ASSOCIATION OF CORPORATE COUNSEL
Corporate & Securities Law Committee
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

ASSOCIATION OF CORPORATE COUNSEL
Employment & Labor Law Committee
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

April 11, 2006

Via e-mail: rule-comment@sec.gov

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

Re: File Number S7-03-06: Proposed Amendments to Requirements for Executive Compensation and Related Party Disclosure

Dear Ms. Morris:

The Corporate & Securities Law Committee and the Employment & Labor Law Committee of the Association of Corporate Counsel ("ACC") are pleased to have this opportunity to provide comments on behalf of ACC with respect to the proposed amendments to the proxy statement executive compensation disclosure rules which the Securities and Exchange Commission (the "Commission") published in the Federal Register on February 8, 2006.

By way of background, we would like to note that ACC is the in-house counsel bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, ACC has grown to more than 18,000 members in more than 58 countries who represent 7,500 corporations, with 46 Chapters and 15 Committees serving the membership. Its members represent 49 of the Fortune 50 companies and 98 of the Fortune 100 companies. Internationally, its members represent 42 of the Global 50 and 74 of the Global 100 companies. The Corporate & Securities Law Committee is the largest of ACC's committees, with over 7,200 attorney members, many of who are employed by public companies that are subject to the Commission's disclosure requirements. The Employment & Labor Law Committee has 4,643 attorney members.

Introduction

We support the overall objective of the proposed disclosure rules in seeking to provide shareholders and potential investors with clear and comprehensive information concerning the compensation of executive officers. Many shareholder groups have justifiably expressed criticism and frustration with respect to certain perceived shortcomings in the current disclosure regime in effect under Item 402 of Regulation S-K and have demanded more transparent and comprehensive information concerning the various items that comprise an executive officer's compensation package as well as the overall value of that package in terms of both current and post-termination compensation. On behalf of ACC, we wish to commend the Commission for its efforts in formulating an enhanced disclosure regime designed to make more information available to shareholders and potential investors concerning the executive compensation process and the multiple components of the compensation packages provided to the named executive officers.

However, there are certain aspects of the proposed rules that ACC believes should be revised or eliminated in the final disclosure regime. The changes are recommended because, as proposed, the rules either (i) require the disclosure of extraneous or immaterial information or (ii) require that the information be reported in a manner that will lead to shareholder confusion and potential overstatement of the actual compensation provided to the executive officers. In addition, the Commission should take into consideration the administrative complexity that the proposed rules will entail for reporting companies. In the last several years, public companies have been required to devote substantial time, resources and expense to comply with an expanding environment of statutory and regulatory requirements, including the Sarbanes-Oxley Act of 2002, the compensation expense accounting standards of FAS 123(R) and the recent deferred compensation legislation under Section 409A of the Internal Revenue Code. In finalizing the new executive compensation disclosure rules, the Commission should strike a reasonable balance between the need to provide investors with more comprehensive information and the objective of furnishing that information in a focused and concise manner. This balance should be made without imposing additional administrative burdens upon companies whose resources are already strained in the current regulatory environment by requiring them to furnish immaterial and irrelevant disclosures.

We have set forth our comments below in accordance with the organizational structure of the proposed changes to Item 402 of Regulation S-K. We have limited our comments to that particular Item and have not included any comments with respect to the proposed changes to Items 201(d), 403, 404 of Regulation S-K or new Item 407 of the Regulation.

Item 402(a) – Officers Covered

Recommendation. We support the inclusion of the principal financial officer within the named executive officer group. However, we recommend that the current regulatory standard be retained regarding the determination of the named executive officers, i.e., that this determination continue to be made solely on the basis of salary and bonus.

Analysis. Due to the increased responsibilities of principal financial officers as a result of the certification requirements of the Sarbanes-Oxley Act in 2002, we agree that such officers, together with principal executive officers, should automatically be named executive officers for compensation disclosure purposes. However, in determining the composition of the remaining named executive officer group, we believe that the use of the various compensation components proposed to be included in the "total column" of the summary compensation table is not the appropriate vehicle for identifying which of the executive officers should be listed in the disclosures. There are simply too many items proposed to be included in the "total column" that either are not indicative of the actual compensation decisions made by the compensation committee or that are so prospective and contingent in nature that such inclusion could skew these determinations. Accordingly, we suggest that the determination of the other named executive officers be made solely on the basis of the salary and bonus columns of the summary compensation table.

