." The Release goes on to indicate that the proposed amendments to Form 8-K contained therein are designed to "require real-time disclosure of employee compensation events that more clearly satisfy [the 'unquestionably or presumptively' material] standard."

We support the Commission's goal of clarifying Form 8-K in this regard. The proper interpretation of Item 1.01 in the context of executive compensation has been a source of considerable confusion since the Item became effective in August 2004.

We suggest, however, that the proposed amendments to Form 8-K contained in the Release are not sufficient to accomplish the goal of achieving clarity in this area. As currently proposed, new Item 5.02(e) would be triggered only if an issuer adopts a "material" compensatory plan, contract or arrangement ("Specified Plans") in which a registrant's principal executive officer, principal financial officer, or a named executive officer for the most recent fiscal year ("Specified Parties") participates or is a party, or a Specified Plan is materially amended or modified, or a material grant or award under any such Specified Plan is made to a Specified Party or materially modified. Given the considerable media, regulatory and investor attention paid to executive compensation questions in recent years, it will be difficult in many instances to determine with certainty whether a particular compensation arrangement is material and therefore potentially required to be disclosed pursuant to Item 5.02(e). It would be preferable, in our view, to either (i) remove compensation matters from the ambit of Form 8-K altogether and rely on the annual proxy statement for these disclosures or (ii) provide substantially more guidance, either in Instructions to the Form, commentary in the adopting release, or follow-on FAQs, on the issues in this area that have presented the most confusion. These areas include (i) whether and to what extent there is an obligation to report changes to annual salary on Form 8-K, (ii) whether and to what extent changes to the perquisites that are made available to an issuer's executive officers trigger Form 8-K, (iii) what disclosure, specifically, must be made when targets for annual or long-term incentive awards are set, (iv) whether and to what extent payments of discretionary bonuses trigger the obligation to file Form 8-K and (v) what would constitute, for purposes of Instruction 2 to the new Item 5.02(e), "material consistency" with the original terms of a Specified Plan.

Instruction 6 to Grants of All Other Equity Awards Table

The Release includes a proposed new table, the Grants of All Other Equity Awards table, in which issuers would be required to disclose certain information regarding non-performance

based equity awards made to named executive officers during the preceding fiscal year. One item that would be required to be included in the new table would be information relating to the exercise or base price of options, SARs and similar awards. If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate column would be required showing the market price on the date of grant. Instruction 6 to the proposed new table ("Proposed Instruction 6"), would provide that in determining when the exercise or base price of an option, SAR or similar instrument is less than the market price of the underlying security, "the registrant may use either the closing price per share of the security on an established public trading market on the date of grant*, or if no such market exists,* any other formula prescribed for the security." (Emphasis added.)

A similar concept to that found in Proposed Instruction 6 is found in the current version of Instruction 6 to Item 402(c) ("Current Instruction 6"). Item 402(c) relates to the Option/SAR Grants in Last Fiscal Year table. Current Instruction 6 provides that in "determining the grant-date market or base price of the security underlying options or free-standing SARs, the registrant may use either the closing market price per share of the security, or any other formula prescribed for the security." Proposed Instruction 6 differs from Current Instruction 6, therefore, in that it would require, for all securities in which a public market exists, that the market price of the security be determined by reference to the closing market price on the date of grant, while Current Instruction 6 permits the use of "any other formula" prescribed for the security.

We suggest that the wording of Current Instruction 6 be retained in the final rules. Many public companies have equity plans that require that options be issued with an exercise price equal to the fair market value of a share of common stock on the date of grant, but define fair market value by reference to the average of the high and low sale prices on the date in question. If Proposed Instruction 6 is adopted, issuers with plans that include such a definition might conclude that they were required to include an extra column in the Grants of All Other Equity Awards table if the average of the high and low sale prices on any grant date is less than the closing market price on such date. This is presumably not the type of disclosure that is intended to be captured by the requirement that an additional column be added when the exercise price of an option is less than the grant date fair value.

Instruction 2 to Outstanding Equity Awards at Fiscal Year-End Table

The Release includes a proposed new table, the Outstanding Equity Awards at Fiscal-Year End table, in which issuers would be required to disclose information regarding the outstanding equity awards held by named executive officers. In the body of the table itself, issuers would be required to include information relating to the number of shares subject to, and fiscal-year end value of, option, restricted stock and incentive plan awards. Instruction 2 to the proposed new table would require, in addition, that issuers disclose in a footnote the expiration date of options, SARs and similar instruments and the vesting date of restricted stock and similar instruments and incentive plan awards.

