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EXECUTIVE COMPENSATION

DISCLOSURE HANDBOOK

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UPDATED **2023**

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Executive Compensation Disclosure Handbook: A Practical Guide to the SEC'S Executive Compensation Disclosure Rules February 2023

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1.0 Introduction

Executive compensation disclosures in proxy statements and annual reports continue to garner attention and scrutiny by the Securities and Exchange Commission (SEC), shareholders and the public. This updated handbook provides an overview for public companies navigating the SEC's compensation disclosure rules, anticipated rulemaking mandated by the Dodd-Frank, Wall Street Reform and Consumer Protection Act ("Dodd-Frank") other regulatory requirements and the views of proxy advisory firms. This handbook also offers practical advice to help companies produce understandable disclosures that thoughtfully tell their stories about executive compensation.

See **Appendix A** to this handbook for a copy of the full text of the rules, as amended through February 14, 2023. See **Appendix B** for the Compliance and Disclosure Interpretations issued through February 10, 2023 in connection with these rules.

2.0 Compensation discussion and analysis

A key component of a company's executive compensation disclosure is the Compensation Discussion and Analysis (CD&A), which discusses the material information necessary to understand the objectives and policies of a company's compensation programs for its "named executive officers" (see Section 2.2 regarding the determination of named executive officers). The CD&A should explain and put into perspective the numbers in the compensation tables that follow it.

CD&A is Principles-Based Disclosure. The CD&A is required to address certain topics, but is a principles-based report, which means that each company must determine in light of its particular facts and circumstances what elements of the company's compensation policies and decisions are material to investors. The CD&A's overview of executive compensation is intended to be similar in scope to the Management's Discussion and Analysis (MD&A) section of an annual report that discusses a company's results of operations and financial condition. Like the MD&A, the CD&A must not use "boilerplate" language or simply repeat the information provided in the executive compensation tables and related narrative to the tables. The goal is to have meaningful and readable disclosure that is not legalistic.

Focus Must Be on Analysis. Companies should focus the CD&A on *analysis*, explaining *how* they arrived at the particular forms and levels of compensation that they chose to award and *why* they pay that compensation and made the compensation decisions they did (rather than simply describing *what* they decided or their process for making compensation decisions). Increasingly, shareholders want the CD&A to explain how the amounts and forms of executive compensation, including specific performance measures utilized in executive compensation programs, relate to a company's performance.

CD&A is *Company* Disclosure. The CD&A is company disclosure, *not* compensation committee disclosure, and is *filed,* not furnished. The general disclosure and liability provisions of the Securities Exchange Act of 1934 (Exchange Act) apply to the CD&A, and it is covered by the CEO and CFO certifications required under the Sarbanes-Oxley Act of 2002.

CD&A Must Discuss All Named Executive Officers. The CD&A must discuss the company's executive compensation policies and decisions applicable to all its named executive officers, as well as any material differences in compensation policies and decisions for any individual named executive officer. Executive officers for whom policies or decisions are materially similar can be grouped together. Where the policies or decisions for an individual named executive officer are materially different from the others (e.g., in the case of a principal executive officer), his or her compensation should be discussed separately.

May Need to Discuss Events That Occurred before or after the Subject Fiscal Year. The CD&A should discuss policies and decisions implemented in prior fiscal years as necessary to present a fair and complete understanding of the company's executive compensation policies and decisions for the fiscal year covered by the CD&A and the tabular compensation disclosure. The CD&A should likewise discuss policies and decisions adopted or implemented after fiscal year-end but before the company files the CD&A (such as the adoption or implementation of new or modified programs and policies or material increases in compensation levels).

Non-GAAP Financial Measures. The SEC disclosure rules provide that discussion in the CD&A regarding incentive plan target levels that are non-GAAP financial measures will not be subject to the SEC's non-GAAP disclosure rules (which, among other requirements, would require a GAAP reconciliation). The SEC Staff has stated that if non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any purpose other than disclosure of target levels that are non-GAAP financial measures, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the non-GAAP disclosure requirements of Item 10(e) of Regulation S-K. In these pay-related circumstances only, the SEC provided that it will not object if a company includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the SEC will not object if the company complies with the non-GAAP disclosure rules by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information.

2.1 Format and presentation

Most of the CD&A is typically included in a narrative format and should be written in easy to understand, plain-English. In addition to satisfying SEC requirements, the CD&A is an important tool used by companies to communicate with shareholders, especially in light of the requirement that companies provide shareholders with an advisory vote on executive compensation (See Section 7.1 below). In the years since the SEC originally required companies to include a CD&A, disclosure practices have significantly evolved. Below are some of the enhancements that companies are making to their CD&A discussions in order to make them more reader-friendly and useful for investors:

- **Executive Summary.** Many companies include an executive summary at the beginning of the CD&A. The summary can be used to provide a road-map of the CD&A, but the focus of executive summaries in recent years has typically been to summarize key compensation decisions and to highlight positive pay practices and the relationship between company performance and executive pay.

- **Simplifying and Shortening Disclosure**. In recent years, an increasing number of companies have revisited their approach to the CD&A with an eye toward applying the SEC's plain English principles of clear and concise disclosure. Providing investors with shorter and easier-to-read disclosure and avoiding unnecessary repetition help to improve transparency and promote investor understanding of the company's executive compensation policies and practices.
- **Charts and Graphs.** In the executive summary and throughout the CD&A companies have increasingly used a larger number of charts and other graphics to better illustrate the relationship between performance and pay, to describe the relationship among pay elements and the proportion of pay that is "at-risk" and to summarize and efficiently disclose elements of executive pay.
- **Best Pay Governance Practices**. Many companies use the CD&A to highlight positive aspects of the company's compensation program, including alignment with "best practices" and/or the absence of controversial pay policies such as multi-year bonus guarantees, excise tax gross-ups, single trigger change-in-control benefits and/or excessive executive perquisites. Often companies include this type of disclosure in the form of "what we do/what we don't do" checklists.
- **Realized/Realizable Pay**. In recent years, many companies have sought to demonstrate in the CD&A the link between pay and performance by comparing corporate performance to the pay actually realized or realizable by executive officers during the fiscal year, rather than the total compensation amount reported in the Summary Compensation Table. Dodd-Frank mandates that the SEC adopt disclosure rules requiring some version of this type of disclosure. On April 29, 2015, the SEC issued proposed rules requiring companies to disclose the link between companies' financial performance and executive compensation. The final rules have not yet been adopted. For more information on these forthcoming requirements, see Section 14.1 below.

2.2 Identification of named executive officers

Companies must disclose in the CD&A and related tables and narrative the compensation of their "named executive officers." Item 402(a) of Regulation S-K identifies the named executive officers as:

- **The CEO and CFO.** All individuals who served as the principal executive officer or the principal financial officer of the company *at any time* during the most recent fiscal year:
  - regardless of compensation level; and
  - regardless of whether they were serving as CEO or CFO on the last day of the most recent fiscal year.

- **The Three Most Highly Compensated Executives.** The three most highly compensated executive officers (other than the CEO and CFO):
  - who were serving as executive officers at the end of the last completed fiscal year; and
  - whose *total compensation* was $100,000 or more for the last completed fiscal year. For purposes of determining whether an individual is a named executive officer, total compensation includes all elements of compensation reportable in the Total column of the Summary Compensation Table, excluding any amount reportable in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table. For information on the amounts to be reported in these tales, see Section 3 below.
- **Up to Two Former Executives.** Up to two additional individuals who served as executive officers during any part of the last completed fiscal year but who were not serving as executive officers at the end of the last completed fiscal year, provided such individuals' *total compensation* for the year would have made the individual one of the three most highly compensated executives for the last completed fiscal year. If a former executive officer became a non-executive officer employee during the last completed fiscal year, the compensation the person earned during the entire fiscal year is considered when determining if the person is a named executive officer for that year. For purposes of determining whether a former executive officer qualifies as a named executive officer, total compensation includes all elements of compensation reportable in the Total column of the Summary Compensation Table, excluding any amount reportable in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table.

Definition of "Executive Officer." The SEC defines "executive officer" to include any president, vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function or any other person (including any employee of a subsidiary) who performs similar policy-making functions for the company. The definition is similar to the standard used under Section 16 of the Exchange Act, and accordingly the reference to "policy-making function" is not intended to include policy-making functions that are not significant.

Inclusion of Executive Officer(s) of Subsidiaries. It may be appropriate for a company to include as a named executive officer one or more officers or other employees of subsidiaries.

Compensation Related to Overseas Assignments May Be Excluded. In determining the named executive officers (other than the CEO and CFO), companies may generally exclude cash compensation relating to overseas assignments that is attributed primarily to such assignments. However, companies must include other compensation even if it was not part of a recurring arrangement and that was unlikely to continue.

Expect Year-to-Year Changes in Which Executive Officers are "Named". Since the determination of the three most highly compensated executive officers (other than the CEO and CFO) is based on total compensation (calculated as described above), the identity of the named executive officers (other than the CEO and CFO) may be affected in any given year by an unusual, one-time payment, such as the grant of a large stock option, a signing bonus or a severance payment. As a result of severance payments being included in the calculation of total compensation, companies also frequently may find that they are required to disclose compensation information for executive officers whose service terminated during the last completed fiscal year. It is not uncommon to have more than five named executive officers if a company has experienced changes in its executive team.

2.3 Required CD&A topics

The CD&A must answer the following questions about the company's compensation for its named executive officers.

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?
- How does each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?
- Did the company consider the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions? If so, to what extent? How did that consideration affect the company's executive compensation decisions and policies?

2.4 Additional CD&A topics

The SEC also provides a nonexclusive list of topics that a company should discuss in the CD&A if material and relevant to an understanding of its compensation policies and procedures for its named executive officers. The CD&A must be comprehensive and must discuss the compensation policies and practices that the company actually applies, even if they do not fall within one of the examples below.

- Policies for allocating between current and long-term compensation and, for long-term compensation, the basis for allocating compensation to each different form of award.

- Policies for allocating between cash and noncash compensation, and among different forms of noncash compensation.
- How the company determines when to grant awards, including equity-based compensation such as options.
- Specific items of corporate performance used to set compensation policies and make compensation decisions.
- How the company structures and implements specific forms of compensation to reflect company performance and/or individual performance.
- Whether the company can exercise discretion to pay compensation even if performance does not meet established performance goals or whether the company can otherwise reduce or increase the size of any award or payout—if so, the company must describe each particular exercise of this discretion and whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goal(s).
- How the company structures and implements specific forms of compensation to reflect a named executive officer's individual performance and/or individual contribution to these items of the company's performance, describing the elements of individual performance and/or contributions that are taken into account.
- The company's policies and decisions on adjusting or recovering awards or payments if the company restates or otherwise adjusts the relevant company performance measures in a manner that would reduce the size of an award or payment.
- Factors the company considers to increase or decrease compensation.
- How the company considers prior compensation in setting other elements of compensation (e.g., gains from prior stock or option awards).
- The company's basis for selecting particular events as triggering events under any contract, agreement, plan or arrangement that provides for payments at, following or in connection with a termination of the executive or a change in control of the company (e.g., the company's rationale for providing a single trigger for change-in-control payments).
- The effect of accounting and tax treatment on the company's compensation decisions.
- Any stock ownership guidelines, stating the amount and form of ownership required, and any policies regarding hedging the economic risk of such ownership.
- Whether the company engaged in any benchmarking of total compensation or any element of compensation, identifying the benchmark and, if applicable, its components, including component companies (discussed further below).

- The role the company's executive officers play in executive compensation decisions.

Compensation Consultants. In addition, if a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should consider discussing the role of that consultant in the CD&A. Although not required to be discussed within the CD&A by the applicable rules, many companies address compensation consultant independence together with the CD&A discussion of a compensation consultant's role. For more information on these requirements, see Section 6.2 below.

Benchmarking. The SEC has clarified that "benchmarking" generally means using compensation data about other companies as a reference point on which, either wholly or in part, to base, justify or provide a framework for a compensation decision (e.g., when a compensation committee intends to set total compensation at the median level of a comparator group). Benchmarking does not include a situation where a company reviews or considers a broad-based third-party survey for a more general purpose, such as to obtain a general understanding of current compensation practices (e.g., as a "market" check after determining compensation on some other basis). If a company is in fact benchmarking its executive compensation against a peer group or survey, the SEC requires companies to identify all of the companies in the peer group or survey. The disclosure must include the names of the individual companies and, with respect to peer groups, why the comparator companies were selected for inclusion in the peer group. In addition, when a company states that it ties specific elements of compensation to a benchmark goal (such as setting bonus at the 50th percentile), it must disclose where actual payments and awards fall within the targeted range and, if applicable, the reason for any compensation amounts that fall outside the targeted range. Considerations in the formation of a company's peer group should be addressed, and changes in a company's peer group from year to year should be discussed. In comment letters, the SEC Staff has also required quantification regarding peer groups (such as revenue and market capitalization information for the company and the peer group).

Disclosure of Performance Targets. Companies must disclose company and individual performance targets for incentive compensation and the actual achievement level against the targets if they are material elements of the company's compensation policies and decisions, unless the disclosure would result in competitive harm to the company. Since adoption of the rules, the SEC Staff has consistently focused on this disclosure requirement and to date has issued more comment letters to companies on this item of the executive compensation disclosure rules than any other. The SEC Staff also has clarified that although the general rules regarding disclosure of non-GAAP financial measures (Regulation G) do not apply to disclosure regarding performance-related target levels, a company must disclose how the target levels are calculated from its audited financial statements.

The following considerations apply regarding performance target disclosure:

- **Threshold Question is Materiality**. A company must first determine whether performance targets are a material element of the company's compensation policies and decisions. If performance targets are not material, then the company is not required to disclose them. Whether performance targets are material is a facts-and-circumstances test, which a company must evaluate in good faith. The SEC has indicated that the fact that a target was not met is not dispositive as to materiality but rather is only one factor to consider. For example, even if the performance target does not result in an actual payout, it still may be material if it plays an important role in how the company incentivizes its named executive officers.
- **Qualitative vs. Quantitative Performance Goals.** A company may distinguish between *qualitative/subjective* individual performance goals (e.g., effective leadership and communication) and *quantitative/objective* performance goals (e.g., specific revenue or earnings targets). A company is not required to provide quantitative targets for what are inherently subjective or qualitative assessments. However, shareholders often are skeptical of whether qualitative performance goals are rigorous and performance-oriented, so companies may enhance their disclosures around qualitative performance criteria to address such concerns.
- **Competitive Harm Exception.** If performance targets are material in the context of a company's executive compensation policies or decisions, companies are required to disclose those target levels or other performance factors or criteria unless they involve confidential information the disclosure of which could result in competitive harm to the company. This relief is not available if companies have publicly disclosed the target levels elsewhere. The SEC rarely accepts competitive harm arguments for corporate-level performance targets where the disclosure is being made after the fiscal year has ended and actual company results have been disclosed. The SEC also rarely accepts competitive harm arguments for corporate-level financial performance targets, such as earnings per share, earnings per share growth or revenue growth. Competitive harm arguments are more likely to be accepted in the context of performance targets tied to the results of an operating or business unit.
- **If Performance Goal Omitted, Must Discuss Likelihood of Achieving Goal.** If a company omits performance targets, the CD&A must discuss with meaningful specificity *how difficult* it will be for the executive, or *how likely* it will be for the company, to achieve the undisclosed target levels or other undisclosed factors or criteria. A company must provide support for this level-of-difficulty statement, and not just generally state that the targets are "challenging" or are "stretch goals" (for example, companies may discuss the correlation between past achievement and anticipated future achievement of the performance target).

In the context of the required shareholder advisory vote on executive compensation and continuing emphasis on pay-for-performance, companies often voluntarily disclose more than is required by the SEC disclosure rules. Many companies have expanded their disclosure of the performance metrics underlying their incentive programs to highlight the link between the performance metrics chosen and the company's business strategy.

Shareholder Outreach. In large part in response to the shareholder advisory vote on compensation requirement, companies have increased their direct outreach to significant shareholders regarding their executive compensation programs and policies. Increasingly, companies explicitly address their shareholder engagement efforts in the CD&A. Particularly in a year following a failed or lower shareholder advisory vote (e.g., less than 80% support), companies often illustrate their responsiveness by addressing specific concerns raised by shareholders during these engagement efforts and the specific actions taken in response to these concerns. These often take the form of "what we heard" / "what we did" graphics.

Forward-Looking Disclosures. As discussed above in Section 2.0, there are instances where disclosure of events occurring prior to, or following the end of, the applicable fiscal year is required by the SEC disclosure rules. Some companies voluntarily provide additional CD&A disclosure to describe changes to their compensation programs occurring after the end of the fiscal year where such disclosure is not otherwise required by SEC disclosure rules. Such discussion may focus on positive changes to the compensation programs and/or responses to performance in the most recent fiscal year.

2.5 The "New Normal" CD&A

By Heather Marshall & Brian Myers

It has been almost 15 years since the compensation, discussion and analysis (CD&A) was introduced and, in that time, we have seen a marked evolution in both the style and tone of the section. Initially, the narrative largely looked and read like the rest of the annual proxy statement—dense paragraphs drafted with a primary focus on compliance. This endured for the first few years after introduction despite concerns from shareholders and other readers about the legalese that often made the CD&A difficult to understand. Technical language was the tradeoff for real content that provided the story of pay and performance. As a result, readers frequently misunderstood the design and intentions of executive pay programs.