In determining the other named executive officers, we think that inclusion of equity awards, which may or may not ultimately have a realized value and the potential value of which can and will change over time, could inadvertently skew the determination of which executive officer is listed in the table. In addition, we believe that our suggested approach will eliminate a number of compensation components that are influenced by events and factors over which the compensation committee has little control. For example:

- The "all other compensation" column includes the increase in the actuarial value of benefits accrued during the year under defined benefit and pension plans. The value of that particular compensation element is significantly impacted by the executive officer's age and may in certain instances result in an executive officer's inclusion in the summary compensation table simply because he or she is older than the other executive officers.

- The "all other compensation" column also includes earnings on non-qualified deferred compensation. The amount of those earnings may in many instances be attributable in large part to the voluntary deferrals of salary, bonus and other compensation made by an executive officer and his or her investment acumen in selecting the notional funds to measure the return on his or her deferred compensation account.

- Certain perquisites included in the "all other compensation" column may also be an inappropriate measure for identifying the company's highest paid executive officers. For example, relocation expenses, temporary housing allowances and related tax gross-ups paid to executive officers as part of a new hire package or in connection with a job reassignment may in a number of instances represent transitory additions to their compensation package that are not truly indicative of the actual on-going compensation level the compensation committee has targeted for them.

- There are also other items includible in the "all other compensation" column that are likely to skew the compensation payable to certain executive officers because of external factors or isolated events.

Item 402(b) – Compensation Discussion and Analysis

Recommendation. We recommend that the Compensation Discussion and Analysis should be treated as document furnished, and not filed with, the Commission and that the names of the members of the compensation committee should appear below the required disclosure. Such an approach would provide a uniform set of standards for both the Item 402(b) report and the audit committee report required under Item 306 of Regulation S-K.

Analysis. The Commission currently requires the compensation committee to disclose its compensation policies and practices with respect to the company's named executive officers through a report that appears over the names of the compensation committee members. Item 402 of Regulation S-K also requires a 5-year stock performance graph to be included in the company's proxy statement. Both the compensation committee report and 5-year stock performance graph are intended to show the relationship, if any, between compensation and corporate performance, as reflected by stock price. Under the current rules, the compensation committee report is considered "furnished" rather than "filed" with the Commission.

The Commission has proposed that both the compensation committee report and the 5-year stock performance graph be eliminated and replaced with a comprehensive Compensation Discussion and Analysis (the "CD&A"). Unlike the current compensation committee report, however, the CD&A would be considered part of the proxy statement, and thus soliciting material "filed" with the Commission. As a consequence, the CD&A would be subject to the disclosure requirements under Regulations 14A and 14C and to the liability provisions of Section 18 of the Securities Exchange Act of 1934, as amended. In addition, if the CD&A is included or incorporated by reference into a periodic report, the CD&A must contain certifications by the principal executive officer and principal financial officer as required under the Sarbanes-Oxley Act of 2002.

While we believe the items to be discussed in the CD&A will provide significant value to investors, treatment of the CD&A as soliciting material "filed" with the Commission puts the principal executive and financial officers in a potentially untenable position and threatens the independence of the compensation committee. To avoid this, we believe that the CD&A should continue to be considered "furnished" and should be signed by the members of the compensation committee, since the committee is responsible for most elements of compensation provided to the named executive officers.

Under current corporate governance best practices and the NYSE and NASDAQ rules, the compensation committee is charged with the responsibility for establishing the company's executive compensation policies and practices. Their deliberations and actions must be independent of company and management involvement and influence. For that reason, compensation committee meetings are closed sessions, and the principal executive officer and principal financial officer usually are not permitted to be present at the compensation committee meetings when their own compensation is being discussed. By treating the CD&A as "filed" with the Commission, the principal executive and financial officers would be required to certify decisions made outside of their presence. To be in a position to certify the CD&A, the principal executive and financial officers would have to be privy to the compensation committee's deliberations and actions. This could interfere with the committee's independence and is in direct contradiction of corporate governance best practices and the NYSE and NASDAQ rules. However, if the CD&A is required to appear over the names of the compensation committee members, those actually engaged in the decision making process would also be charged with the duty to disclose accurately the required information concerning the decisions and policies they have adopted. Accordingly, we recommend that the CD&A continue to be treated as "furnished" and that the names of the compensation committee members appear below the CD&A, just like the current compensation committee report.