In many instances, an issuer's named executive officers hold a large number of distinct option, restricted stock and incentive plan awards. In such instances, the footnote contemplated by proposed Instruction 2 would be quite lengthy and a substantial administrative burden to prepare. More importantly, perhaps, the disclosure generated in response to Instruction 2 would be of limited value to investors and could, by virtue of its sheer length, overshadow other compensation-related disclosures that will be of greater interest. If the Commission continues to believe that mandating disclosure relating to expiration dates is advisable, requiring presentation of a weighted-average time to exercise or vesting figure for each of the three categories of awards covered by the table would seem to be preferable to requiring a potentially unwieldy list of the expiration or vesting dates of all outstanding awards.

Disclosure Regarding Matters Considered in Evaluating Director Independence

We support the Commission's proposal to consolidate the disclosure requirements regarding director independence and related corporate governance disclosure requirements under a single disclosure item. We believe, however, that the Commission should not adopt the proposed new requirement, which would be set forth in new Item 407(a)(3), that issuers describe any "transactions, relationships or arrangements not disclosed pursuant to Item 404(a) . . . that were considered by the board of directors under the applicable independence definitions in determining that the director is independent."

As the Commission is aware, the New York Stock Exchange, the Nasdaq Stock Market and the American Stock Exchange (the "SROs") have in recent years each adopted extensive requirements relating to director independence. Each of the SROs has adopted its own test for determining whether a director is independent. While the specifics of the independence tests imposed by the three SROs vary, they share the same general structure. No director is independent under any of the tests unless (i) the board of directors makes a determination that the director does not have a material relationship[1] with the relevant issuer and (ii) the director does not have any of a series of specific relationships identified in the rules of the relevant SRO.

In response to these new requirements, the in-house legal staff at many public companies have developed the practice of seeking information from individual directors regarding, and then reporting to the full Board on, a wide range of matters that could conceivably be relevant to the Board's required independence determinations. These reports often address topics, such as

[1] This is the subjective standard imposed by Section 303A.02(a) of the New York Stock Exchange Listed Company Manual. The respective subjective standards imposed by the Nasdaq Stock Market and the American Stock Exchange are worded differently but are similar in concept to that imposed by the New York Stock Exchange. Under the test imposed by Nasdaq, a director will not be independent if the director has a relationship "which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." See Section 4200(a)(15) of the Nasdaq Stock Market Marketplace Rules. Under the test imposed by the American Stock Exchange, a director cannot qualify as independent "unless the Board of Directors affirmatively determines that the director does not have a material relationship with the listed company that would interfere with the exercise of independent judgment." See Section 121(A) of the American Stock Exchange Company Guide.

(i) de minimis ordinary course business dealings between the issuer and entities with which the director is affiliated, (ii) situations in which non-employee directors have co-invested in entities unaffiliated with the issuer and (iii) personal relationships between directors or between the directors and the executive officers, that issuers have previously not been required to disclose. If proposed Item 407(a)(3) is adopted, issuers will be forced to choose between (i) limiting the information that is provided to their boards in connection with their independence determinations and (ii) disclosing information that is not otherwise required to be disclosed and is often of a personal nature. To the extent that they choose to limit the information that is provided to directors as they make their independence determinations, the quality of such determinations may be diminished.

Item 404, both in its current form and as proposed to be amended, imposes careful limits on the information that issuers are required to disclose regarding transactions involving their directors. The proposed amendment to Item 407(a)(3) should not be used as a means to obviate those limitations. If the Commission continues to believe that additional information regarding a board's independence determinations is advisable, proposed Item 407(a)(3) could be modified to make clear that issuers must disclose only the category of, and not specific details regarding, the information that was considered by the board in making its independence determinations.

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We appreciate the opportunity to comment on the Release and would be happy to discuss any questions that the Commission or its staff may have with respect to the contents of this letter. Questions may be directed to the undersigned at 312-853-7097.

Very truly yours,

/s/ John P. Kelsh

John P. Kelsh