The Advent of Say on Pay. While the underlying legal requirements have remained relatively unchanged, the CD&A itself has undergone a welcome transformation in the past 15 years, driven in no small part by the implementation of say on pay in 2011. While the content continues to reflect "what" must be disclosed

under the rules, companies have focused more on "how" they disclose it, and to whom they are disclosing. This is apparent to most readers as soon as they open the proxy—the CD&A is more visually engaging and focused on strong and clear disclosure. But this isn't just a case of style over substance. Writers also have sought to make critical information easier to find and understand, with less jargon and greater explanation. This effort has offered shareholders and proxy advisors the ability to avoid misinterpretation of facts and circumstances as well as mitigate concerns, where present.

The catalyst for this evolution came as a byproduct of mandatory say on pay votes imposed on U.S. companies 10 years ago by the Dodd-Frank Wall Street Reform and Consumer Protection Act. It is easy—and fair—to point the finger to one specific area (proxy advisors), but CD&A improvements also have occurred as the say on pay environment has become the new normal. This focus on ongoing enhancement by companies has been driven by:

- The fear of standing out, in this case with an insufficient CD&A;
- Readability and navigability that enables the average reader to quickly find what they need and understand the theme of the discussion; and
- Pay for performance—and not just generically saying it, but demonstrating it.

The result has been the shift to a CD&A that is generally more direct, understandable and flexible, which means more companies are creating useful documents that thoughtfully tell their stories about executive pay. And that effectively fulfills the original goals for the CD&A: to improve the quality and usefulness of the information provided so readers can understand the intent and outcome of a company's executive pay program on an ongoing basis.

Overall, companies have sought to tell their compensation story before others tell it for them. They have focused on moving beyond the legal requirements and to tell their story in their own words, providing context and details that support an overarching theme.

Shareholder Engagement. While the CD&A has transformed immensely, say on pay has fostered more direct communication between public companies and their shareholders. This feedback mechanism has been guided by several intertwined drivers:

- A desire to avoid embarrassing public votes on executive pay or compensation committee members;
- Greater focus by institutional investors on key issues that influence their vote decisions and their willingness to proactively communicate these issues to portfolio companies;

- Proxy advisor voting guidelines that encourage evidence of engagement and responsiveness; and
- The resulting awareness of the role effective disclosure plays not only in the determination of investor voting policies, but in the engagement process between investors and their portfolio companies.

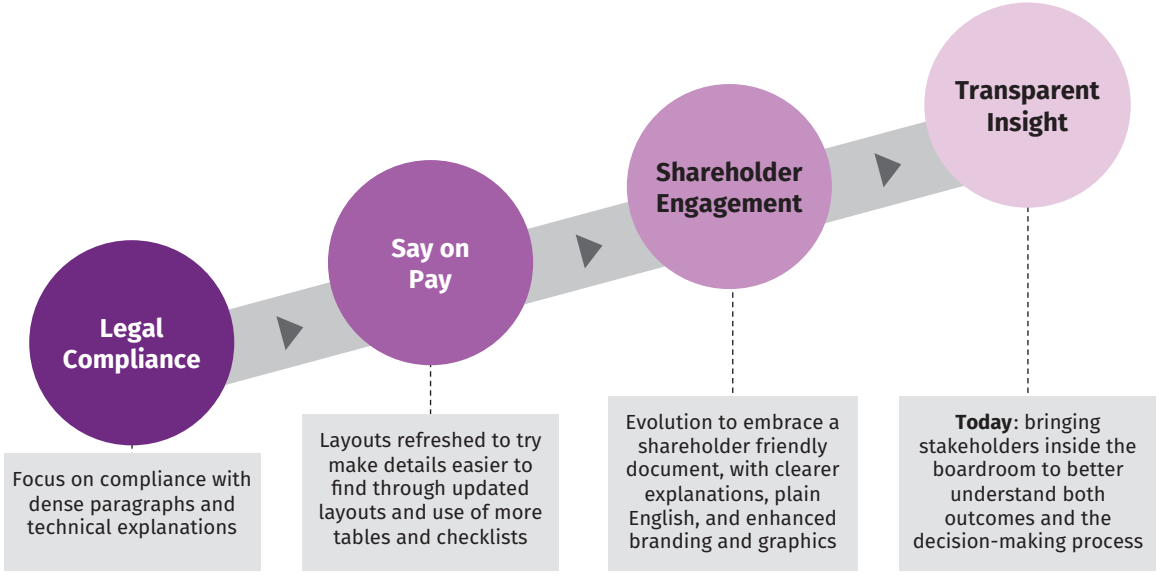
Interaction between shareholders and companies originally was carried out in reaction to low vote results in the years after the implementation of say on pay but has increased to a point where proactive engagement is now an ongoing event. This new normal has provided both internal and external drivers for further enhancements to the CD&A. These have included keeping up with the market, as companies observed peers reworking their CD&As, and increased pressure from the C-suite and Compensation Committee stemming from both what they were seeing elsewhere and the messages they heard from investors. This has driven changes throughout the proxy statement, perhaps with the most recent notable example being greater commentary on ESG-related matters and, as part of that, diversity and inclusion initiatives.

However, perhaps the most powerful driver of change has been company performance and how that aligns with pay outcomes. Looking at this dynamic is often a key factor in voting decisions by institutional shareholders and in vote recommendations issued by proxy advisors. It is in these times, when companies have a challenging performance backdrop and/or previously low say on pay outcome, that the mandate for changes to executive pay programs and the CD&A is set. This dynamic may once again step into the spotlight in 2021, with the impact of COVID-19 resulting in pay-performance misalignment or program modifications, which generally will require enhanced contextual information.

Transparent Insight. As we entered 2020, we were already observing another shift in the evolution of the CD&A among leading companies, building on the many positive changes that had come before. Shareholder engagement was providing companies with a regular feedback loop on their executive compensation programs, decisions and disclosures. Despite enhanced disclosure, it became increasingly apparent that confusion remained and spanned multiple areas, including how:

- Performance goals are set, which is a fundamental part of ensuring the alignment of pay and performance;
- Executive compensation programs align with a company's purpose and strategic priorities; and
- Decisions are made, such as the application of judgment and discretion in approving incentive payments (perhaps the most critical piece of information).

This has driven a mindset of bringing readers "inside the boardroom" to help them better understand the role the Committee plays in these areas, the thinking underpinning decisions, and the contextual backdrop against which decisions are made. Ultimately, this has resulted in a more holistic perspective in the CD&A.



Common Elements Observed in CD&As. While there's no single CD&A roadmap or checklist that companies follow, there are several disclosure tools that have become commonplace. These often are deemed to be best practices, although their relevance naturally varies by company.

Executive summary	• Highlight key themes and messages from the CD&A
	• Typically, 2-3 pages and include graphics to effectively summarize content
	• Generally covers:
	  • Performance highlights for the year;
	  • How those highlights translated into pay for the year—both outcomes and awards;
	  • An overview of any shareholder engagement that was undertaken during the year, with detail on the rationale and the outcome;
	  • Any material changes to compensation programs or policies during the year; and

	• Any other relevant and material events, such as executive turnover or one-time awards *The order of these items is influenced by each company's unique circumstances. For example, a company that had a low say on pay vote in the prior year might begin with a focus on engagement before moving on to changes and then outcomes. Alternatively, for a company with a good say on pay history, limited changes and a strong performance story will likely focus more on the first few points.*
Pay mix graphic	• Graphic summary of the target mix of pay for the CEO and named executive officers • Often highlights at-risk pay from fixed pay and performance-based variable pay from time-based variable pay *If a company has been criticized by investors for having an insufficient portion of the package based on performance, this provides an opportunity to address that concern by, for example, explaining the philosophical reason for why options are deemed to be performance-based.*

Shareholder engagement	• Report on discussions with shareholders as part of an annual or situational outreach
	• Often presented through the lens of "what was heard" and "what was done"
	• Disclosure typically also includes details on the number and coverage of shareholders engaged
	• Serves multiple purposes:
	  • Demonstrates a willingness to listen
	  • Demonstrates responsiveness when framing change
	  • Provides details to stakeholders that were not involved in the outreach, such as smaller investors and shareholders as well as proxy advisors
	  • Provides an opportunity to reinforce to a broader audience why atypical or less popular features are maintained even if some shareholders voice concerns
	  • Provides context for say on pay voting outcome

	This section can be used with great effect to reinforce areas that historically have been flagged as a concern when there is no change. Addressing those concerns head-on, rather than remaining silent, enables a company to set out its case for the chosen approach, hopefully providing the additional context or detail needed to gain the support of an uncertain investor.
Best practices list	• Succinct checklist that highlights various compensation and governance practices adopted or avoided by a company • Enables the reader to quickly confirm that the expected policies and procedures are followed rather than leaving them to search for the details in dense text
Pay for performance assessment	• Some form of graph or table that demonstrates the alignment of pay and performance over time • More variation in terms of how companies approach this disclosure • Often initially introduced when proxy advisor pay-for-performance assessments are expected to show misalignment, or if a company wishes to contextualize particularly high or low outcomes *The style of this disclosure will be heavily informed in the first instance by the presenting circumstances, but it generally focuses on the CEO and illustrates how some form of take-home pay (realized or realizable) aligns with performance over three or more years.*

Emerging Elements of CD&As. As we look forward, there are areas we expect to see become increasingly common and where many early companies have already made a move.

Compensation Committee letter	• Replacement to an executive summary • Covers much of the same content but in a more personable tone • Enables the content to change more fluidly from year-to-year to spotlight the Committee's focal areas or substantive decisions and changes *More typically we expect this to replace the executive summary if it is covering similar content to avoid duplication. However, some may use a letter to set the scene at the start of the CD&A or to address anything that is particularly relevant for the Committee (e.g., shareholder engagement).*

Alignment with compensation purpose / strategy	• Contextual information on a company's purpose and strategic priorities • Cascades into a description of the chosen performance metrics and, where relevant, incentive vehicles • Performance metrics to demonstrate alignment to the overarching focus of the company, often presented in the form of the "what" and why they matter *This section can be used to proactively address concerns regarding duplicative metrics across incentive plans, which is generally frowned upon. Often, the rationale for duplicative metrics ties back to a fundamental business focus, and this context and open explanation can help inform voting decisions.*
Goal setting	• Describes the processes around how goals are set • May list the various data points referenced in approving goals • Provides assurance around the rigor and thought that goes into incentive awards being made
Environmental, Social and Governance (ESG)	• A standalone section or theme woven into the CD&A (and potentially broader proxy) • Highlights aspects of the executive compensation program tied back to ESG priorities • Discusses feedback from shareholders related to ESG as part of any engagement *See below for expanded discussion on this topic*

The Advent of ESG. There has been increasing investor momentum and focus on ESG issues in recent years, and the inherent human capital impact of COVID-19 has only intensified that interest. In combination these factors are prompting many to reflect on if and how they should address ESG matters in their CD&A as they make changes to other aspects of their proxy statement.

To answer that question, it is helpful to put yourself in the shoes of an investor. What aspects of your ESG and human capital policies and practices are relevant from an executive compensation standpoint?

- **Providing Context:** ESG-related activities may provide additional context for pay design and/or compensation decisions. For example, discussing actions taken to protect employees in response to COVID-19 and ensure the safe continuation of operations may be relevant in assessing discretionary actions taken as it relates to executive pay.

- **Reflecting Accountability:** If the Compensation Committee has broader remit, it can be helpful and appropriate to include that in its annual processes overview.
- **Shareholders are Asking About It:** If the topic of ESG is coming up during shareholder engagement, it is worth noting that in a report-out on engagement topics, highlighting any particular connections with executive compensation.
- **An Incentive Plan Goal:** Perhaps most obvious, if an ESG-related metric is included in your incentive program, address it in both the section on incentives as well as in a strategic alignment section to spotlight why it is so important to the organization.

Practical Tips for Drafting Your CD&A. Following are some additional suggestions and guidelines for general CD&A drafting:

- Keep it relevant: It's easy to add content to a CD&A—with new requirements, regulations or guidelines come more drafting. However, it also is important to take a step back and ask what can be removed. Perhaps it is information that is no longer required or relevant for investors (e.g., legacy contracts that are redundant, old plans with no outstanding awards) or duplicative content that results from the order of information.
- Be succinct: Why use 20 words when five will do? Look at your CD&A and try to identify areas where you can reduce word count or remove repetition.
- Incorporate tables and infographics: Look for opportunities to present information in new ways. CD&As should be an appropriate balance of text, tables and graphs, tailored to the content you want to communicate and highlight. More forward-thinking CD&As strike the right balance, while those that lag are dense, text-heavy documents, or use tables and graphics excessively or ineffectively. If you have a text-heavy document, consider whether a dual column format helps make the content less daunting.
- Use plain English and keep things simple: Avoid using jargon or terms that don't translate outside your company, industry or specialty. Making use of a glossary to define unusual terms can be a helpful tool for balancing readability with length. Make the CD&A as accessible as possible by speaking in terms that demonstrate the simplicity of your arrangements and policies.
- Connect the dots: Frame program design and decisions within a broader context (to the extent it is relevant) as to how your business is run. At a minimum, contextualize executive pay decisions and outcomes against the overarching performance backdrop. For purpose-led companies, consider the role this plays in how you think about compensation and how executive compensation fits into the broader employee context.

Seize the Day. There is a lot to think about as you consider your next CD&A. And it can be overwhelming if you decide to completely overhaul your CD&A rather than make incremental changes. Remember the purpose of the CD&A and why a strong CD&A is important:

- A good CD&A can mitigate the risk of a negative say on pay outcome. A document that sets out the right information in a way that is easily found and understood is important for ensuring support from your investors.
- The CD&A is your opportunity to be proactive and own the message you want to present. Explain why you do what you do and address the relevant points, rather than risking someone else incorrectly filling in the blanks.
- It also is your opportunity to demonstrate a commitment to shareholders and a willingness to engage and respond to feedback.

When it comes to updating their CD&As, companies often are afraid of change. But staying the same should be the real fear. Change demonstrates that you are paying attention to the environment around you. And, as more companies embrace change, those who stand still will risk falling behind and looking out of touch.

But if there is one tip that tops the list it's this: Start early and assemble the right CD&A team, including at least one independent reviewer. People fear change for a reason—it's not easy. But if you leave things until it is too late or fail to involve the right stakeholders, you run the risk of reverting to the status quo. Change doesn't have to be painful, but it will take some time, thought and effort.

3.0 Executive compensation tables and related narrative disclosures

The compensation tables and related narrative disclosures required by Item 402 of Regulation S-K fall into three broad categories:

- **Current Compensation Earned**. Companies must disclose compensation earned by or awarded to the named executive officers during the most recently completed fiscal year and the preceding two fiscal years, as applicable, in the Summary Compensation Table and provide supplemental information on plan-based awards granted during the last completed fiscal year in the Grants of Plan-Based Awards Table, with accompanying narrative disclosure for both tables, under Item 402(c) through (e) of Regulation S-K.
- **Current Equity Holdings and Realizations on Equity Holdings**. Companies must disclose outstanding equity holdings as of fiscal year-end in the Outstanding Equity Awards at Fiscal Year-End Table and amounts realized under equity awards during the most recent fiscal year in the Option Exercises and Stock Vested Table under Item 402(f) through (g) of Regulation S-K.
- **Post-Employment Compensation**. Companies must disclose retirement and other post-employment compensation, including defined benefit pension plan benefits, in the Pension Benefits Table, non-qualified deferred compensation plans in the Nonqualified Deferred Compensation Table and must describe and quantify other post-employment plans and benefits, including payments relating to resignation, severance, retirement and change in control, under Item 402(h) through (j) of Regulation S-K.

See **Appendix A** to this handbook for copies of the tables required by the compensation rules. One or more columns in the required tables and entire tables (other than the Summary Compensation Table) may be omitted if there is no applicable information required for any of the named executive officers. Companies must specify the applicable fiscal year in the title to each required table that calls for disclosure as of or for a completed fiscal year. Note that SEC rules provide some relief for smaller reporting companies and emerging growth companies by limiting the disclosure required to be reported by such companies. See Section 11 for further information on the disclosure requirements applicable to such companies.

3.1 Summary compensation table

The Summary Compensation Table is the principal source of specific executive compensation disclosure, and the CD&A and other compensation tables are intended to explain and supplement the numbers

reported in the Summary Compensation Table. The Summary Compensation Table requires, to the extent applicable, information for each of the named executive officers under each of the column headings shown below.

Name and Principal Position	Year	Salary ($)	Bonus ($)	Stock Awards ($)	Option Awards ($)	Non-Equity Incentive Plan Compensation ($)	Change in Pension Value and Nonqualified Deferred Compensation Earnings ($)	All Other Compensation ($)	Total ($)

Three Years of Compensation Information Required. Companies must disclose information for each of the last three completed fiscal years, with the following exceptions:

- **Newly Appointed Executive Officer**. If an individual became a named executive officer for the first time during the last completed fiscal year, information is required only for that year and not for either of the prior two fiscal years during which the individual was not a named executive officer. However, if an executive officer was a named executive officer during the last completed fiscal year and was also a named executive officer two years prior, compensation information for the executive officer must be disclosed for all three fiscal years, even though the individual was not a named executive officer during the intervening year.
- **Newly Reporting Companies**. A company may exclude information for fiscal years prior to the last completed fiscal year if the company was not an Exchange Act Section 13(a) or (15)(d) reporting company at any time during that year, unless the information was required to be disclosed in a prior SEC filing.
- **Emerging Growth & Smaller Reporting Companies**. As discussed in Section 10, emerging growth companies and smaller reporting companies need only provide information for the last two completed fiscal years.