While it is our recommendation that the CD&A be a report of the compensation committee, we do not believe that the compensation committee should be required to assume any responsibility for the accuracy of the actual numbers reflected in the summary compensation table and the other required compensation tables. The compensation committee sets the company's overall compensation policies and practices for the executive officers but is not involved in the day-to-day administration of those policies. The compensation committee simply has neither the means nor the resources to determine or verify the accuracy of the data contained in the compensation tables. Accordingly, the compensation committee's responsibility should extend only to the discussion of the compensation policies and practices applicable to the company's named executive officers, as those policies and practices are set forth in the CD&A. The responsibility for the accuracy of the amounts reported should remain with the company's management.

Our recommended approach would also result in uniform standards for both the CD&A and the audit committee report. Both reports would be over the names of the applicable committee members and would be treated as furnished, and not filed with the Commission.

Item 402(c) – Stock Awards and Equity Awards Columns
Item 402(h) – Option Exercises and Stock Vested Table

Recommendation. We recommend that only one valuation methodology be utilized for all stock and stock-based awards and that the appropriate methodology is the actual gain realized by the executive officers from those awards, and not the FAS 123(R) cost to the company. Such a consistent valuation approach would eliminate the need for the Option Exercises and Stock Vested Table

Analysis. We believe that the various disclosures proposed for equity compensation will create unnecessary confusion because of the inconsistent valuation methodologies utilized and will lead investors and shareholders to erroneous conclusions concerning the actual compensation provided to the named executive officers. This problem is compounded by the double-counting that permeates the proposed disclosure regime. Under the proposed rules, equity compensation would be reportable in the following five separate tables: the summary compensation table, the two supplemental equity award tables, the year-end outstanding equity award table, and the option exercise and stock vesting table.

In the summary compensation table, the equity awards are valued at their grant date fair value for FAS 123(R) purposes, whereas the year-end equity award and option exercise/stock vesting tables use the intrinsic value method, namely, the fair market value of the shares at the time of the gain realization event (option exercise or stock vesting) less the price (if any) paid or payable for those shares. We believe that the equity compensation disclosure rules would be substantially improved and less confusing if a single valuation methodology were applied consistently throughout the various compensation tables. Accordingly, we suggest that the following changes be made in order to provide shareholders and other investors with a less confusing and more realistic assessment of the equity compensation component.

1. Revise the Award Columns of the Summary Compensation Table. The stock awards and option awards columns in the summary compensation table should be revised to eliminate the FAS 123(R) valuation methodology and instead require the disclosure of the actual gain realized during the fiscal year from option exercises and stock vesting. The FAS 123(R) methodology is not the appropriate standard for quantifying the compensation actually delivered to the named executive officers. The FAS 123(R) fair value methodology is designed to measure the cost of the award to the company, and not the actual value realized by the executive officer from that award. Even though an option grant may have substantial FAS 123(R) cost to the company, unless the stock subject to that option increases over the strike price, the named executive officer will not derive any compensation element from that award. For restricted stock or restricted stock unit awards, the FAS 123(R) cost to the company may be substantially greater than the value of the stock at the time of vesting. The objective of the summary compensation should be the identification of the compensation earned by the named executive officers for the years in question. The amount that reasonably reflects the value of the compensation earned by the named executive officer, rather than the cost to the company of providing that compensation, should prevail as the more accurate measure. Moreover, our suggested approach would not result in any dilution to the quantity or quality of disclosure, since the two supplemental award tables to the summary compensation table provide comprehensive information to shareholders and potential investors with respect to current awards in a more meaningful and understandable format.