All Compensation Earned by Named Executive Officers Must Be Included. A company must include *all* compensation earned or awarded to a named executive officer for services to the company during the last completed fiscal year without regard to whether that compensation is paid directly by the company or a third party, for example by a parent or subsidiary company. In addition, even compensation that is excluded for purposes of determining whether an individual qualifies as a named executive officer for a given fiscal year because such compensation relates predominantly to an overseas assignment must

nevertheless be reported in the Summary Compensation Table if it is determined that such individual does qualify as a named executive officer.

- **Service for a Partial Fiscal Year.** If a named executive officer (including the CEO and CFO) served as an executive officer for only a portion of the last completed fiscal year, *all* compensation earned by the named executive officer for that fiscal year for services to the company in any capacity must be disclosed. For example, if an individual qualifies as a named executive officer due to a promotion during the last completed fiscal year, compensation earned during that fiscal year prior to the promotion must be disclosed. Amounts earned for service during a portion of a fiscal year should not be annualized (e.g., for a newly hired CEO or those executive officers who terminated during the year).

After a Merger, May Exclude "Predecessor" Compensation. Because the SEC does not consider the resulting company in a merger as a successor for compensation purposes, after a merger, the resulting or successor company should exclude all compensation earned by an executive officer for service with the predecessor company that disappeared in the merger for disclosure purposes and when calculating total compensation for purposes of determining the identity of the successor company's named executive officers. Similarly, a parent corporation may exclude compensation paid by a subsidiary entity before that entity became a subsidiary (i.e., when it was a target). A different result may apply in situations involving an amalgamation or combination of companies.

All Deferred Compensation Must Be Included. A company must include in the appropriate column of the table *all* compensation earned by the named executive officer for services to the company during the last completed fiscal year, regardless of whether payment of such amounts was deferred. Because the aggregate amounts deferred may also be disclosed in the Nonqualified Deferred Compensation Table (described below), to avoid double counting, companies must disclose by footnote to the Nonqualified Deferred Compensation Table any amounts also reported in the Summary Compensation Table.

Summary Compensation Table Must Report Value of Compensatory Related Person Transactions. The value of all transactions between the company and a third party where the primary purpose is to compensate a named executive officer for service to the company must be disclosed, even if the transaction also qualifies as a related person transaction. See Section 10 for additional information on the related person transaction disclosure rules.

All Compensation Must Be Reported in U.S. Dollars. Compensation amounts must be reported in U.S. dollars, rounded to the nearest whole dollar. Any compensation paid in a non-U.S. currency must be

identified in a footnote to the applicable column that identifies the currency and describes the rate and methodology used to convert the amount to U.S. dollars.

3.1.1 Salary and Bonus Columns. Companies must disclose in the Salary and Bonus columns the dollar value of base salary and bonus (cash and noncash) earned by the named executive officers during the applicable fiscal years.

- **Salary.** While not expressly defined in Item 402, "salary" may include items such as sales commissions, accrued but unused vacation time and any director fees paid to a named executive officer. Director fees paid to a named executive officer may also be reportable in the All Other Compensation column but in either case, a footnote must accompany such disclosure identifying and itemizing such director compensation and amounts.
- **Bonuses.** Companies must report in the Bonus column the value of cash-based guaranteed or discretionary bonuses, retention bonuses, hiring bonuses and relocation bonuses that are not based on pre-established performance criteria. Bonus amounts are disclosed for the fiscal year *earned*, not paid. For example, a retention bonus payable upon service through the end of the fiscal year is reportable for that fiscal year, even if actually paid by the company in the following fiscal year. Cash amounts earned under a "non-equity incentive plan" are not reported in the Bonus column but under the Non-Equity Incentive Plan Compensation column when earned.
  - **When is a "Bonus" a Non-Equity Incentive Plan Award?** An award is generally not a "bonus" for purposes of the Summary Compensation Table if the award is intended to serve as incentive for performance to occur over a specified period of any duration, even less than a year, and (1) the outcome of a performance target upon which payment of the award is conditioned is substantially uncertain at the time the target is established and (2) the target is communicated to the executive. A non-equity incentive award is reported in the Non-Equity Incentive Plan Compensation column of the Summary Compensation Table when and to the extent earned, and not in the Bonus column. However, if the company, in its discretion, pays an amount in excess of the amount earned for achievement of the performance measures established for the non-equity incentive compensation, the company should report the value of the excess amount in the Bonus column.
- **If Noncash Compensation is Received in Lieu of Salary or Bonus, Generally Must Report as Salary or Bonus.** Subject to the exceptions described below, any salary or bonus that the named executive officer elects to receive in the form of stock or stock-based or other forms of noncash compensation generally must be disclosed in the appropriate column of the Summary Compensation Table (e.g., in the Salary or Bonus column). In addition, companies must footnote the applicable Salary or Bonus column to disclose the receipt of any forms of noncash

compensation and, if applicable, that the award is also reported in the Grants of Plan-Based Awards Table. Two exceptions apply:

- **Noncash Compensation Subject to FASB ASC Topic 718.** If the noncash compensation is within the scope of the accounting rules for stock-based compensation, FASB ASC Topic 718 (e.g., pursuant to an agreement whereby the named executive officer can elect settlement in stock or equity-based compensation within the scope of FASB ASC Topic 718), then the company must report the award as a stock award or option award, as applicable, instead of including the value in the Salary or Bonus column. The company should also report the awards, as applicable, in the Grants of Plan-Based Awards Table, Outstanding Equity Awards at Fiscal Year-End Table and Option Exercises and Stock Vested Table and explain in a footnote to the applicable tables that the named executive officer received the award in lieu of salary or bonus.
- **Noncash Compensation Not Subject to FASB ASC Topic 718 That Exceeds Value of Salary or Bonus Foregone.** If the noncash compensation received in lieu of salary or bonus is not within the scope of FASB ASC Topic 718, but its value exceeds the value of the amount of salary or bonus foregone, the company must report the incremental value in the appropriate column of the Summary Compensation Table (e.g., Stock Awards or Option Awards column), based on the grant date fair value of such award and provide footnote disclosure about the circumstances of the award. If the value of the stock, equity-based or other form of noncash compensation is the same as the amount of salary or bonus foregone at the election of the named executive officer, the amounts are reported only in the Salary or Bonus column. The company should also report the award, as applicable, in the Grants of Plan-Based Awards Table, Outstanding Equity Awards at Fiscal Year-End Table and Option Exercises and Stock Vested Table and explain in a footnote to the applicable tables that the named executive officer received the award in lieu of salary or bonus.

- **Bonus Clawback.** If, during the last completed fiscal year, a company recovers all or a portion of a bonus or incentive compensation that was paid to a named executive officer during a year included in the table that precedes the last completed fiscal year, the Summary Compensation Table should adjust the Bonus or Non-Equity Incentive Compensation amount previously reported for that fiscal year to reflect the "clawback" with footnote disclosure of the amount recovered. The CD&A should discuss the reasons for the "clawback" and how the amount recovered was determined if necessary to understand the company's compensation policies and decisions regarding the named executive officers.
- **Generally No Disclosure Required if Discretionary Bonus Declined Before Granted.** No disclosure is required if an executive officer declines a discretionary bonus before it is granted (e.g., if the

executive officer advises the company that she will not accept an award before the board of directors takes action to approve the bonus).

- **Report on Form 8-K Any Salary or Bonus Amounts That Cannot Be Timely Determined.** In the rare situation where a company cannot determine the amount of salary or bonus earned in the last completed fiscal year before it files the proxy statement or annual report that includes executive compensation disclosure, the company must disclose in a footnote to the applicable column(s) that the amount of salary or bonus is not yet calculable and the date on which it is expected to be calculated. When the amount is calculable, the company must disclose on Form 8-K both the amount *and* a new total compensation figure that includes the amount.

3.1.2 Stock Awards and Option Awards Columns. Companies must report the aggregate grant date fair value of all stock awards and option awards granted during the reported fiscal year, computed in accordance with FASB ASC Topic 718, excluding the effect of estimated forfeitures and without regard to the rules on when such expense is recognized.

- **What Are Stock Awards?** "Stock awards" are equity awards whose value is derived from the company's equity securities or that may be settled by issuance of the company's equity securities and are within the scope of FASB ASC Topic 718. Restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units and other similar instruments that do not have option-like features are all stock awards.
- **Option Awards Include Stock Appreciation Rights.** "Option awards" are other equity awards that are similarly within the scope of FASB ASC Topic 718. Option awards include stock options, stock appreciation rights (whether granted in tandem with a stock option or freestanding and whether they can be settled in stock or cash, either at the election of the company or a named executive officer) and other similar instruments with option-like features.
- **Stock Awards and Option Awards Include Parent or Subsidiary Stock.** A company should report awards of stock of a parent or subsidiary company and options or other rights to purchase stock of a parent or subsidiary company that are awarded to the company's named executive officers for services to the company in the same manner as the company would report such awards if they related to the company's own shares, rather than shares of its parent or subsidiary company.
- **When to Include Value of an Award?** Amounts for stock awards and option awards are reported for the year of grant (even if granted as compensation for services rendered prior to the fiscal year in which the actual grant occurs). In contrast, awards in the Non-Equity Incentive Plan Compensation column are reported for the year earned, even if paid in a subsequent year.

- **How to Report Awards With a Performance Condition?** Equity awards subject to performance conditions are reported based on the probable outcome of the performance condition (typically the "target" award value) as of the award's grant date. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. Companies must disclose in a footnote to the table the aggregate grant date fair value for the award, assuming the highest level of achievement under the award if this amount is greater than that reported in the table.
  - **Performance Condition.** A performance condition is a condition affecting the vesting, exercisability, exercise price or other pertinent factors used in determining the grant date fair value of an award that relates to both:
    - the executive rendering services for an explicitly or implicitly specified period of time; and
    - achieving a specified performance target that is defined solely by reference to the company's own operations or activities or those of another company or group of companies (e.g., attaining a specified growth rate in return on assets or a specified relative total shareholder return vis-à-vis a specified peer group, obtaining regulatory approval to market a specified product, selling shares in an initial public offering or other financial event or attaining a growth rate in earnings per share that exceeds the average growth rate in earnings per share of other entities in the same industry).
- **Disclose FASB ASC Topic 718 Valuation Assumptions.** Companies must disclose in a footnote to the applicable column the valuation assumptions used for the grant date fair value computation. Companies may do so by cross-reference to the discussion of the relevant valuation assumptions in their financial statements, footnotes to the financial statements or MD&A (or by a hyperlink if the proxy materials are made available on the Internet). A company may also provide the assumption information for the last completed fiscal year by reference to the Grants of Plan-Based Awards Table if the company reports the information in that table.
- **Disclose Equity Awards Even if Forfeited During the Year of Grant.** Companies must disclose the grant date fair value of all equity awards granted during the last completed fiscal year, even if they are subsequently forfeited during that same year. In this instance, companies typically include a footnote explaining that the award was forfeited and the listed value will not be realized by the applicable executive.
- **Special Rules Govern Reporting of Equity Incentive Plan Awards Where Compensation Committee Retains Negative Discretion to Reduce Awards.** Generally, equity incentive plan awards are reported in the year of grant, even if the compensation committee retains negative

discretion to reduce awards. However, special rules may govern the deemed year of grant in certain circumstances.

- **Disclose Incremental Expense of Option Awards Repriced or Equity Awards Materially Modified During Fiscal Year.** If the company repriced any options or stock appreciation rights or materially modified any equity awards held by a named executive officer during the last completed fiscal year, the company must disclose any incremental increase in fair value (i.e., the difference between the value immediately prior to and immediately after the repricing or material modification) calculated as of the repricing or modification date in accordance with FASB ASC Topic 718 with respect to the repriced or modified award. If an award is modified in the year of grant, companies report both the original grant date fair value and the incremental fair value resulting from the modification in the appropriate equity award column of the Summary Compensation Table (and both values are counted for purposes of identifying the named executive officers for a given year). Footnote disclosure can be helpful to explain the inclusion of both values to shareholders.
- **Value of Earnings on Stock Awards and Option Awards Generally Not Reportable.** The value of earnings on equity awards (e.g., dividends or dividend equivalents) will generally not need to be reported, because the value of the earnings is already reflected in the calculation of the grant date fair value of the award. However, if a company paid dividends or other earnings on awards that did not take into account the assumed effective dividend rate in the awards' initial grant date fair value calculation, then the company must include the value of those earnings in the All Other Compensation column.

3.1.3 Non-Equity Incentive Plan Compensation Column. Companies must report in the Non-Equity Incentive Plan Compensation column the dollar value of all amounts earned during the applicable fiscal year under non-equity incentive plans. Non-equity incentive plans are incentive plans that are not covered by FASB ASC Topic 718 for financial reporting purposes (e.g., cash-based plans). Incentive plans are generally defined as plans, contracts, authorizations or arrangements, even if not set in a formal document, providing compensation intended to serve as incentive for performance to occur over a specified period, and are contrasted with amounts reported in the "Bonus" column.

- **Report Amounts Only When *Earned*.** Unlike stock awards and option awards, which are reported in the year granted, a company reports non-equity incentive plan awards *only* for the fiscal year when the specified performance criteria under the plan are satisfied and the compensation is earned. If a relevant performance measure is satisfied during a fiscal year (including during a single year in a plan with a multi-year performance period), companies must disclose the amount earned as compensation for that year, even if not payable until a later date (but then companies

are not required to subsequently report the actual payment). The SEC justifies the inconsistency between the treatment of equity and non-equity awards (disclosure in the year of grant as opposed to disclosure in the year earned) on its view that there is no clearly required or accepted method (like FASB ASC Topic 718) for establishing a grant date fair value for non-equity based incentive awards that reflects the performance contingencies.

- **Report Amount of Declined Award.** If a non-equity incentive plan award is granted but payment of the award is declined by an executive officer, companies must disclose the amount earned pursuant to the award, even though declined, in the Non-Equity Incentive Plan Compensation column (and should include the amount in the Total column for purposes of determining whether the individual is a named executive officer). Companies should disclose the executive officer's decision to decline payment of the award, either by adding a column to the Summary Compensation Table next to the Non-Equity Incentive Plan Compensation column that reports the amount of non-equity incentive plan compensation declined, or by providing footnote disclosure to the Summary Compensation Table. Moreover, in the CD&A, companies should consider discussing the effect, if any, of the executive officer's decision on how the company structures and implements compensation to reflect performance.
- **Exercise of Discretion in Determining Non-Equity Incentive Plan Amounts.** If, in the exercise of negative discretion, a company pays an amount less than that earned by meeting the performance measure in the non-equity incentive plan, such amounts generally are still reportable in the Non-Equity Incentive Plan Compensation column. If, in the exercise of discretion, a company pays an amount over and above the amount earned by meeting the performance measure, the excess amount should be reported in the Bonus column. To the extent material, companies should discuss in the CD&A the basis for the use of discretion in determining amounts payable under a non-equity incentive plan. Where a company has exercised positive discretion to pay an amount over and above the amount earned under an applicable performance measure, investors and proxy advisory firms will likely expect disclosure in the CD&A clearly explaining the company's business rationale and how the decision aligns with shareholder interests.

- **Reporting an Annual Incentive Plan Award With an Embedded Stock Settlement Feature.** If an incentive plan by its terms allows executive officers to elect payment of an annual incentive award in either equity or cash, companies report the payouts as follows:
  - Companies report payments settled in shares in the Stock Awards column of the Summary Compensation Table (and also as an equity incentive plan award in the Grants of Plan-Based Awards Table) (even if the amount of the award is not determined until the next fiscal year).
  - Companies report cash payments in the Non-Equity Incentive Plan Compensation column of the Summary Compensation Table (and also as a non-equity incentive plan award in the Grants of Plan-Based Awards Table).
- **Reporting an Annual Incentive Plan Award Settled in Stock With No Embedded Stock Settlement Feature.** If no right to stock settlement is embedded in the terms of an annual incentive plan award, the award is not within the scope of FASB ASC Topic 718 and, therefore, is a non-equity incentive plan award. Companies report any payments settled in shares in the Non-Equity Incentive Plan Compensation column of the Summary Compensation Table, with footnote disclosure of the stock settlement. Companies also report the award as a non-equity incentive plan award in the Grants of Plan-Based Awards Table. Companies do not report any stock received upon settlement of the annual incentive plan award in the Grants of Plan-Based Awards Table since that would double count the award.
- **No Exception for Delayed Payment.** Once the performance criteria are satisfied, a company must report the award even if the award is subject to forfeiture conditions (such as a continued service requirement) that could delay or prevent payment. The company may discuss any forfeiture conditions in the related narrative disclosure.
- **Disclose *Grants* in Grants of Plan-Based Awards Table.** Even though non-equity incentive plan awards are reported in the Summary Compensation Table only when earned, the grant of a non-equity incentive plan award must be disclosed in the Grants of Plan-Based Awards Table in the year of grant. See Section 3.2.
- **Include All Earnings on Outstanding Awards.** Companies must report in the Non-Equity Incentive Plan Compensation column all earnings with respect to outstanding non-equity incentive plan awards and quantify these amounts in a footnote, regardless of when the earnings are actually paid.