The proposed disclosure rules also overstate the compensation element by requiring the entire FAS 123(R) value to be reported, even though the award is subject to vesting and is to be amortized over the vesting period for financial accounting purposes. Accordingly, these two columns are certain to confuse shareholders because they fail to report accurately either the actual financial cost to the company for the year in which the award is made or the actual compensation that may eventually be realized by the named executive officer. The proposed rules are simply not in harmony with the fiscal-year reporting regime embodied in the summary compensation table and do not reflect the actual compensation provided to the named executive officer for each of the fiscal years reported.

2. **Eliminate the Option Exercises and Stock Vesting Table.** If the suggested change is made to the summary compensation table, there would be no need for this additional equity compensation table. Shareholder confusion would be avoided because of the inconsistent valuation methodologies and the double-counting attributable to that inconsistency would be eliminated. The same award should not be reported at full fair value on the grant date and then reported at its intrinsic value in subsequent years as that award vests or is exercised.

Accordingly, we believe that our suggested changes would effect the following improvements to the proposed disclosure rules governing equity compensation:

(i) The inconsistent valuation methodology introduced by FAS 123(R) would be eliminated, together with the mismatch between the FAS 123(R) expense actually reported in the company's income statement (based on the proper amortization of that cost) and the full FAS 123(R) grant date fair value reported in the summary compensation table. Instead, equity compensation would be reported on the basis of the intrinsic value actually delivered to the named executive officers. It is that intrinsic value which accurately quantifies the compensation realized by such officers from their equity awards.

(ii) The elimination of the Option Exercises and Stock Vested Table would reduce the potential double-counting of the same equity award. The Fiscal-Year End Table would remain, and its intrinsic value methodology would allow shareholders to aggregate the numbers reported in that table with the intrinsic value numbers reported in the award columns of the summary compensation table in accordance with our suggestion and thereby measure the true compensation element delivered by those awards.

(iii) Companies would be relieved of the administrative burden of having to track the grant date fair value of each award that is reported in the Option Exercises and Stock

Vested Table. In time, the various awards that would have to be aggregated in that table would require companies to assemble grant date valuation data from numerous years. That assembled data would be of little or no value to the shareholders, because the table does not require a precise matching of each option exercise or stock vesting with the specific grant date fair value of that award. The table imposes an undue administrative burden upon companies simply to atone for the double-counting that occurs by reason of the inconsistent valuation methodologies. In addition, there is little logic for offsetting the actual gains realized from the awards by the prior FAS 123(R) values reported for those awards in the summary compensation table. Intrinsic value and FAS 123(R) value are two completely different valuation methodologies and cannot be reasonably integrated to quantify the compensation attributable to the awards.

(iv) Disclosure in the summary compensation table of the actual value realized with respect to equity awards will also promote another major shareholder objective, namely, that compensation committees take into account the value derived from historical awards when designing current compensation programs. The summary compensation table itself would show a clear running tally from year to year of the wealth actually realized by the named executive officers from the equity awards, and that dollar value would be shown side-by-side with the other elements of current compensation reported in the summary compensation table and the two supplemental award tables. Shareholders and investors would thus be presented with a fair and accurate representation of the compensation actually realized by each named executive officer in each of the reported fiscal years.

(v) Columns (f), (g) and (h) would all be consistent in their approach to disclosure, since all three columns would report amounts that have actually been earned during the fiscal year. Under the proposed rules, columns (f) and (g) would report stock and option awards at the time of grant, whereas column (h) would report non-stock incentive compensation only when earned.

Alternatively, should the Commission decide to retain the proposed regime of dual valuation methodologies, then the proposed rules should be revised in the following respects:

A. The FAS 123(R) value reported in the Stock Awards and Option Awards columns of the summary compensation table should be limited to the portion of the grant date fair value that the company actually takes as an amortizable expense for the fiscal year reported. For those FAS 123(R) awards that result in capitalized costs, the company would be allowed for this purpose to make a reasonable estimate of the appropriate amortization period for reporting those costs in the summary compensation table. The suggested change would bring the disclosure in line with the annual reporting concept that permeates the summary compensation table and reduce the substantial overstatement of compensation attributable to equity awards that the proposed rules would otherwise yield.