3.1.4 Change in Pension Value and Nonqualified Deferred Compensation Earnings Column. A company must disclose in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column an amount equal to the sum of:

- the change in pension value under the company's pension plans; and
- the value of any above-market or preferential earnings under the company's nonqualified deferred compensation plans.

The company must separately identify and quantify each component, as applicable, in a footnote.

- **Change in Pension Value.** Change in pension value reflects the aggregate annual change in the actuarial present value of accumulated pension benefits under all of the company's defined benefit and actuarial plans. These plans include nonqualified and tax-qualified defined benefit plans, cash balance plans and supplemental executive retirement plans. The change in pension value does not include changes under any of the company's defined contribution plans, such as 401(k) plans.
  - **No Negative Amounts.** Where a named executive officer participates in more than one pension plan, a company may subtract negative values from decreases in value of one or more plans in calculating the aggregate change in actuarial present value of the named executive officer's accumulated pension benefit. However, a company may not report a negative amount (i.e., less than zero) for the aggregate change in pension value reported in the Summary Compensation Table, but must disclose any negative amount in a footnote to the Change in Pension Value and Nonqualified Deferred Compensation Earnings column.
  - **Compute Change in Value Using Financial Statement Assumptions.** A company computes the aggregate annual change in pension value using the same assumptions and measurement periods that it used for its audited financial statements for the applicable fiscal year. Basically, the annual change equals the difference between the accumulated benefit amount disclosed in the Pension Benefits Table (discussed below) for the subject fiscal year and the accumulated benefit amount that was or would have been disclosed for the prior fiscal year.
  - **Include Value of Any Distributions.** If a named executive officer received a distribution, in-service or otherwise, under any company pension plan during the fiscal year, the company should include the value of the distribution in determining any increase in pension value.
- **Earnings on Nonqualified Deferred Compensation.** Amounts reported include only above-market or preferential earnings under any of the company's nonqualified deferred compensation plans during the most recent fiscal year, including under nonqualified defined contribution plans. Interest on deferred compensation is above-market only if the rate of interest exceeds 120% of

the applicable federal long-term rate, with compounding (as per Section 1274(d) of the Internal Revenue Code) at the rate that corresponds most closely to the rate under the company's plan at the time the interest rate or formula is set (or reset, should the rate be reset). Dividends or dividend equivalents on deferred compensation denominated in company stock are preferential only if earned at a rate higher than dividends on the company's common stock. Earnings tied to changes in the value of publicly traded investment funds are not treated as above-market. Only the above-market or preferential portion of the earnings must be disclosed. A company may disclose its criteria for determining above-market or preferential earnings in a footnote or as part of the narrative disclosure.

3.1.5 All Other Compensation Column. A company must use the All Other Compensation column to disclose the aggregate amount of all compensation that the company could not properly report in any other column of the Summary Compensation Table (with a limited exception for certain perquisites), reflecting the SEC's requirement that *all* compensation earned by the named executive officers must be disclosed in the Summary Compensation Table.

- **Companies Must Identify and Quantify in a Footnote Each Element of All Other Compensation That Exceeds $10,000 in Value.** Except for certain perquisites, companies must include in the All Other Compensation column the aggregate value of all elements of All Other Compensation, regardless of amount, and must identify and quantify in a footnote to the column the value of any item that exceeds $10,000 (in a manner that identifies the particular nature of the benefit received). The footnote requirement only applies to compensation for the most recently completed fiscal year. Special rules apply to perquisites and other personal benefits (described below).
- **Elements of All Other Compensation.** Examples of the elements of compensation required to be included in the All Other Compensation column include:
  - **Value of Securities Purchased at a Discount.** A company must include in the All Other Compensation column the value of all securities purchased from the company or its subsidiaries for below fair market value (measured under FASB ASC Topic 718) *unless* the discount is generally available to all security holders or salaried employees (e.g., under a tax-qualified employee stock purchase plan under Section 423 of the Internal Revenue Code).
  - **Post-Employment Payments.** A company must include in the All Other Compensation column the value of amounts paid or accrued in connection with a named executive officer's termination of employment (or constructive termination) or in connection with a change in control of the company. This would include distributions under a defined benefit or actuarial plan if the distributions are accelerated in connection with a change in control. An amount is

considered accrued if a named executive officer's performance necessary to earn the amount is complete. For example, if the named executive officer has completed all performance required to earn an amount, but the payment is subject to a six-month deferral to comply with Section 409A of the Internal Revenue Code, the amount would be considered an accrued amount. However, if the executive officer's receipt of a payment is subject to a covenant not to compete for a certain period extending beyond the applicable fiscal year end, the amount is not reportable because performance is still required for the payment to become due.

- **Company Contributions to Defined Contribution Plans.** A company must include in the All Other Compensation column the value of annual vested and unvested company contributions or other allocations to qualified defined contribution plans (e.g., 401(k) plans) and nonqualified defined contribution plans.
- **Value of Life Insurance Premiums Paid by the Company.** A company must include in the All Other Compensation column the value of any life insurance premiums paid by, or on behalf of, the company for the benefit of a named executive officer (other than nondiscriminatory group life insurance available generally to all salaried employees).
- **Certain Dividends.** A company must include in the All Other Compensation column the value of any dividends or other earnings paid on stock awards or option awards if the dividends or earnings were not factored into the grant date fair value of the awards in accordance with FASB ASC Topic 718.
- **Value of All Tax Reimbursements.** A company must include in the All Other Compensation column the value of all tax gross-ups or other amounts reimbursed by the company for the payment of taxes (even if in connection with perquisites and other personal benefits that do not meet the $10,000 disclosure threshold described below). Even if the tax gross-up is not payable by the company to the named executive officer until the year following receipt of the compensation for which the gross-up is payable, the tax gross-up should be reported in the same year that the related compensation was paid to provide a clear view of all costs to the company associated with providing the compensation.
  - **Value of Perquisites and Other Personal Benefits With Aggregate Value of at Least $10,000.** A company must include in the All Other Compensation column the value of perquisites and other personal benefits or property paid or provided to a named executive officer *only if* the aggregate value is equal to or greater than $10,000.
  - **If Perquisites Included in All Other Compensation Column, Must Identify Each by Footnote.** If a company is required to include the value of perquisites or personal benefits in the amount reported in the All Other Compensation column (i.e., because the aggregate value is equal to

or greater than $10,000), the company must separately identify the particular type or nature of each perquisite or personal benefit received in a footnote to the All Other Compensation column, including those benefits with zero or nominal aggregate incremental cost to the company (for example, travel and entertainment is too broad if the personal benefit consisted of security while on travel). Spousal or guest accompaniment on a business flight is a common zero incremental cost perquisite. If the named executive officer fully reimbursed the company for the actual total cost of an item, the company should not treat the item as a perquisite or other personal benefit and should not include the value of the item or identify it by type.

- **Each Perquisite That Exceeds $25,000 or 10% of Total Perquisites' Value Must Be Quantified by Footnote.** A company must separately quantify in a footnote the value (aggregate incremental cost to the company) of any perquisite or personal benefit paid to a named executive officer that exceeds the greater of $25,000 and 10% of the aggregate value of all perquisites and personal benefits received by that named executive officer. For example, if the total value of a named executive officer's perquisites is $200,000, a company must separately identify each perquisite received in the footnote, but need only quantify each perquisite valued at $25,000 or more.

  However, if the individual's total perquisites are valued at more than $350,000, the company must separately identify and quantify each perquisite worth 10% or more of the total perquisite value ($35,000 or more).

- **For Each Quantified Perquisite, Must Describe How Value Calculated.** If the company is required to quantify the value of a perquisite, the company must also describe in the footnote its methodology for calculating the perquisite's aggregate incremental cost. If a perquisite or other personal benefit has no aggregate incremental cost, it must still be separately identified by type.

- **WHAT IS A PERQUISITE OR OTHER PERSONAL BENEFIT?**

  Determining whether an item is a perquisite is one of the most difficult aspects of the SEC's executive compensation disclosure rules, and yet is one of the most high-risk issues, as the SEC's most common focus in enforcement cases involving executive compensation is the failure to disclose perquisites and SEC focus on undisclosed or underreported perquisites has heightened in recent years. The SEC provides interpretive guidance on what constitutes a perquisite or personal benefit, but does not provide a bright-line definition. The SEC suggests a two-pronged analysis:

  Prong 1: Is the Item "Integrally and Directly Related to the Performance of the Executive's Duties"? This prong is intended to be interpreted narrowly and should be limited to items that a company provides because the executive needs them to perform the job.

  - **If "Yes," It Is Not a Perquisite.**
  - **If "No," Go to Prong 2.**

  Prong 2: Does the Item "Confer a Direct or Indirect Benefit That Has a Personal Aspect"? A company should apply this prong without regard to whether it provides the item for a business reason or for the company's convenience.

  - **If "No," It Is Not a Perquisite.**
  - **If "Yes," It Is a Perquisite—Unless Broad-Based.** If the item confers any personal benefit, the item is a perquisite or personal benefit *unless* the item is generally available to all employees on a nondiscriminatory basis (such as group life, health, hospitalization or medical reimbursement plans that do not discriminate in scope, terms or operation in favor of executive officers of the company and that are generally available to all salaried employees with the exception for relocation benefits below).

Companies should keep in mind that even if an expense is ordinary or necessary for tax purposes, this tax treatment is *not* determinative on whether an item is or is not a perquisite or personal benefit for compensation disclosure purposes.

Relocation Benefits are Perquisites. Due to the SEC's concern that even broad-based relocation plans may operate in a discriminatory manner that favors executives, relocation assistance is a perquisite.

SEC Examples of Items That are Perquisites or Personal Benefits:

- personal use of a company plane;
- security provided at a personal residence or during personal travel;

- commuting expenses (whether or not provided for the company's convenience or benefit);
- personal travel using vehicles owned or leased by the company;
- housing and other living expenses (including relocation assistance);
- clerical or secretarial services for personal matters;
- club memberships not exclusively used for business entertainment;
- personal financial or tax advice or investment management services;
- discounts on company products or services not generally available to all employees; and
- relocation benefits.

SEC Examples of Items That are *Not* Perquisites or Personal Benefits:

- Cellular phone or laptop computer;
- business travel;
- business entertainment;
- security during business travel; and
- itemized expense accounts used solely for business.

How to Value Perquisites. A company must value all perquisites and other personal benefits on the basis of the aggregate incremental cost to the company or its subsidiaries. This value may differ from the value the company uses for tax purposes. For example, for personal use of company aircraft, the SEC confirmed that the company cannot use the amount it attributes to an executive for federal income tax purposes (e.g., under the Standard Industry Fare Level, or SIFL, rules) or the cost of first-class airfare to compute the aggregate incremental cost of personal use of company aircraft. For each perquisite included in the All Other Compensation column for which a company must disclose the separate value in a footnote, the company must also describe in the footnote its methodology for calculating aggregate incremental cost.

Companies May Include a Separate Table for Perquisites or for All Items of "All Other Compensation." Some companies may find it helpful to include a separate perquisites table to supplement the All Other Compensation column of the Summary Compensation Table to more clearly present the required disclosures. Companies may also find it helpful to include a separate table to identify and quantify the items in the All Other Compensation column.

3.1.6 Total Column. The number in the Total column is the sum of the dollar amounts reported in each of the other columns in the table for the covered fiscal year, including the Change in Pension Value and

Nonqualified Deferred Compensation Earnings column (as noted above, the values disclosed in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column are excluded from the calculation of total compensation for purposes of determining who the named executive officers are for a fiscal year).

Companies do not disclose in the Summary Compensation Table the value of equity awards granted in a prior fiscal year that vest or are exercised in the subject fiscal year (though such amounts are reported in the Option Exercises and Stock Vested Table), nonqualified deferred compensation payouts contributed in a prior year (though they are disclosed in the Aggregate Withdrawals/Distributions column of the Nonqualified Deferred Compensation Table), 401(k) distributions (as 401(k) contributions and any company matching contributions were already disclosed in the Summary Compensation Table), and earnings on 401(k) plans (because the requirement to disclose earnings only extends to above-market or preferential earnings on nonqualified deferred compensation).

Footnote Disclosure Requirements. If an instruction requires footnote disclosure to the Summary Compensation Table but does not specifically limit disclosure to compensation for the company's last completed fiscal year, companies need only provide footnote disclosure for the other years reported in the Summary Compensation Table if such disclosure is material to an investor's understanding of the compensation reported in the Summary Compensation Table for the company's *last completed fiscal year*.

3.2 Grants of plan-based awards table

The Grants of Plan-Based Awards Table follows and supplements the Summary Compensation Table by providing additional information about plan-based compensation (both equity and non-equity) granted during the last completed fiscal year. The Grants of Plan-Based Awards Table requires, to the extent applicable, information for each of the column headings shown below. Non-equity incentive plan awards granted in the last completed fiscal year, even if they were not reported in the Summary Compensation Table because the relevant performance criteria have not yet been satisfied, are disclosed in this table. Companies also may need to include up to three supplemental columns to the Grants of Plan-Based Awards Table (indicated below as unshaded headings), depending on their particular circumstances, and may voluntarily include a column to disclose the type of award (also indicated below as an unshaded heading). Companies also should discuss the material terms of all awards included in the Grants of Plan-Based Awards Table in the narrative that follows the table.

Name	Type of Award	Grant Date	Appr-oval Date	Number of Non-Equity Ince-ntive Plan Units Granted (#)	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Future Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or Units (#)	All Other Option Awards: Number of Secu-rities Under-lying Options (#)	Exercise or Base Price of Option Awards ($/Sh)	Closing Price on Grant Date ($/Sh)	Grant Date Fair Value of Stock and Option Awards ($)
					Thres-hold ($)	Target ($)	Maxi-mum ($)	Thres-hold (#)	Target (#)	Maxi-mum (#)					

Disclose Each Award Separately. A company must disclose *each* award granted during the last completed fiscal year on a separate row in the Grants of Plan-Based Awards Table even if the award is subsequently declined or forfeited. If awards were granted under more than one plan, the company must indicate the plan under which each award was made. If multiple types of awards are granted to the named executive officers (e.g., time-based stock options, time-based restricted stock units, performance-based restricted stock units, etc.), a company may voluntarily add a column titled “Type of Award” for clarity.

Disclose Only Plan Awards Granted During the Last Completed Fiscal Year. Companies disclose awards granted *during* the last completed fiscal year only, even if the award is for services or performance in a prior fiscal year. Awards granted after the last completed fiscal year for services or performance in that year similarly are not yet disclosed in the Grants of Plan-Based Awards Table but should be discussed in the CD&A.

Include Grant Date and Grant Date Fair Value for Equity-Based Awards Only. A company is required to include a date in the Grant Date column and a value in the Grant Date Fair Value of Stock and Option Awards column for equity-based awards only. For other types of awards, the company may leave these columns blank. Just as in the Summary Compensation Table, companies disclose the aggregate grant date fair value for each stock and option award in accordance with FASB ASC Topic 718. The sum of the grant date fair values for each equity award disclosed in the Grants of Plan-Based Awards Table should equal the amounts disclosed in the Stock Awards and Option Awards columns in the Summary Compensation Table.

Disclose Threshold, Target and Maximum Payouts for Non-Equity and Equity Incentive Plan Awards. With respect to incentive plan awards, both non-equity and equity-based, "threshold" refers to the minimum amount payable for a certain level of performance under a plan; "target" refers to the amount payable if the specified performance target(s) are reached; and "maximum" refers to the maximum payout possible under a plan. For non-equity incentive plans, estimated future payouts are expressed in dollars and for equity incentive plans, as a number of shares.

- **What if an Award Does Not Provide for Threshold, Target and Maximum Payouts?** If an award provides for only a single estimated payout, the company should report that amount in the Target column. If an incentive plan award does not provide for threshold or maximum payouts, the company should leave those columns blank. A footnote should explain that there are no threshold or maximum levels for the award. If an equity incentive plan award is denominated in dollars but payable only in shares, a company should describe the payment terms in a footnote. If all the awards included in the column are similarly denominated in cash but payable only in shares, the company may choose to change the "(#)" caption to "($)" and report the value of the awards instead of the number of shares.
- **If Target Amount Not Determinable, Provide Estimate.** If a target amount is not determinable, companies must provide a representative amount based on the company's performance during the last completed fiscal year.
- **Disclose Threshold, Target and Maximum Amounts, Even if Actual Amount Already Determined.** A company must disclose threshold, target and maximum amounts as of the award's grant date, including for an award that the company already paid or settled, even though the company also discloses the actual amount of the award earned in the Summary Compensation Table or the Option Exercises and Stock Vested Table. If a company makes all non-equity incentive plan awards under an annual plan and these awards are earned in the same year that the company granted the award, the company may change the heading for this column to "Estimated Possible Payouts Under Non-Equity Incentive Plan Awards."

- **Disclose Grant Date Fair Value of Equity Incentive Plan Awards Based on Probable Outcome of Performance Conditions.** Companies disclose the grant date fair value of equity awards subject to performance conditions based on the probable outcome of such conditions (typically at "target"). This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures.
- **Reporting of Equity Incentive Plan Awards Where Compensation Committee Retains Negative Discretion to Reduce Awards.** Generally, equity incentive plan awards are reported in the year of grant, even if the compensation committee retains negative discretion to reduce awards, notwithstanding the fact that the accounting treatment for the award may provide that the grant date does not actually occur until the end of the performance period, after the compensation committee has determined whether to exercise any negative discretion.