B. Under the proposal, if an option or stock appreciation right is repriced or otherwise modified, the full value of the modified award must be included in the Summary

Compensation Table. Such an approach exhibits the overstatements and duplicate reporting problems inherent in the current proposal, since the award will first be reported at full fair value when granted and then will have to be reported at full fair value each time it is subsequently modified. The proposed disclosure in such a scenario is too inconsistent with the actual accounting treatment of the modification under FAS 123(R) to be sustainable and will unnecessarily confuse shareholders and potential investors and lead them to misunderstandings concerning the true economic value of the award. Accordingly, we recommend that only the incremental fair value of the modified award be included in the Summary Compensation Table so that a reasonable relationship is maintained between the reported financial cost of the modification and the value disclosed in the summary compensation table.

Should the Commission not agree that our recommendations would result in a more accurate and understandable presentation of the compensation derived from equity based awards, then we would like to make the Commission aware that we support, in the alternative, the approaches suggested by the Society of Corporate Secretaries and Governance Professionals beginning on page 6 of its April 6, 2006 comment letter on the proposed rules. That letter suggests the use of two separate compensation tables -- one covering aspects of pay earned during the year and a second covering grants and awards made during the year and outstanding grants and awards that are contingent on performance or vesting dates. The Society suggested, in the alternative to the two-table approach, two separate "total" columns in the summary compensation table--reflecting total compensation earned and total contingent compensation.

Item 402(c) – All Other Compensation Column: Perquisites

Recommendation. We recommend that the disclosure threshold for perquisites be increased to $25,000 in the aggregate and that individual perquisites with an incremental cost of less than $1,000 should neither be reportable nor taken into account in calculating the recommended $25,000 aggregate threshold. We also recommend that the Commission reconsider the standards it has proposed for distinguishing perquisites from standard business practices, since the Commission's approach is overly broad in its identification of potential perquisites.

Analysis. The proposal would require (as to each named executive officer and director):

- Disclosure of "perquisites and other personal benefits" if the aggregate amount of those benefits equals or exceeds $10,000 for the year in question.

- Once the $10,000 disclosure is attained, a footnote disclosure that (a) identifies each benefit and, if that particular benefit is valued at the greater of $25,000 or 10% of total perquisites and other personal benefits, (b) quantifies the value of that particular benefit.

- Disclosure of tax reimbursements (including "gross-ups") with respect to any compensation (not just perquisites) even if the underlying compensation is excluded from mandatory disclosure under the above rules.

- Where a benefit is to be valued, the reporting company is to do so using the "aggregate incremental cost" to the company (and its subsidiaries), although that valuation method does not necessarily track the income tax value ascribed to such benefit.

We believe that the general approach to perquisites reflected in the proposal is appropriate and agree that perquisites should not be deemed to include items "integrally and directly related to the performance of the executive's duties". However, we wish to comment on three distinct aspects of the proposed disclosure rules relating to perquisites and other personal benefits.

1*. *Determination of Disclosable Benefits. We are concerned that the inclusion in the perquisites category of any company-provided item that "confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company" is problematic and likely to include benefits that are provided predominantly to facilitate the efficient performance of the individual's duties rather than to confer a personal benefit upon that person.

We understand the difficulty in establishing a workable set of disclosure principles for this particular area and recognize that the Commission has found recent disclosure practice as to perquisites to be disappointing. However, in our view, the proposal goes too far in suggesting that <u>any</u> sort of "direct or indirect" personal benefit renders a company-provided benefit a disclosable perquisite. Consider the example in the proposal of "a reserved parking space that is close to business facilities but not otherwise preferential". While we would agree that such a benefit should not be viewed as a perquisite, we are concerned that the language suggests that a comparable benefit that is in any sense "preferential" should be viewed as a perquisite. Suppose, for example, that the parking made available to senior executives is covered (where other company-provided parking is not) or that the parking is available only to employees at a certain level in the company. Should those latter distinctions trigger a potentially disclosable benefit or one in which investors would have an interest? We believe that the answer is clearly in the negative. Accordingly, we recommend that the Commission give further consideration to the distinction between the two standards of "integrally and directly related to the performance of the executive's duties" (which standard is viewed as "narrow") and the seemingly over-broad "confer[ring] a direct or indirect benefit that has a personal aspect" (which would seem to subsume almost all benefits that have some personal and some business aspects).

We are cognizant of the difficulty involved in the identification process and agree that reporting companies should not be permitted to hide valuable benefits behind a characterization that they are "ordinary and necessary" business expenses. However, we are concerned that the proposed standard may lead to reporting and disclosure of all company-paid or provided benefits (<u>e.g.</u>, covered parking). The list of clearly excludable items (<u>i.e.</u>, travel to and from business meetings, other business travel, business entertainment, security during business travel, and itemized expense accounts the use of which is limited to business purposes) is so narrow and (we would submit) so bereft of personal elements as to be relatively unhelpful.

2. Disclosure Thresholds. We understand the Commission's frustration with the current disclosure thresholds (the lesser of $50,000 or 10% of total salary and bonus) but would suggest that the proposed $10,000 threshold reduces the analysis to a level of non-materiality. We would therefore suggest a threshold of $25,000 at a minimum and perhaps a $50,000 level for companies with a capitalization in excess of $1 billion. We would suggest that this expansion of the threshold is especially appropriate in light of the proposal's expansive view of the scope of disclosable "perquisites" (as discussed above). We would also suggest that this threshold dollar amount be indexed to inflation (comparable to the IRS method of addressing dollar limits).

The proposal would require that once the $10,000 threshold is reached, each perquisite must be separately identified and, for each specific perquisite with a value greater of $25,000 or 10% of the individual's total perquisites, separately quantified. We believe that the dollar differences in these two thresholds function as a reasonable compromise between the Commission's disclosure goals in this area and the administrative burden to reporting companies and believe that the proposal appropriately avoids valuation of de minimis benefits. However, we feel that this balanced approach is not reflected in the methodology proposed to determine whether the $10,000 threshold is met. In particular, we read the proposal to require each reporting company to value each non-excluded benefit separately and then sum up all such non-excluded benefits (regardless of amount) to determine whether the $10,000 threshold is met. As a practical matter, this methodology would require each reporting company to value every de minimis benefit provided to its executive officers, thus imposing a significant administrative burden on the company and undercutting the point of the $25,000/10% threshold relating to disclosure of the value of particular benefits.

We suggest that the same kind of de minimis approach to be used under the proposed rules in identifying the individual benefits to be separately quantified should also be applied to the determination of whether the various benefits provided the executive officer meet the $10,000 threshold calculation. In this context, we would propose that the de minimis amount be $1,000 per benefit (again, indexed to inflation in a manner comparable to IRS rules). A benefit valued at less than $1,000 is clearly not material and should not lead to abuse, and use of this de minimis rule will somewhat ameliorate the difficulties posed by lowering the general threshold to $10,000 and by the expansive view taken by the proposal as to what constitutes a non-excludable benefit. Accordingly, we recommend that reporting companies should not have any obligation to report separate and discrete personal benefits, provided the value of each such benefit is less than $1,000.

3. Valuation Methodology. Finally, we wish to express our agreement with the valuation methodology set forth in the proposal that would value perquisites at their incremental cost to the company rather than at their "retail" value. A "retail" methodology would be extremely burdensome to reporting companies, without resulting in commensurately improved disclosure. Certainly, a "retail" methodology would not reflect the true cost to the company of providing the benefit. For example, the cost to a company of providing a $100 cash bonus is $100 (disregarding the value of the tax deduction). The cost to the company of permitting personal use of an aircraft that is already owned or leased by the company is not the "retail price to charter the same model aircraft" but, instead, as contemplated by the "aggregate incremental cost" rule, the cost is the incremental cost to the company. It would be helpful though if the Commission would provide more guidance regarding how to calculate "aggregate incremental cost."

Item 402(f)(2) – Additional Highly Compensated Employees

Recommendation. We recommend that this proposed disclosure requirement be eliminated because it will yield little useful information to the investor community, while creating potential employee relations problems.

Analysis. In Proposed Item 402(f)(2), the Commission would require the disclosure of the total compensation and job description of up to three additional employees who are not executive officers of the company but who earn more than the highest paid executive officers. Although the Commission's rationale for including this requirement is to inform shareholders and investors about the use of corporate assets to compensate the most highly paid employees of a company, inclusion of such information will not accomplish this goal. In fact, such disclosure will likely yield little useful information to the investor community, create administrative burdens for employers and friction among the company's employees and negatively impact the competitive market for the employees. For the foregoing reasons, which we discuss below in greater detail, we recommend that this proposal be eliminated from the final amendments to Item 402.