All Other Stock Awards and All Other Option Awards. In this column, companies must disclose the number of shares of stock or shares subject to options that were granted during the last completed fiscal year that did not qualify as incentive plan awards. This would include equity awards that vest solely based on continued service to the company and awards that are fully vested at grant.

Grant Date and Grant Date Fair Value of a Multi-Year Incentive Award. If an award granted during the last completed fiscal year has multiple single-year performance periods for which annual performance targets are set at the beginning of the entire multi-year performance period, the entire grant date fair value for the award is disclosed. However, if each annual performance target is not set until the beginning of such single-year performance period, each of the dates on which the performance target is established is treated as a separate grant date for purposes of the table and only the grant date fair value for the awards for which the performance goals were established is disclosed in the table. In this case, narrative disclosure may be necessary to help clarify what is reflected in the table.

Disclose Repriced Options or Equity Awards Materially Modified During Fiscal Year. If the company repriced any options or stock appreciation rights or otherwise materially modified any equity awards held by a named executive officer during the last completed fiscal year, the company must disclose as a separate grant the incremental increase in fair value calculated as of the repricing or modification date under FASB ASC Topic 718. Any new equity grants made during the last completed fiscal year pursuant to a repricing would also be disclosed in the table. The company must discuss any repricing or modification transactions in the CD&A and in the narrative disclosure that follows the Summary Compensation Table and Grants of Plan-Based Awards Table. This requirement does not apply to any repricing pursuant to an

anti-dilution provision specified in the plan or award, or any repricing that occurs automatically through a pre-existing formula or mechanism specified in the plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options.

Consideration Paid for an Award. If a named executive officer paid cash consideration for any award in the Grants of Plan-Based Awards Table, the company must disclose, by footnote to the appropriate column, the amount of consideration paid.

Up to Three Additional Columns May Be Required. Companies must add one or more additional columns to the Grants of Plan-Based Awards Table in the following situations:

- **If Stock Option Exercise Price is Less Than Closing Market Price on Grant Date.** If the per share exercise price, or base price, of options, stock appreciation rights or similar option-like instruments is less than the per share closing market price reported for the underlying security on the grant date, a company must add a column at the far right side of the Grants of Plan-Based Awards Table that reports the closing market price on the grant date. For example, this may occur if a company determines option exercise prices based on the average of the high and low stock prices on the grant date, an average closing price for the 30 days preceding the grant date or the closing market price on the day preceding the grant date.
  - **Describe How Company Determined Exercise Prices.** The company must also describe its methodology for determining any exercise or base prices that differ from the closing market prices on the awards' respective grant dates in a footnote to the Grants of Plan-Based Awards Table or in the accompanying narrative disclosure.
- **If Compensation Committee Action Did Not Occur on Grant Date.** If a company's compensation committee (or other similar committee) or the full board of directors granted, or was deemed to take action to grant, equity-based awards on a date other than the FASB ASC Topic 718 grant date for such awards, the company must disclose the date of the actual committee or board action in a new column immediately to the right of the Grant Date column.
- **If Non-Equity Incentive Plan Award is Denominated in Units or Other Rights.** If a non-equity incentive plan award is denominated in units or other rights, a company must disclose the units or other rights awarded in a separate column immediately to the left of the columns in which incentive plan awards are disclosed.

3.3 Narrative description of additional material factors after summary compensation table and grants of plan-based awards table

Following the Summary Compensation Table and the Grants of Plan-Based Awards Table, companies must describe by narrative any additional material factors necessary to understand and give context to the information in the two preceding tables, which may include (depending on a company's specific circumstances):

- **Material Terms of Plans That Govern Awards Included in Summary Compensation Table or Grants of Plan-Based Awards Table.** Companies should discuss the material terms of any plan that governs awards included in the Summary Compensation Table or the Grants of Plan-Based Awards Table if the terms are not evident from the tabular disclosure and are not addressed in the CD&A.
- **Material Terms of Employment Agreements.** Companies should discuss the material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten, that are necessary to understand the information in the tables.
- **Terms of Any Repricing or Material Modification.** Companies should discuss (here and in the CD&A) the material terms of any repricing or material modification to outstanding awards, including changing or eliminating performance criteria, extending the exercise period, changing the bases on which returns are determined or changing vesting or forfeiture conditions.
- **Material Terms of Awards in Grants of Plan-Based Awards Table.** Companies should include a general description of the formula or criteria to be applied in determining the amounts payable, the vesting schedule(s), whether dividends or other amounts will be paid on the awards, and a description of the performance-based conditions and any other material conditions applicable to the awards. (See discussion above regarding disclosing confidential information related to specific performance targets.)
- **Relationship of Salary and Bonus to Total Compensation.** Companies may explain the level of each named executive officer's salary and bonus in proportion to total compensation.
- **Post-Employment Payments Included in Summary Compensation Table.** Companies should discuss post-employment compensation here only to the extent the Summary Compensation Table requires disclosure of that compensation. Otherwise, companies are required to provide this disclosure in the Potential Payments Upon Termination or Change in Control discussion that specifically addresses post-employment compensation (discussed below).

- **NARRATIVE DISCLOSURE VS. CD&A**

  How is Narrative Following Grants of Plan-Based Awards Table Different From CD&A? The CD&A generally focuses on broader topics regarding executive compensation policy objectives and how executive compensation arrangements are designed or operated to implement those policies. In contrast, the narrative that follows the Summary Compensation Table and the Grants of Plan-Based Awards Table focuses on, and provides context to, the specific disclosures in those two tables, and often is used to provide more detailed information on the mechanics or precise terms of those arrangements.

  Where Should Companies Discuss Named Executive Officer Employment Agreements? Companies may need to discuss the terms and conditions of named executive officer employment agreements in up to three different locations in the compensation disclosure:

  - in the CD&A;
  - in the narrative following the Summary Compensation Table and the Grants of Plan-Based Awards Table (described above); and
  - in the narrative that describes Potential Payments Upon Termination or Change in Control to named executive officers (described below).

  In order to minimize repetition, companies may use cross references to direct readers to these applicable disclosures.

3.4 Outstanding equity awards at fiscal year-end table

Companies must disclose all outstanding stock options, stock appreciation rights (and similar awards), and unvested stock awards held by the named executive officers as of the most recent fiscal year-end in the Outstanding Equity Awards at Fiscal Year-End Table. Companies must also disclose the exercise prices of options, stock appreciation rights and similar instruments and, for unvested stock awards (including restricted stock, restricted stock units and similar instruments) and unearned awards granted under equity incentive plans, the fiscal year-end market or payout value of the awards. Companies often voluntarily include a supplemental column in the table to disclose the grant date of outstanding options (indicated below as an unshaded heading). The requirements described in this section for options apply equally to stock appreciation rights and similar instruments.

The Outstanding Equity Awards at Fiscal Year-End Table requires, to the extent applicable, information for each of the column headings shown below, other than the columns captioned “Grant Date” and “Value of Unexercised In-the-Money Options/SARs at Fiscal Year-End ($),” which are optional.

Name	Grant Date	Option Awards						Stock Awards			
		Number of Securities Underlying Unexercised Options (#)	Number of Securities Underlying Unexercised Options (#)	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price ($)	Option Expiration Date	Value of Unexercised In-the-Money Options/ SARs at Fiscal Year-End ($)	Number of Shares or Units of Stock That Have Not Vested (#)	Market Value of Shares or Units of Stock That Have Not Vested ($)	Equity Incentive Plan Awards: Number of Unearned Shares, Units or Other Rights That Have Not Vested (#)	Equity Incentive Plan Awards: Market or Payout Value of Unearned Shares, Units or Other Rights That Have Not Vested ($)
		Exercisable	Unexercisable								

Option Awards. A company must disclose each individual outstanding option award, along with its exercise price and expiration date, as a separate line item and not on an aggregated basis. However, the company may disclose information regarding outstanding stock options on an aggregated basis if the stock options share an identical exercise price and expiration date. Likewise, a single award consisting of a combination of options, stock appreciation rights and/or similar option-like instruments may be reported on an aggregated basis unless each tranche has a different exercise price or expiration date.

The company must disclose the vesting dates for each option award in a footnote. In providing this disclosure, companies often add a supplemental column titled “Grant Date” to the table, which can simplify disclosure for option grants that all vest according to a standard vesting schedule from the grant date (for example, 25% per year). If any different vesting schedule applies to an option, then the footnote to the table would also need to include disclosure about this vesting schedule.

Stock Awards. A company must disclose in the Outstanding Equity Awards at Fiscal Year-End Table the total number and market value of all unvested equity plan stock awards and unearned shares of stock under equity incentive plan awards. Unlike for outstanding stock options, a company may disclose this information on an aggregated basis in the applicable column. A company must disclose the vesting dates for each stock award in a footnote. The company must include as stock awards any outstanding in-kind earnings on stock awards that have earned share dividends or share dividend equivalents, unless these in-kind earnings were vested when declared or vested during the fiscal year, in which case they are reported in the Option Exercises and Stock Vested Table.

- **What is "Market Value"?** The "market value" for shares of unvested stock and unearned equity-based incentive plan holdings is equal to the product of the closing market price of the company's stock at the most recent fiscal year-end and the number of unvested shares or units or the number of unearned equity-based incentive plan awards, as applicable.

Disclose Equity Incentive Awards in Applicable Option Awards or Stock Awards Column. A company must report unearned option awards or stock awards granted under equity incentive plans under the applicable Equity Incentive Plan Awards column until the relevant performance condition is satisfied. After the performance condition is satisfied, if the option awards or stock awards remain subject to forfeiture conditions (such as a time-based vesting requirement), a company must report option awards in the Number of Securities Underlying Unexercised Options/Unexercisable column and unvested stock awards in the Number of Shares or Units of Stock That Have Not Vested column. A company should report all outstanding vested option awards in the Number of Securities Underlying Unexercised Options/Exercisable column (until exercised or no longer outstanding).

- **Generally Report Number of Shares Based on Threshold Level of Performance Achieved.** A company generally reports the number of unearned shares or units that have not vested in the Equity Incentive Plan Awards column and the market or payout value for such Equity Incentive Plan Awards based on the threshold performance goals. However, if the last completed fiscal year's performance (or, if the payout is based on performance over more than one year, the last completed fiscal years over which such performance is measured) exceeded the threshold performance goal, the company must use the next higher performance measure (target or maximum) that exceeds the last completed fiscal year's performance (or, if the payout is based on performance to occur over more than one year, the last completed fiscal years over which performance is measured). If an award provides for a single estimated payout, the company should report that amount. If the company cannot determine the target amount, the company must provide a representative amount based on performance during the last completed fiscal year.

Include Awards Transferred Other Than for Value. A company must disclose any awards that a named executive officer transferred other than for value (such as for family estate planning purposes), and must include by footnote the nature of the transfer.

3.5 Option exercises and stock vested table

A company must report in the Option Exercises and Stock Vested Table the number of shares acquired and the dollar amounts realized by named executive officers during the last completed fiscal year on the exercise of stock options, stock appreciation rights and similar instruments and on the vesting of shares of stock, including restricted stock, restricted stock units and similar instruments. The company may present the data on an aggregated basis for option awards and stock awards, respectively.

Name	Option Awards		Stock Awards	
	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise ($)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting ($)

Include Value of Amounts Deferred and Awards Transferred for Value. If a named executive officer deferred receipt of any amount on exercise or vesting of an award, a company must disclose by footnote to the Option Exercises and Stock Vested Table the amount and terms of the deferral. If a named executive officer transferred an award for value, the company must include in the Option Exercises and Stock Vested Table the amount realized on transfer.

Include Value of Vested In-Kind Earnings on Stock Awards. A company should include in the amount disclosed in the Stock Awards column the value of any in-kind earnings on stock awards that have earned share dividends or dividend equivalents that were vested when declared or that vested during the last completed fiscal year.

Include Total Shares Subject to Exercise of an Option or Stock Appreciation Right. A company should include in the Option Awards column the total number of shares subject to an option or stock appreciation right that was exercised or settled during the last completed fiscal year, not the net number of shares that may have actually been received upon exercise. Likewise, upon the “net” settlement of restricted stock units, the company should report the full number of shares that vested, not the after-tax number of shares

actually received by the executive. The company may explain that the named executive officer actually received a smaller "net" number of shares in a footnote or in the narrative disclosure.

- **POST-EMPLOYMENT COMPENSATION**

  Executive retirement packages and other post-termination compensation can represent a significant commitment of corporate resources and a significant portion of overall compensation to a named executive officer. The rules require that companies provide disclosure, to the extent applicable, about the following three sources of potential post-employment compensation to the named executive officers:

  - pension plans;
  - nonqualified deferred compensation plans; and
  - severance, retirement, termination, constructive termination or change-in-control arrangements.

3.6 Pension benefits table

A company must disclose in the Pension Benefits Table information about the named executive officers' participation in certain retirement plans during the last completed fiscal year. To the extent applicable, companies must provide information for each of the column headings shown below.

Name	Plan Name	Number of Years Credited Service (#)	Present Value of Accumulated Benefit ($)	Payments During Last Fiscal Year ($)

Pension Plans Covered. Pension plans for which disclosure is required in this table include defined benefit plans, cash balance plans and supplemental executive retirement plans, but exclude defined contribution plans, both nonqualified and qualified, such as 401(k) plans.

Disclose Information on a Plan-by-Plan Basis. A company must identify in a separate row each pension plan in which a named executive officer participates and provide the required disclosure for each plan.

- **Number of Years of Credited Service.** The number of credited years of service is computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the company's audited financial statements for the last completed fiscal year.

- If the number of years of credited service for a named executive officer under any plan is different from the number of actual years of service with the company, the company must provide footnote disclosure quantifying any difference and any resulting increase in benefits.

- **Present Value of Accumulated Benefit.** The actuarial present value of a named executive officer's accumulated benefit is computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the company's audited financial statements for the last completed fiscal year.
  - In calculating the actuarial present value, the company must use the same assumptions, such as interest rate assumptions and mortality rate assumptions, that it uses to derive the amounts disclosed in conformity with generally accepted accounting principles, except with regard to the retirement age assumption. The company must assume that retirement age is the earliest time at which a participant may retire under the plan without any benefit reduction due to age and that the named executive officer will continue to work at the company until such time. If applicable, the company may choose to include information for a later "normal" retirement age in an additional column (e.g., if a plan has both a "normal" retirement age and also a younger age at which an individual may receive retirement benefits without any reduction in benefits). The estimated present value is calculated based on each named executive officer's compensation as of the pension plan measurement date. The assumptions used for financial statement reporting purposes that the company should use for calculating the actuarial present value are the discount rate, the lump sum interest rate (if applicable), post-retirement mortality and payment distribution assumptions. The company should ignore pre-retirement decrements for purposes of these calculations, such as due to withdrawal, disability, early retirement and death.
  - If a company has a cash balance plan pursuant to which a named executive officer is only entitled to the amount credited to the cash balance account as of any date, the company must still report the actuarial present value of the named executive officer's accumulated benefit as is done for other defined benefit plans. In such case, the amount reported in the table generally will differ from the named executive officer's accrued benefit under the cash balance plan.
  - The valuation method and all material assumptions applied in quantifying the present value of the accumulated benefit must be disclosed in a narrative that accompanies the Pension Benefits Table. A company may satisfy this disclosure requirement by cross-reference to a discussion of those assumptions in the company's financial statements, footnotes to the financial statements or MD&A.

- **Allocating Between Tax-Qualified Defined Benefit Plans and Related Supplemental Plans.** For purposes of allocating the current accumulated benefit between tax-qualified defined benefit plans and related supplemental plans, companies must apply the applicable Internal Revenue Code limitations in effect as of the pension plan measurement date.
- **Contingent Benefits.** Any contingent benefits that may be payable under a plan by reason of death, early retirement or other termination of employment should not be disclosed in the table but should be disclosed in the narrative disclosure of potential post-termination payments.

Narrative Disclosure to Accompany Pension Benefits Table. Companies must provide additional narrative disclosure of material factors necessary to understand each plan disclosed in the Pension Benefits Table. Material factors necessary to understand each plan may include, depending on the specific circumstances of a company:

- **Material Terms and Conditions of Payments and Benefits Under Plan.** A company must describe the material terms and conditions of payments and benefits available under a plan, which would generally include the plan's normal retirement payment, benefit formula and eligibility standards and the effect of the form of benefit elected on the amount of annual benefits. "Normal retirement" means retirement at the normal retirement age defined in the plan or, if not so defined, the earliest time at which a participant may retire under the plan without any benefit reduction due to age.
- **Elements of Compensation Applied in Benefit Formula.** A company must generally describe and identify each specific element of compensation (such as salary and various forms of bonus) applied in each plan's benefit formula.

As described above, a company may also be required to make the following disclosures in the narrative:

- **Purposes for Multiple Plans.** If a named executive officer is eligible to participate in more than one plan, the company must describe the different purposes for each plan if necessary for an understanding of the plan.
- **Policies Regarding Credit for Years of Service.** If the company credits a named executive officer with years of service that exceed that number of years of actual service with the company, the company must also describe its policies regarding granting extra years of credited service if necessary for an understanding of the plan.

- **ADDITIONAL PENSION BENEFITS DISCLOSURES**

  Identify Any Named Executive Officer Currently Eligible for Early Retirement. If any named executive officer is currently eligible for early retirement under any plan, the company must generally disclose the executive officer's identity, identify the plan, and describe the plan's early retirement payment, benefit formula and eligibility standards. "Early retirement" means retirement at the early retirement age defined in the plan or otherwise available to the executive officer under the plan.