First, disclosure of this information would likely be limited to certain classes of employees whose compensation is based on commissions or other performance incentives, such as salespeople, insurance agents, traders or investment bankers. In addition, some companies may have a difficult time tracking the compensation of those individuals, particularly if the business has a large number of employees with commission-based compensation or commission-based employees overseas.

Although information regarding the salary of the three most highly compensated employees might be interesting, disclosure of this information may provide little value to the company's shareholders and potential investors. In making this disclosure, companies would be required to disclose the individual's total compensation for the year, together with a description of his or her position. However, the proposal does not require disclosure of the individuals' names. Without such disclosure, shareholders and potential investors are not likely to find the information regarding an individual's total compensation useful, particularly if they cannot deduce the individual's identity from the required job description. In addition, because the class of employees likely to be listed under Proposed Item 402(f)(2) may not consist of upper-level management positions, their compensation will fall outside the purview of the board of directors or compensation committee. Their compensation may be driven by commissions and other performance incentives set by management and usually are not tied to objective company-wide measures such as sales and production levels that would be of importance to shareholders and potential investors.

In addition, disclosure of such compensation is likely to cause internal friction among the company's employees. Employee compensation is typically confidential between the employee and his or her employer, in part to avoid competition or rifts amongst individuals who believe their own compensation is inadequate in comparison to others within the organization. If companies are forced to disclose the total compensation of the three most highly compensated employees who earn amounts in excess of the highest paid executive officers, the morale of the other employees is likely to be negatively affected. This is especially true if employees, unlike the investor community, are able to deduce the identity of the individuals named in the disclosure.

Similarly, disclosure of this information could have broader implications for the company and the employees. The disclosure mandated by Proposed Item 402(f)(2) could negatively impact the competitive market for non-managerial employees paid on commission or incentive basis if employers decide to limit the compensation that may be awarded to such employees to avoid the necessity of disclosure. Also, competitors may use the compensation information as a recruiting tool to lure top salespeople away from smaller-sized employers where the identification of those salespeople is more likely to be discernable.

In sum, we recommend that Proposed Item 402(f)(2) not be adopted. Requiring the disclosure of the total compensation of up to three additional most highly compensated employees who earn more than the highest paid executive officers will render little useful information to the company's shareholders and investors, will likely create tension among the issuer's employees and could negatively affect the competitive market for the class of employees whose compensation are most likely to be disclosed under this proposed item. We therefore urge the Commission to exclude Proposed Item 402(f)(2) from the final executive compensation disclosure requirements.

Item 402(k) – Potential Payments upon Termination or Change in Control

Recommendation. We recommend that the required disclosure be limited to a narrative summary of the material terms governing such payments and that the tabular disclosure requirement should be eliminated because it involves too much speculation as to compensation levels, stock prices and potential change in control events or termination dates.

Analysis. We understand and appreciate the Commission's desire to provide investors with a more complete and transparent analysis of the compensation paid to the principal executive officers. However, we believe that the current proposal requiring both narrative and quantitative disclosure of post-employment payments will not achieve that desired goal. To the contrary, we believe that quantitative disclosure will result in almost complete double-counting of compensation set forth in the summary compensation and equity tables. Moreover, we believe that any such disclosure will be unhelpful at best and misleading at worst, because the underlying calculations will necessarily be based on speculative assumptions concerning, among other things, the timing of an expected severance or change in control, the valuation of the company at that time, any expected premium paid for the company, and future salary or bonus payments.

A typical severance agreement for an executive provides for severance pay based on a multiple of annual compensation, including base salary and target bonus, and for the acceleration of the vesting and/or payment of other forms of compensation. For instance, a severance or change in control agreement may provide that all stock options and restricted shares, as well as benefits under a supplemental retirement plan, will become immediately vested, and that any such benefits that are not otherwise immediately payable will be paid within 30 days of the termination date. A severance or change in control agreement may also provide for continued health coverage or other benefits and perquisites for a period of time.