  Disclose Pension Benefits Accelerated During the Last Fiscal Year in Connection With a Termination of Employment or a Change in Control in Summary Compensation Table. A company must disclose pension benefits paid to named executive officers during the most recent fiscal year in the Pension Benefits Table; however, if the payment of the pension benefits is *accelerated* in connection with a termination of employment or a change in control, the amounts must *also* be disclosed in the All Other Compensation column of the Summary Compensation Table.

3.7 Nonqualified deferred compensation table

In the Nonqualified Deferred Compensation Table, companies must disclose information for each of the column headings below for each named executive officer for all nonqualified deferred compensation plans.

Name	Executive Contributions in Last Fiscal Year ($)	Registrant Contributions in Last Fiscal Year ($)	Aggregate Earnings in Last Fiscal Year ($)	Aggregate Withdrawals/ Distributions ($)	Aggregate Balance at Last Fiscal Year-End ($)

Disclose Information on a Plan-by-Plan Basis. Companies must disclose the required information for each named executive officer on a plan-by-plan basis for nonqualified deferred compensation plans in which a named executive officer participated during the last completed fiscal year.

Do Not Include Tax-Qualified Defined Contribution Plan Disclosure. Companies should not provide information about tax-qualified defined contribution plans in the Nonqualified Deferred Compensation Table, such as contributions to 401(k) plans and 401(a) profit sharing plans. Individual contributions to such plans are reflected in the Salary, Bonus, or other applicable column of the Summary Compensation Table and company contributions to such plans are disclosed in the All Other Compensation column of the Summary Compensation Table.

Report Contributions on an Accrual Basis. For an excess plan related to a qualified plan, if contributions earned in the last completed fiscal year were not credited by the company until the next fiscal year, the

SEC Staff has taken the position that they are still considered company contributions during the last completed fiscal year and should be reported on that basis in the Nonqualified Deferred Compensation Table as well as in the All Other Compensation column of the Summary Compensation Table. If this is not possible due to the timing of determining such contributions, then the basis for reporting should be explained in footnotes.

How Are Earnings Calculated and Disclosed? "Earnings" include dividends, stock price appreciation (or depreciation) and other similar terms. "Earnings" should encompass any increase or decrease in the account balance during the last completed fiscal year that is not attributable to contributions, withdrawals or distributions during the year. If plan earnings are calculated by reference to actual earnings of mutual funds or other securities, such as company stock, companies may identify the referenced security and quantify its return, which disclosure may be aggregated if the same measure applies to more than one named executive officer.

Deferrals of Vested Equity Awards. If an equity award has vested and is subsequently deferred, whether pursuant to the election of the named executive officer or the terms of the equity award or plan, the deferred receipt of the vested equity award is reported in the table.

Reconciliation of Numbers Reported in Summary Compensation Table. To reconcile the Nonqualified Deferred Compensation Table with the Summary Compensation Table and avoid confusion over amounts that are reflected in both tables, companies must disclose by footnote:

- the amount of any contributions or earnings that also were reported as compensation in the Summary Compensation Table for the last completed fiscal year; and
- the amount in the Aggregate Balance column in the Nonqualified Deferred Compensation table that was included as compensation to the named executive officer in the Summary Compensation Table for prior years.

Amounts need only be disclosed by footnote to the extent they were actually previously reported in the Summary Compensation Table for the named executive officer.

Additional Narrative Disclosure Describing Material Factors. Following the Nonqualified Deferred Compensation Table, companies must provide narrative disclosure of the material factors necessary to understand the tabular disclosure. This discussion may address, depending on the specific circumstances of the company:

- the types of compensation that may be deferred and any limits on deferrals (e.g., percentage of compensation limit);

- material terms about payouts, withdrawals and other distributions; and
- the measures for calculating interest or other plan earnings (including who selects the measures and the frequency and manner in which selections can be changed), quantifying interest rates and other earnings measures.

3.8 Potential payments upon termination or change in control

Although the SEC rules do not prescribe a tabular format, companies must provide quantitative and narrative disclosure about written or unwritten contracts, agreements, plans or arrangements that provide for potential payments to the named executive officers at, following or in connection with:

- termination of employment, including termination in connection with resignation, severance, retirement, constructive termination or other termination;
- a change in control of the company; or
- a change in the named executive officer's responsibilities (that may not result in termination of employment).

The amounts payable under such arrangements should be quantified assuming the triggering event to have occurred on the last business day of the company's last completed fiscal year and, to the extent relevant, based on the closing market price per share for the company's stock on that date.

Disclosure Requirements for Potential Post-Employment Payments. To the extent required and not disclosed elsewhere, for each named executive officer, companies must disclose:

- the specific events triggering payments or the provision of other benefits, including health care benefits and perquisites;
- for each triggering event, the estimated amount of payments and benefits due, even if the payment amounts are uncertain (in which case a reasonable estimate or range of payments and benefits may be provided), including:
  - a description of the types and estimated amounts of payments and benefits payable—applying the same thresholds for perquisites used for the All Other Compensation column of the Summary Compensation Table and applying the assumptions used for financial reporting purposes under generally accepted accounting principles for quantifying health care benefits;
  - whether these payments would or could be in installments or a lump sum;
  - the duration of these payments if not lump sum;

- who provides the payments;
- if uncertainties exist as to the provision of payments and benefits or the amounts involved, a description of the material assumptions underlying the estimates (or the reasonable estimated ranges of amounts)—this disclosure falls within the safe harbor for forward-looking information; and
- a description and explanation of how the company determines the appropriate payment and benefit levels under the various triggering events;

- any material conditions or obligations that apply to the receipt of payments or benefits (e.g., the obligation to abide by non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and any provisions regarding waiver of breach of these agreements);
- for accelerated stock options, the difference between the per share exercise price and the closing market price per share as of fiscal year end;
- any tax gross-up payments, including golden parachute excise tax payments; and
- any other material features of the contracts, agreements, plans or arrangements necessary to understand the foregoing.

- **KEEP IN MIND...**

  Are All Potential Post-Termination Payments Disclosed in This Narrative? If any payment or benefit that would be provided in connection with a triggering event is fully disclosed in the Pension Benefits Table or the Nonqualified Deferred Compensation Table and related narrative, a company may satisfy these disclosure requirements by cross-referencing to the applicable portion of that disclosure. If the form or amount of any such payment would be increased, or vesting or any other provision accelerated upon a triggering event, companies must disclose such increase or acceleration in this narrative. In addition, companies are not required to describe payments or benefits in this narrative if they do not discriminate in scope, terms or operation in favor of executive officers and are available generally to all salaried employees. Option awards to executive officers in amounts greater than those provided to all salaried employees are not considered within the "scope" of nondiscriminatory arrangements.

  Former Named Executive Officers. For any named executive officer who is not serving in that capacity at the end of the most recent fiscal year, companies must provide the above information only to the extent a triggering event actually occurred and should describe the actual triggering event and payments. However, if following the end of the last completed fiscal year but prior to filing the Form 10-K or proxy statement for such prior fiscal year, a named executive officer leaves the company,

SEC guidance provides that if the named executive officer is not the CEO or CFO of the company or otherwise a named executive officer for the year of termination and any severance is provided under its original terms (not newly negotiated), disclosure may be provided only for the actual triggering event and payments and not for additional scenarios that can no longer occur. Proxy advisory firms have increasingly focused on severance compensation provided to former executive officers that exceeds pre-existing contractual entitlements. If special severance is approved for a departing executive officer or severance is paid upon a voluntary resignation, care should be taken to explain the rationale for why such payments were approved and how the company determined that payment of the amounts was appropriate.

Provide Definitions of Any Defined Terms for Triggering Events. Companies should provide specific definitions or explanations of any defined terms for triggering events, such as "change in control," "cause" or "good reason."

Tabular Disclosure for Post-Termination Payments. Companies typically provide tabular disclosure, either in a single table or separate tables for each named executive officer, in addition to the required narrative disclosure as appropriate to help clarify and explain the information about post-termination payments.

3.9 Golden parachute compensation

In certain situations, as described below, the Golden Parachute Compensation Table requires disclosure of named executive officers' golden parachute arrangements (i.e., compensation arrangements in connection with significant corporate transactions such as a merger, acquisition, consolidation, etc.). The applicable disclosure requires information regarding any agreement or understanding, whether written or unwritten, between a named executive officer and the acquiring or target company concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the company.

If a solicitation is made by the company for a meeting of shareholders at which the shareholders are asked to approve the acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all assets of the company, then the company must also provide a separate, non-binding advisory shareholder vote to approve named executive officer golden parachute compensation as disclosed pursuant to the Golden Parachute Compensation Table. However, if such golden parachute compensation has already been subject to a say-on-pay vote as described in Section 7 below, then the separate shareholder vote is not required. Any agreements or understandings between an acquiring

company and the named executive officers of the reporting company, where the reporting company is not the acquiring company, are not required to be subject to the separate shareholder advisory vote. Further details regarding the applicable votes and requirements can be found in Section 7 below. This discussion focuses on the information required in the Golden Parachute Compensation Table and related footnotes and narrative.

The Golden Parachute Compensation Table requires, to the extent applicable, information for each of the column headings shown below.

Name	Cash ($)	Equity ($)	Pension/ NQDC ($)	Perquisites/ Benefits ($)	Tax Reimbursement ($)	Other ($)	Total ($)

3.9.1 Cash Column. Companies must disclose in the Cash column the aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments.

3.9.2 Equity Column. Companies must disclose in the Equity column the aggregate dollar value of stock awards for which vesting would be accelerated, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards.

3.9.3 Pension/NQDC Column. Companies must disclose in the Pension/NQDC column the aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements.

3.9.4 Perquisites/Benefits Column. Companies must disclose in the Perquisites/Benefits column the aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits.

3.9.5 Tax Reimbursements. Companies must disclose in the Tax Reimbursement column the aggregate dollar value of any tax reimbursements.

3.9.6 Other. Companies must disclose in the Other column the aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reportable in the other columns of the table.

3.9.7 Total. Include the total aggregate dollar value of the sum of all amounts reported in the table in the Total column.

- **Double Trigger vs. Single-Trigger.** For each of the columns described in 3.9.1 through 3.9.6, the company should include a footnote quantifying the amounts payable that is attributable to a

double-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable that is attributable to a single-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

- **Date of Triggering Event; Price Per Share.**

If the Golden Parachute Compensation Table is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the company, the disclosure provided by the table should be quantified assuming that the triggering event took place on the latest practicable date and the price per share of the company's securities must be determined as follows:

- If the shareholders are to receive a fixed dollar amount, the price per share should be that fixed dollar amount; and
- If the shareholders are not to receive a fixed dollar amount, the price per share should be the average closing market price of the company's securities over the first five business days following the first public announcement of the transaction.

If the Golden Parachute Compensation Table is included in a proxy solicitation for an annual meeting at which directors are elected for purposes of subjecting the disclosed agreements to a say-on-pay vote as described in Section 7, the disclosure provided by the table must be quantified assuming that the triggering event took place on the last day of the company's last completed fiscal year and the price per share is the closing market price of the company's securities as of that date.

- **Individuals Included in Table.** The individuals included in the table will be those executive officers included in the Summary Compensation Table in the company's most recent filing with the SEC that required such disclosure; provided, however, that any principal executive officer or principal financial officer who was not included in the company's most recent summary compensation table because such individual did not serve in such position until after the end of the fiscal year covered by that table will nevertheless be considered a named executive officer that must be included in the Golden Parachute Compensation Table.
- **Reasonable Estimates.** If uncertainties exist as to the provision of payments and benefits or the amounts involved, the company is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure.

- **Two Tables May Be Required.** If the company is conducting a shareholder advisory vote in connection with a merger or acquisition or other applicable transaction to cover new arrangements or understandings and/or revised terms of agreements and understandings that were previously subject to a say-on-pay vote, the company must provide two separate tables as follows:
  - One table should disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a say-on-pay vote and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote; and
  - The second table should disclose only the new arrangements and/or revised terms subject to the separate shareholder advisory vote.
- **Arrangements Between Acquiring Company and Named Executive Officers.** In cases where disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company is required, the company must clarify whether such agreements are included in the separate shareholder advisory vote by providing a separate table of all agreements and understandings subject to the shareholder advisory vote, if different from the full scope of golden parachute compensation disclosure.
- **Accompanying Narrative.** In addition to the tabular disclosure described above, companies must provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the Golden Parachute Compensation Table. Such factors should include, at a minimum, a description of:
  - the specific circumstances that would trigger payment(s);
  - whether the payments would or could be lump sum or in installments, disclosing the duration, and by whom they would be provided; and
  - any material conditions or obligations applicable to the receipt of payments or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

4.0 Director compensation disclosure

Similar to the Summary Compensation Table for named executive officers, companies must disclose in the Director Compensation Table all director compensation earned or paid to its directors in the last completed fiscal year. Narrative disclosure of any material factors necessary to understand the director compensation accompanies the table.

4.1 Director compensation table

Companies must disclose the information shown in the column headings below for each director for the last completed fiscal year. A company can omit any column for which it has no required disclosure.

Name	Fees Earned or Paid in Cash ($)	Stock Awards ($)	Option Awards ($)	Non-Equity Incentive Plan Compensation ($)	Change in Pension Value and Nonqualified Deferred Compensation Earnings ($)	All Other Compensation ($)	Total ($)

Must Include All Individuals Who Served as Directors During Fiscal Year. Companies must include in the table each person who served as a director during any part of the last completed fiscal year, even if that person was no longer serving as a director at the end of the fiscal year or is not up for re-election.

No Disclosure Required for Directors Who are Also Executive Officers. Companies can omit information for any director who also serves as a named executive officer if they disclose in a footnote to the Summary Compensation Table any amounts received by the named executive officer for services as a director. Companies can also omit from the Director Compensation Table compensation information for any director who serves as an executive officer but is not a named executive officer and does not receive any additional compensation for director services (and the conditions in Instruction 5.a.ii to Item 404(a) of Regulation S-K are satisfied) if they disclose in a footnote to the Director Compensation Table or in the accompanying narrative that the executive officer did not receive any additional compensation for services as a director. Companies may disclose information related to employee compensation for directors who are also employees (but not executive officers) either in the Director Compensation Table or with the Item 404(a) Transactions with Related Persons disclosure. The SEC has indicated disclosure in this situation would be clearer and more concise in the Director Compensation Table.

Companies May Aggregate Disclosure. The SEC rules allow companies to aggregate compensation disclosure in a single row for two or more directors if all elements and amounts of compensation are the same (and as long as the names of the directors for whom disclosure is presented on a group basis are clear from the table). In practice, however, companies rarely use this format and instead tend to report compensation for each director on an individual basis.

Amounts in Director Compensation Table Calculated the Same Way as in Summary Compensation Table. The rules for calculating the amounts reportable in the columns of the Summary Compensation Table apply to identical column headings in the Director Compensation Table (e.g., the Stock Awards, Option Awards, Non-Equity Incentive Plan Compensation, Change in Pension Value and Nonqualified Deferred Compensation Earnings and All Other Compensation columns). With respect to the Fees Earned or Paid in Cash column, companies must disclose the dollar amount of all fees earned or paid in cash for services as a director during the last completed fiscal year, including annual retainer fees, committee and/or chairmanship fees.

Disclose Additional Specific Information in All Other Compensation Column. The All Other Compensation column of the Director Compensation Table generally follows the instructions for the same column of the Summary Compensation Table. Companies must include in this column all compensation not reported in the other columns of the Director Compensation Table other than perquisites and other personal benefits with an aggregate value for a director of less than $10,000 (this means that companies do not have to include the value of *any* perquisites for a director if the aggregate value is less than $10,000). Companies must separately identify and quantify in a footnote to this column any item of compensation, other than perquisites or personal benefits, that exceeds $10,000 in value. In the case of perquisites or personal benefits, companies must separately identify these items to the extent the aggregate value of all perquisites or personal benefits to a director equals or exceeds $10,000 and must separately quantify each perquisite or personal benefit with a value greater than $25,000 or 10% of the value of total perquisites and personal benefits for a director.

Disclose Consulting Fees and Legacy or Charitable Awards Programs. Companies must include in the All Other Compensation column to the Director Compensation Table, if applicable:

- the dollar amounts of consulting fees paid to directors (including pursuant to joint ventures or for non-director services) and
- the annual costs of payments and promises of payments under director legacy or charitable awards programs. Companies must disclose in the table the annual amount of the cost of a director legacy or charitable awards program with footnote disclosure of the total dollar amount

payable under each such program and other material terms of each such program. Disclosure is required even if the charitable matching program is available to all company employees.

No Supplemental Tabular Disclosure is Required; Must Disclose Certain Additional Information by Footnote to the Director Compensation Table. No supplemental tables are required to the Director Compensation Table, but companies must disclose by footnote to the table the aggregate number of shares subject to outstanding unvested stock awards and unexercised option awards held by the director at the end of the last completed fiscal year. If a company repriced or otherwise materially modified any stock or option awards held by a director during the last completed fiscal year, the company must also include in the table and disclose as a separate grant in the footnote the incremental increase in fair value computed as of the repricing or modification date under FASB ASC Topic 718.