Under the proposed amendments, each named executive officer's annual compensation and the value of equity awards will be set forth in the summary compensation table and the equity compensation tables. Such would be the case whether the dual valuation methodologies incorporated into the amendments or our suggested single intrinsic valuation methodology is utilized. Further disclosure of the same compensation and awards would double-count the executive's potential compensation and distort the value of a severance or change in control package. In particular, equity awards and supplemental retirement benefits could vest over time and become fully earned in advance of the executive's termination of employment or a change in control. In situations where the severance or change in control arrangement merely accelerates a future payment that is already vested, and discounts the payment to present value using reasonable actuarial assumptions, there is no material additional financial benefit being provided, or cost incurred by the issuer in connection with the severance or change in control.

As noted above, benefits payable solely upon severance or change in control are typically based on factors that change over time, such as salary and bonus levels, and stock price. Any historical data used in preparing a quantitative disclosure concerning such benefits would likely produce results substantially different than the payments that the company would have to make upon an actual future severance or change in control and would thus be misleading. Using future projected amounts would also present a substantial risk of misleading investors -- for example, valuing equity awards at a potential future severance or change in control would necessarily involve the company's making assumptions about future share prices, and in the case of a change in control, about the premium an acquiror might pay for the company’s shares. The speculation would be further exacerbated by calculations required for parachute tax gross-ups under Section 4999 of the Internal Revenue Code, since those calculations would have to be based on a series of hypothetical payments under hypothetical circumstances.

Accordingly, we believe that a narrative description of post-employment payments would provide shareholders with a sufficient understanding of the severance or change in control package. As long as the details of the package are sufficiently described, investors can make their own quantitative assessment of the impact of a future severance or change in control, using the information in the summary compensation table and the equity compensation tables along with whatever assumptions they consider appropriate regarding the potential timing of a future severance or change in control, expected changes in future salary or bonus levels, or expected stock price appreciation, and in the case of a change in control, the likelihood that particular executives will continue to be employed following the transaction.

We believe that the $100,000 threshold for disclosure for compensatory plans should remain. The proposed rules require disclosure of written and unwritten arrangements that provide for payments following, or in connection with, executives' resignation, severance, retirement or other termination. The $100,000 threshold is important to limit the number of arrangements disclosed to those that are actually material to shareholders. Disclosure of arrangements that provide for small payments or awards could require the issuer to spend substantial time and money preparing the disclosure, with little or no benefit to shareholders or potential investors. In fact, the additional disclosure would distract investors from focusing on material post-employment payments.

Effective Date

We note that the Commission has, to date, received a large volume of comment letters on the proposed disclosure rules, and those comments may lead to significant changes to the final rules. As a result, there is no certainty at present as to what the final disclosure rules will actually require with respect to executive compensation, and companies accordingly lack significant guidance at the moment as to the exact information that will need to be prepare and compiled to meet the requirements to the final rules. For that reason, we would suggest that the Commission consider an appropriate lead time in the range of 120 to 180 days before the relevant proxy seasons for the final rules to become effective in order to allow companies sufficient time to meet their obligations and provide accurate and comprehensive information concerning executive compensation. We propose that the rules become effective for those companies with a fiscal year ending December 15, 2006 or afterward (if adopted by September 30, 2006) or March

15, 2007 or afterward (if adopted by December 31, 2006). During the period between publication of the final rules and their extended effective dates, companies would be encouraged to comply with the new rules to the extent they have the capacity and compiled data to do so.

Conclusion

We thank the Commission again for the opportunity provided us to comment on the executive compensation disclosure proposals and we hope that this letter will be a useful contribution to the debate. We would be pleased to discuss at your convenience any questions you may have concerning our comments. Please call Luise Welby at (703) 903-3242 or James Baine at (870) 864-6485 should you have any questions or should you wish us to discuss any of our comments in more detail

Respectfully Submitted,

ASSOCIATION OF CORPORATE COUNSEL

By: Luise M. Welby
Chair, Corporate & Securities Law Committee

By: James Baine
Chair, Employment & Labor Law Committee

cc: Hon. Christopher Cox, Chairman of the Securities and Exchange Commission
Hon. Paul S. Atkins, Commissioner
Hon. Roel C. Campos, Commissioner
Hon. Cynthia A. Glassman, Commissioner
Hon. Annette L. Nazareth, Commissioner