4.2 Narrative disclosure of director compensation

Companies must disclose in a narrative that accompanies the Director Compensation Table any additional material factors necessary to understand the tabular disclosures. While each company must determine which factors are material to understanding its director compensation arrangements based on its specific circumstances, disclosure may address these factors:

- **Standard Compensation Arrangements.** Companies should provide a description of standard compensation arrangements for directors, such as retainer fees and fees paid for committee service, service as a chairman or committee and meeting attendance, including how such fees are paid (e.g., in cash, stock options or stock).
- **Nonstandard Compensation Arrangements.** Companies must disclose if any director has a different compensation arrangement, identifying that director and the terms of the arrangement.
- **Equity Compensation Practices.** Disclosure is required regarding any equity compensation timing or pricing practices, analogous to the disclosure required for named executive officers in the CD&A.

- **REVIEW COMMITTEE PROCESSES AND PROCEDURES**

  Companies should review with their compensation committees (or governance committees if they determine director compensation) and, if necessary, update the compensation processes and procedures used to set and implement director compensation. Many companies also disclose in the director compensation narrative information on any benchmarking that was completed in establishing director compensation elements and levels.

5.0 Analysis of risks related to compensation for all employees

Item 402(s) of Regulation S-K requires a company to discuss its policies and practices for compensating all employees (not just the named executive officers) as they relate to risk management practices and risk-taking incentives to the extent that risks arising from these policies and practices are reasonably likely to have a material adverse effect on the company.

Companies Must Disclose Relationship Between Risk Management and Compensation Policies and Practices for All Employees. Item 402(s) of Regulation S-K requires a company to discuss its policies and practices for compensating all employees, including non-executive officers, if the compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. While Item 402(s) is technically not part of the CD&A and does not specify where the disclosure should be presented, in the release adopting Item 402(s), the SEC noted that, to the extent that risk considerations are a material aspect of a company's compensation policies or decisions for named executive officers, the company must discuss them in its CD&A. Subsequently, the SEC Staff issued a Compliance and Disclosure Interpretation, which provides that to ease investor understanding, the SEC Staff recommends that Item 402(s) disclosure be presented together with the company's other Item 402 disclosure.

- **Disclosure Standard Similar to MD&A.** In the release adopting Item 402(s), the SEC pointed out that the "reasonably likely" disclosure threshold is the same threshold used in the MD&A rules, and that the approach for risk disclosure "would parallel the MD&A requirement, which requires risk-oriented disclosure of known trends and uncertainties that are material to the business." The adopting release also provides that, in assessing whether disclosure is required, a company could consider policies and practices that mitigate or balance incentives, such as clawback policies or stock ownership/holding requirements. The SEC noted that, by focusing on risks that are reasonably likely to have a material adverse effect on the company, Item 402(s) rules are intended to elicit disclosure that would be most relevant to investors and avoid voluminous disclosure of potentially insignificant and unnecessarily speculative information.
- **Nonexclusive List of Situations that May Trigger Disclosure.** Item 402(s) includes a nonexclusive list of situations that may trigger disclosure, such as different compensation policies and practices for different business units, and issues that companies may need to address related to the business units or employees discussed when disclosure is required. Although all companies have to perform some analysis of whether disclosure under Item 402(s) is required, Item 402(s) does not require a company to make an affirmative statement that it has determined that the risks

arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company.

- **VOLUNTARILY DISCLOSE CONCLUSIONS AND/OR PROCESS IN ANY EVENT**

  The SEC specifically noted that Item 402(s) of Regulation S-K does not require a company to make the negative disclosure that it has determined that the risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company. However, to avoid receiving a comment letter from the SEC, companies should, at a minimum, disclose their conclusion under Item 402(s) and should also at least reference and consider discussing in some detail the process they went through to arrive at that conclusion. Specifically, after Item 402(s) became applicable during the 2010 proxy season, some companies received comment letters from the SEC inquiring about the basis for the company's response (or lack of response) to Item 402(s). If a company did not provide any affirmative disclosure about compensation-related risk, the Staff tended to inquire whether the omission was the result of a determination that no disclosure was required. In some other cases, the Staff also asked for a description of the process that a company used to reach its conclusion that no disclosure is required. Therefore, many public companies routinely disclose both their conclusion under Item 402(s) (generally, the conclusion is that the risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company) and also mention/discuss the process they used to arrive at that conclusion in their proxy statements.

6.0 Compensation committee & compensation consultants

There are several issues relating to compensation committees that fall outside Item 402 of Regulation S-K, but affect or relate to the disclosure required under that item.

6.1 Compensation committee independence

There are two major standards that currently apply to service on a company's compensation committee.

Stock Exchange Compensation Committee Independence Standards. Under NYSE and Nasdaq listing standards, listed companies must have a compensation committee comprised entirely of independent directors. In addition, NYSE and Nasdaq listing standards require that, in affirmatively determining the independence of any director who will serve on the compensation committee, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company that is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:

- the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the listed company to the director; and
- whether the director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.

"Non-Employee Director" Under Section 16. Under the SEC's Section 16 rules, stock-based transactions between a company and its officers or directors are exempt from the short-swing profit liability provisions of Section 16(b) if a committee of two or more "non-employee directors" pre-approves the transactions. Under SEC Rule 16b-3, a "non-employee director" is a director who:

- is not currently an officer or employee of the company, or any parent or subsidiary of the company;
- does not receive compensation, either directly or indirectly, from the company, or any parent or subsidiary of the company, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the $120,000 threshold in Item 404(a) of Regulation S-K; and
- does not have an interest in any other transaction that would be disclosable as a related person transaction under Item 404(a) of Regulation S-K.

"Outside Director" Under Section 162(m). Prior to December 2017, under Internal Revenue Code Section 162(m) and related regulations, performance-based compensation for certain covered employees was exempt from a $1 million limit on deductibility under Section 162(m) if, among other things, the performance goals were set by a compensation committee of two or more "outside directors" and the committee certified that the performance goals were met before the compensation was paid. In December 2017, Congress passed the Tax Cuts and Jobs Act of 2017, which repealed the performance-based exemption from the limit on deductibility, except for certain compensation payable pursuant to a "written binding contract" (generally, as determined under applicable state law) in effect as of November 2, 2017, that was not materially modified after such date.

Unless a company still has outstanding performance awards that are grandfathered under the Tax Cuts and Jobs Act, it is no longer necessary to require compensation committee members to qualify as outside directors.

6.2 Compensation adviser conflicts of interest

Item 407 of Regulation S-K and NYSE and Nasdaq listing standards require companies to assess whether the work of compensation consultants, counsel (other than in-house legal counsel) and other advisers who provide advice to the board of directors or the compensation committee on the amount or form of executive or director compensation raises any conflict of interest, and if so, disclose the nature of the conflict and how the conflict is being addressed. This requirement does not apply to any consultant whose only role affecting the amount or form of executive and director compensation is limited to (1) consulting on any broad-based plan that does not discriminate in favor of executive officers or directors and that is available generally to all salaried employees, or (2) providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice. In determining whether a conflict of interest exists, a company must consider at least six enumerated independence factors:

- the provision of other services to the company by the employer of the compensation consultant;
- the amount of fees received from the company by the employer of the compensation consultant as a percentage of its total revenue;
- the policies and procedures of the employer of the compensation consultant that are designed to prevent conflicts of interest;
- any business or personal relationship between the compensation consultant and a member of the compensation committee;

- any company stock owned by the compensation consultant; and
- any business or personal relationship between the compensation consultant or the employer of the compensation consultant and an executive officer of the company.

NYSE listing standards also require a company to more broadly consider all factors relevant to assessing an adviser's independence from management.

Notably, these standards do not require a compensation adviser or consultant to be independent. A company is not prohibited from using any adviser it prefers when it comes to executive and director compensation advice; however, disclosure is required of potential conflicts of interest (if any are uncovered) and how those are being addressed.

In addition, while the compensation adviser conflicts of interest analysis must be performed every fiscal year, the rules do not require affirmative disclosure that no conflict of interest was found to exist. Many companies, however, voluntarily indicate that adviser independence was assessed and the results of that assessment (typically, that no conflicts of interest were found to exist).

6.3 Disclosure of compensation consultant fees

To help investors better assess the role of compensation consultants and potential conflicts of interest, Item 407 of Regulation S-K requires companies to disclose fees paid to certain compensation consultants who provide advice to the board of directors or the compensation committee on executive or director compensation if the consultants also provide other services to the company.

Must Disclose Fees and Reasoning if Fees Exceed $120,000 for Other Services. If a compensation consultant engaged by the board of directors or compensation committee provides other services to the company (e.g., benefits administration, human resources consulting or product sales), in addition to its services related to determining or recommending the amount or form of executive or director compensation, and the fees for those additional services exceed $120,000 during the company's fiscal year, the company must report the following information:

- the aggregate fees paid for (1) work related to determining or recommending the amount or form of executive and director compensation, and (2) the additional services;
- whether management was involved in the decision to engage the compensation consultant for the non-executive compensation services; and
- whether the board of directors or the compensation committee approved the additional services.

If the board of directors or compensation committee has not engaged its own compensation consultant but management or the company has, the company must disclose the aggregate fees paid to the consultant for advice on executive or director compensation and for the other services if the consultant was engaged to provide advice on executive or director compensation and other services and it received more than $120,000 in fees for the other services during the company's fiscal year.

Disclosure Not Required if Board and Management Have Their Own Consultants. If the board of directors (or the compensation committee) and management each have engaged different compensation consulting firms to provide advice on executive or director compensation, fee disclosure is not required, even if management's consultant provides additional services to the company.

Disclosure Not Required for Consulting Limited to Broad-Based Plans and General Survey Information. As with the compensation adviser independence assessment, the rules do not require fee disclosures where the consultant's only role is consulting on broad-based plans available generally to all salaried employees that do not discriminate in scope, terms or operation in favor of executive officers or directors (e.g., 401(k) plans or health insurance plans) or providing survey information that either is not customized for a particular company or is customized based on parameters that are not developed by the consultant.

6.4 Compensation committee practices and procedures

Each company must disclose specific information about its compensation committee.

- **Committee Members, Meetings, Functions.** Under Item 407 of Regulation S-K, a company must state whether or not it has a standing compensation committee and disclose certain information about the committee:
  - the members of the compensation committee (including each person who served as a member during the last completed fiscal year);
  - the number of committee meetings held by the compensation committee during the last fiscal year; and
  - a description of the functions performed by the compensation committee.

  A company without a compensation committee (or a committee performing similar functions) must explain why it does not have such a committee and identify directors who participate in executive officer and director compensation decisions.
- **Committee Charter and Website Posting.** A company must disclose whether its compensation committee has a charter and, if so, whether the charter is available on the company's website (and provide the website address).

- **Must File Charter with Proxy Statement if Not Posted on Website.** If the charter is not posted on the company's website, the company must append a copy of the charter to its proxy statement at least once every three years (or earlier if the charter was materially amended since the beginning of the past fiscal year) and, for years in which the company does not append its compensation committee charter to its proxy statement, the proxy statement must identify the most recent prior proxy statement that included the charter.
- **Narrative Disclosure.** A company must describe (in narrative format) its processes and procedures for considering and determining executive officer and director compensation, including:
  - the compensation committee's scope of authority;
  - the extent to which the compensation committee may delegate its authority to other persons, including which authority and to whom the compensation committee may delegate;
  - the role of executive officers in determining or recommending the amount or form of executive officer and director compensation; and
  - the role compensation consultants play in determining or recommending executive officer and director compensation, identifying the consultants, whether they were engaged directly by the compensation committee (or persons performing the equivalent functions) or by any other person, the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants.

- **Broader Compensation Committee Function.** In response to pressure from institutional investors and proxy advisory firms, a growing number of companies have expanded the scope of the compensation committee's authority to support the board in its oversight of additional environmental, social and governance (ESG)-related matters, including human capital management, the incorporation of ESG-related metrics into compensation programs, and diversity and inclusion initiatives. In addition, in August 2020 as part of its efforts to further modernize Regulation S-K, the SEC adopted amendments to Regulation S-K requiring disclosure of human capital resources as a separate disclosure topic. The COVID-19 pandemic redoubled investor focus on human capital management issues, including workplace safety and employee welfare. In light of these developments, and to the extent that responsibility for oversight is assigned to the compensation committee, companies should consider providing additional disclosure regarding the compensation committee's role in overseeing the company's human capital management and ESG-related programs and policies.

- **HOW DOES COMPENSATION COMMITTEE DISCLOSURE DIFFER FROM CD&A?**

  While both the compensation committee disclosure and the CD&A address executive officer compensation, each has a different focus. The compensation committee disclosure focuses on the

company's corporate governance structure for considering and determining the amount and form of executive officer and director compensation. In contrast, the CD&A focuses on material information about the company's named executive officer compensation policies and objectives to put into perspective the accompanying quantitative disclosure.

6.5 Compensation committee report

Under Item 407 of Regulation S-K, the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) must state under the caption "Compensation Committee Report" whether:

- the compensation committee has reviewed and discussed the CD&A with management and
- based on the review and discussions, it has recommended to the board of directors that the CD&A be included in the company's annual report on Form 10-K and proxy statement.

The Compensation Committee Report must be over the names of the compensation committee members (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors). The SEC Staff has indicated that new directors who did not participate in the review, discussions and recommendation with respect to the CD&A need not be named in the Compensation Committee Report. Former directors also are not required to be named. However, directors who resigned from the compensation committee during the last completed fiscal year but who remain directors still need to be named in the Compensation Committee Report if they participated in the compensation committee's review, discussions and recommendation with respect to the CD&A. The Compensation Committee Report is "furnished" and not filed but is designed to accompany the CD&A (and is incorporated by reference into the annual report on Form 10-K). However, the SEC has stated that the CEO and CFO will be able to look to this report in making their required certifications regarding disclosure controls and procedures and internal control over financial reporting, which cover the CD&A.

7.0 Shareholder approval of executive compensation & equity plan proposals

A number of disclosures are required or recommended with respect to certain proposals submitted to a company's shareholders for a vote, including the advisory say-on-pay, say-on-frequency and say-on-golden parachute votes required by the SEC beginning in 2011, as well as equity plan proposals requiring shareholder approval in order to comply with certain NYSE, Nasdaq or Internal Revenue Code requirements.

7.1 Say-on-pay proposals

Section 14A of the Exchange Act requires companies to solicit a non-binding, advisory shareholder vote on the company's executive compensation as disclosed pursuant to Item 402 of Regulation S-K. Say-on-pay rules only apply for annual shareholders' meetings at which directors will be elected, or a special meeting in lieu of such meeting.

- **Must Conduct at Least Once Every Three Years.** Say-on-pay votes must be held at least once every three years.
- **Resolution Language.** The final rules do not require companies to use any specific language to be voted on by shareholders, but require the resolution to indicate that the say-on-pay vote is to approve the compensation of the company's named executive officers as disclosed pursuant to Item 402 of Regulation S-K. Many companies have included the following or a substantially similar resolution, which the final rules provided as an example:

  "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED."
- **Proxy Statement Disclosures.** Companies must provide disclosure in the annual meeting proxy statement concerning the say-on-pay vote, including whether it is non-binding. The SEC issued guidance on how a company should describe the say-on-pay vote, providing the following examples as consistent with Exchange Act rules:
  - to approve the company's executive compensation
  - advisory approval of the company's executive compensation
  - advisory resolution to approve executive compensation
  - advisory vote to approve named executive officer compensation

The SEC noted that describing the vote as "to hold an advisory vote on executive compensation" would be inconsistent with Exchange Act rules, because it would not be clear from this description what shareholders are being asked to vote on (i.e., whether they are being asked to vote on whether or not the company should hold an advisory vote on executive compensation, instead of asking shareholders to actually approve the compensation on an advisory basis).

In practice, companies have adopted a range of approaches with the content of their say-on-pay proposals. Some companies have provided a high level summary of the disclosure included in their CD&A while others have elected to cross reference that section or their proxy statement in an effort to minimize duplicative disclosure.

- **Consideration of Voting Results.** Although say-on-pay votes are non-binding, companies must also address in subsequent years' CD&As whether, and if so, how the companies considered the results of their most recent say-on-pay vote, and how that consideration affected their executive compensation decisions and policies.

7.2 Say-on-frequency proposals

Companies are also required to hold a separate non-binding, advisory vote on the frequency with which they will hold say-on-pay votes. These say-on-frequency votes allow shareholders to vote on whether they prefer to be presented with the say-on-pay vote every year, once every two years, or once every three years. Say-on-frequency rules only apply for annual shareholders' meetings at which directors will be elected, or a special meeting in lieu of such meeting.

- **Must Conduct at Least Once Every Six Years.** Say-on-frequency votes must be held at least once every six years.
- **Proxy Statement Disclosures.** Companies must provide disclosure in the annual meeting proxy statement concerning the say-on-frequency vote, including whether it is non-binding. Companies must allow shareholders to cast say-on-frequency votes via the following four choices on the proxy card: one year, two years, three years, or abstaining on the frequency vote.
- **Form 8-K Disclosure of Say-on-Frequency Decision.** Although say-on-frequency votes are non-binding, following the vote, companies must also disclose how often they will conduct say-on-pay votes on a Form 8-K. The Form 8-K must be filed no later than 150 calendar days after the date of the meeting at which the say-on-frequency vote was conducted, and no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the next annual meeting.

7.3 Say-on-golden parachute proposals

Companies are also required to provide additional disclosure regarding compensation arrangements with named executive officers in connection with mergers, acquisitions, and other specified transactions including going-private transactions and third-party tender offers. All agreements and understandings of such "golden parachute" arrangements with named executive officers must be disclosed for both the acquiring and target companies, and the disclosure must be made in the form of both narratives and tables. For additional information on these Golden Parachute Compensation disclosure requirements, see Section 3.9 above.

- **When Disclosure and Vote are Required.** Companies must provide a separate shareholder advisory say-on-golden parachute vote to approve such golden parachute arrangements unless they were subject to a prior say-on-pay vote (although, in practice, it is rare for companies to seek to satisfy the golden parachute advisory vote through a say-on-pay vote). Such say-on-golden parachute votes are only required in connection with shareholders' meetings in which shareholders are voting to approve a merger, acquisition, consolidation, or a proposed sale or other disposition of all of substantially all the company's assets.

7.4 Compensation plan proposals

Compensation plans are subject to a number of different shareholder approval requirements, including under NYSE and Nasdaq listing standards and certain provisions of the Internal Revenue Code (such as for stock options to qualify as "incentive stock options"). When such plans are submitted to shareholders for approval, disclosure requirements under Item 10 of Exchange Act Schedule 14A (which sets forth the disclosure requirements for proxy statements in general) must be met, as discussed below.

7.4.1 NYSE Equity Plan Shareholder Approval Requirements. For companies listed on the NYSE, all equity-compensation plans and any material revisions to the terms of such plans must be submitted to a shareholder vote, subject to a number of limited exceptions as described below.

- **What is an "Equity Compensation Plan"?** An "equity compensation plan" under the NYSE rules includes any plan or other arrangement (including a compensatory grant of options made outside of a plan) that provides for the delivery of equity securities (either newly issued or treasury shares) to any employee, director or other service provider as compensation for services. However, the NYSE shareholder approval rules do *not* apply to (1) plans made available to shareholders generally (e.g., a typical dividend reinvestment plan) or (2) plans that merely allow employees, directors or other service providers to purchase shares at their current fair market value,

regardless of whether the shares are delivered immediately or deferred and regardless of whether payment for the shares is made directly or by giving up compensation otherwise due (e.g., through payroll deductions).

- **What is a "Material Revision"?** A material revision to an equity compensation plan includes any of the following:
  - a material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spin-off or similar transaction);
  - an expansion of the type of awards available under the plan;
  - a material expansion of the class of employees, directors or other service providers eligible to participate in the plan;
  - a material extension of the term of the plan;
  - a material change to the method of determining the strike price of options under the plan (not including a change in the method of determining "fair market value" from the closing price on the grant date to the average or high and low price on the date of grant); and
  - the deletion or limitation of any provision prohibiting repricing of options (keeping in mind that the NYSE construes a plan that does not expressly permit repricing of options as prohibiting repricings).

A material revision does not include any amendment that curtails rather than expands the scope of the plan in question.

- **Which Plans are Exempt from the NYSE Shareholder Approval Requirements?** There are three key exemptions from the NYSE equity compensation plan shareholder approval requirements:

  (1) *employment inducement awards* – An employment inducement award is generally an equity grant made to a person as a material inducement to the person being hired by the company, or rehired following a bona fide period of unemployment. If relied upon, the company must typically issue a press release immediately following the grant of the employment inducement award;

  (2) *certain grants, plans and amendments in the context of mergers and acquisitions* – Companies may convert, replace, or adjust outstanding equity awards to reflect a transaction and may use shares available under plans of the acquired company for grants to employees of the acquired company if such plans were previously approved by shareholders; and

  (3) *grants under qualified plans, certain excess plans, and Code Section 423 employee stock purchase plans* – Shareholder approval is not required for plans intended to meet the requirements of Code section 401(a) (e.g., 401(k) plans or employee stock ownership plans), plans

intended to meet the requirements of Code section 423 (employee stock purchase plans), certain parallel excess plans (i.e., nonqualified pension plans intended to work in parallel with a qualified plan to provide benefits in excess of certain Code limitations), or similar plans revised to comply with foreign tax law.

7.4.2 Nasdaq Equity Plan Shareholder Approval Requirements. As with companies listed on the NYSE, companies listed on the Nasdaq must satisfy shareholder approval requirements when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

- **Which Plans are Exempt from the Nasdaq Shareholder Approval Requirements?** There are four key exemptions from the Nasdaq equity compensation plan shareholder approval requirements:

  (1) warrants or rights issued generally to all security holders of the company or stock purchase plans available on equal terms to all security holders of the company (such as a typical dividend reinvestment plan);

  (2) tax qualified, non-discriminatory employee benefit plans (such plans that meet the requirements of Section 401(a) or 423 of the Code) or parallel nonqualified plans or plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value;

  (3) plans or arrangements relating to acquisitions or mergers in two situations: (a) the conversion, replacement or adjustment of outstanding options or other equity compensation awards to reflect the transaction, or (b) the use, for post-transaction grants, of shares available for grant under pre-existing plans of the acquired company by converting those shares into the dollar-equivalent number of shares of the acquirer if certain requirements are met; or

  (4) employment inducement awards.

7.4.3 Disclosure Requirements. If shareholder approval is to be sought for a plan pursuant to which cash or non-cash compensation may be paid or distributed, the proxy disclosure rules require companies to disclose the following information in the plan proposal set forth in the company's proxy statement:

- the material features of the plan being acted upon;
- each class of persons who will be eligible to participate in the plan, including the approximate number of persons in each such class and state the basis of such participation;

- a table containing the benefits or amounts that will be received by or allocated to each of the following individuals or groups under the plan (if known or determinable): each of the named executive officers, all current executive officers as a group, all current directors who are not executive officers as a group and all employees, including current officers who are not executive officers, as a group. If such information is not known or determinable, this disclosure should be provided with respect to the benefits or amounts that would have been received by or allocated to each such individual or group for the last completed fiscal year as if the plan had been in effect, or a statement should be included that such amounts are not determinable; and
    - If the plan can be amended other than by a stockholder vote to increase its cost or alter the allocation of benefits between persons and groups specified in the above-mentioned table, disclose the nature of the amendments that can be so made.
- **Additional Disclosures for Pension or Retirement Plans.** If a pension or retirement plan is submitted for shareholder action, the company must also disclose: (1) the approximate total amount necessary to fund the plan with respect to past services, the period over which such amount is to be paid and the estimated annual payments necessary to pay the total amount over such period; and (2) the estimated annual payment to be made with respect to current services.
- **Additional Disclosures for Specific Grants or Plans Containing Options, Warrants or Rights.** If a plan containing options, warrants or rights (or a specific grant of options, warrants or rights) is submitted for shareholder action, the company must also disclose: (1) the title and amount of securities underlying options, warrants or rights; (2) the prices, expiration dates and other material conditions related to exercise; (3) the consideration received or to be received for the grant or extension; (4) the market value of securities underlying the options, warrants or rights as of the latest practicable date; and (5) in case of options, the federal income tax consequences of the issuance and exercise of such options to the recipient and company. In addition, the company must state separately the amount of options received or to be received by the following (if such benefits are determinable): each named executive officer, all current executive officers as a group, all current directors who are not executive officers as a group, each nominee for election as director, each associate of any of such directors, executive officers or nominees, each other person who received or is to receive 5% of such options, warrants or rights and all employees, including all current officers who are not executive officers, as a group.

7.5 Equity plan information table

Under Item 201(d) of Regulation S-K, companies must disclose, as of the end of the most recently completed fiscal year, aggregated totals (on the basis of each class of securities) of shares authorized for

issuance under all compensation plans previously approved by shareholders and under all compensation plans not previously approved by shareholders. This information is required to be set forth in an Equity Compensation Plan Information Table in the following format:

Equity compensation plan information

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights (a)	Weighted-average exercise price of outstanding options, warrants and rights (b)	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a)) (c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total			

- **Accompanying Narrative.** For each equity compensation plan that was adopted without the approval of stockholders, the company must briefly describe, in narrative form, the material features of the plan.
- **Location of Disclosure.** If a compensation plan is submitted for shareholder approval, the Equity Plan Information table must be included in the proxy statement. However, in years when no compensation plan is submitted for shareholder approval, this tabular disclosure may be included in the proxy or Form 10-K.
- **Equity Compensation Plans Covered.** Disclosure is required for any compensation plan or arrangement under which company equity securities are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders) in exchange for consideration in the form of goods or services. However, no disclosure is required for:
  - Any plan, contract or arrangement for the issuance of warrants or rights to all company shareholders as such on a pro rata basis (such as a stock rights offering); or

- Any plan intended to be qualified under Code section 401(a) (such as a 401(k) plan or employee stock ownership plan).

7.6 Voting standards

A company's proxy statement must include the following for each item submitted to a vote of the Company's shareholders, including for any say-on-pay, say-on-frequency, say-on-golden parachute, or equity compensation plan proposals:

- State the vote required for approval under applicable state law, company charter or bylaw provisions, and, if applicable, NYSE and Nasdaq listing standards; and
- Disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and bylaw provisions;

Companies often also disclose whether each matter is considered "routine" or "non-routine" for purposes of NYSE rules that are applicable to brokerage firms regarding discretionary voting of their customers' shares. All equity plan proposals, say-on-pay, say-on-frequency and say-on-golden parachute resolutions are considered "non-routine" for these purposes. Under NYSE rules, brokers may not vote on non-routine matters without specific instructions from their customers, resulting in what are commonly referred to as "broker non-votes."

- **NYSE Voting Standards.** In addition to any applicable state law or charter or bylaw provisions, an equity compensation plan proposal that requires shareholder approval under applicable NYSE requirements (see Section 7.4.2 above) must be approved by a majority of the votes cast on the proposal, with the NYSE treating abstentions as votes cast. Formerly, a separate NYSE quorum requirement applied to these proposals, but that standard was repealed in 2013. The treatment of abstentions under NYSE rules may differ from the treatment under relevant state law (and does in fact differ from the applicable treatment under Delaware law). For this purpose, the NYSE counts abstentions as votes cast, meaning that such votes are included in the denominator in determining whether the approval requirement is satisfied. Under Delaware law, abstentions are not treated as votes cast, so they are not counted in determining the outcome of a vote.
- **Nasdaq Voting Standards.** In addition to any applicable state law or charter or bylaw provisions, an equity compensation plan proposal that requires shareholder approval under applicable Nasdaq requirements (see Section 7.4.3 above) must be approved by a majority of the total votes cast on the proposal. Unlike the NYSE, Nasdaq does not define "votes cast" and has issued an FAQ

stating that companies should calculate votes cast in accordance with their charter/bylaw provisions and applicable state law.

7.7 Proxy advisory firm recommendations

When preparing say-on-pay, say-on-frequency, say-on-golden parachute, or equity compensation plan proposals, companies may wish to consider the potential voting recommendations of proxy advisory firms, the largest two of which are Institutional Shareholder Services (ISS) and Glass Lewis.

7.7.1 ISS Voting Guidelines. Under its 2023 United States Proxy Voting Guidelines, ISS states the following with respect to these types of proposals:

- ***Say-on-Pay Proposals***: ISS may issue a negative voting recommendation on a company's say-on-pay proposal if:
  - There is an unmitigated misalignment between CEO pay and company performance using ISS's proprietary "pay for performance analysis," which compares the company's relative total shareholder return (TSR) and the CEO's annualized total pay rank to a peer group over a three year period, compares the rankings of the CEO's total pay and the company's financial performance to a peer group over a three-year period. and views the absolute alignment between CEO pay and company TSR over a five year period.
  - The company maintains significant "problematic pay practices" including any of the following:
    - repricing or replacing of underwater stock options/SARS without prior shareholder approval (including cash buyouts and voluntary surrender of underwater options);
    - extraordinary perquisites or tax gross-ups;
    - new or materially amended agreements that provide for:
      - excessive termination or change in control severance payments, generally exceeding three times base salary + average/target/most recent bonus;
      - change in control severance payments with single or modified single triggers (payments without involuntary job loss or substantial diminution of duties) or problematic Good Reason definitions;
      - change in control excise tax gross-ups, including "modified" gross ups;
      - multi-year guaranteed awards that are not subject to rigorous performance conditions;
    - liberal change in control definition combined with any single-trigger change in control benefits;
    - insufficient executive compensation disclosure by externally-managed issuers;
    - severance payments made when the termination is not clearly disclosed as involuntary; or

- any other provision or practice deemed to be egregious and present a significant risk to investors.

- The board exhibits a significant level of poor communication and responsiveness to shareholders, including any of the following:
  - failure to respond to majority-supported shareholder proposals on executive pay topics;
  - failure to adequately respond to the company's previous say-on-pay proposal that received the support of less than 70 percent of votes cast, taking into account: (1) disclosure of engagement efforts with major institutional investors regarding the issues that contributed to the low level of support; (2) disclosure of the specific concerns voiced by dissenting shareholders that lead to the say on pay opposition; (3) disclosure of specific and meaningful actions taken to address shareholders' concerns; and (4) other recent compensation actions taken by the company; (5) whether the issues raised are recurring or isolated; (6) the company's ownership structure; and (7) whether the support level was less than 50 percent, which would warrant the highest degree of responsiveness.

In addition, ISS will recommend an "against" or "withhold" vote from the members of the Compensation Committee and potentially the full board if:

- There is no say-on-pay proposal on the ballot, and an "against" vote on a say-on-pay proposal is warranted due to pay for performance misalignment, problematic pay practices, or the lack of adequate responsiveness on compensation issues raised previously, or a combination thereof;
- The board fails to respond adequately to a previous say-on-pay proposal that received less than 70 percent support of votes cast;
- The company has recently practiced or approved problematic pay practices, including option repricing without prior shareholder approval or option backdating; or
- The situation is otherwise egregious.

- ***Say-on-Frequency Proposals***: ISS will generally recommend annual say-on-pay votes.
- ***Say-on-Golden Parachute Proposals***: ISS may recommend against a say-on-golden parachute proposal if the company's compensation arrangements exhibit one or more of the following:
  - single- or modified-single-trigger cash severance;
  - single-trigger acceleration of unvested equity awards;
  - full acceleration of equity awards granted shortly before the change in control;
  - acceleration of performance awards above the target level of performance without compelling rationale;

- excessive cash severance (>3x base salary and bonus);
- excise tax gross-ups triggered and payable (as opposed to a provision to provide excise tax gross-ups);
- excessive golden parachute payments (on an absolute basis or as a percentage of transaction equity value); or
- recent amendments that incorporate any problematic features (such as the "problematic pay practices" listed above) or recent actions (such as extraordinary equity grants) that may make packages so attractive as to influence merger agreements that may not be in the best interests of shareholders; or
- the company's assertion that a proposed transaction is conditioned on shareholder approval of the golden parachute advisory vote.

- ***Equity-Based and Other Incentive Plan Proposals***. Since 2015, ISS has followed its holistic, multi-faceted "equity plan scorecard" ("EPSC") approach to evaluating equity and incentive plan proposals. The EPSC approach considers the following three "pillars":
  - **Plan Cost:** The total estimated cost of the company's equity plans relative to industry/market cap peers, measured by the estimated Shareholder Value Transfer in relation to the company's peers, as determined under a proprietary ISS methodology.
  - **The Following Plan Features:**
    - Quality of disclosure around vesting upon a change in control;
    - Discretionary vesting authority;
    - Liberal share recycling on various award types;
    - Lack of minimum vesting period for grants made under the plan; and
    - Dividends payable prior to award vesting.
  - **The Following Company Grant Practices:**
    - The company's three year value-adjusted burn rate relative to its industry/market cap peers;
    - Vesting requirements in most recent CEO equity grants (three year look-back);
    - The estimated duration of the plan (based on the sum of shares remaining available and the new shares requested, divided by the average annual shares granted in the prior three years);
    - The proportion of the CEO's most recent equity grants/awards subject to performance conditions;
    - Whether the company maintains a claw-back policy; and
    - Whether the company maintains post exercise/vesting share-holding requirements.

- In addition, despite the EPSC score, a negative voting recommendation may be issued if any egregious factors apply, including that the plan serves as a vehicle for problematic pay practices or a significant pay-for-performance disconnect.

7.7.2 Glass Lewis Voting Guidelines. The following provides a brief overview of Glass Lewis' approach to evaluating say-on-pay, say-on-frequency, say-on-golden parachute and equity compensation plan proposals as set forth in Glass Lewis' 2023 Proxy Paper Guidelines.

- ***Say-on-Pay Proposals***: Glass Lewis provides say-on-pay voting recommendations on a case-by-case basis after reviewing say-on-pay proposals on both a qualitative basis and a quantitative basis and focusing on several key areas: (1) the overall design and structure of the executive compensation programs, including the selection and challenging nature of performance metrics; (2) the implementation and effectiveness of the executive compensation programs, including pay mix and use of performance metrics in determining pay levels; (3) the quality and content of the company's disclosure; (4) the quantum paid to executives; and (5) the link between compensation and performance as indicated by the company's current and past "pay-for-performance" grades under Glass Lewis' proprietary "pay-for-performance" model. The "pay-for-performance" grade evaluates the compensation of the company's named executive officers and compares such with the compensation of the named executive officers at peer group companies and then compares the company's performance against the performance of those peer companies.
- ***Say-on-Frequency Proposals***: Glass Lewis will generally recommend annual say-on-pay votes.
- ***Say-on-Golden Parachute Proposals***: Glass Lewis provides say-on-golden parachute voting recommendations on a case-by-case basis, taking into account the following non-exclusive factors:
  - the nature of the change-in-control transaction;
  - the ultimate value of the payments particularly compared to the value of the transaction;
  - any excise tax gross-up obligations;
  - the tenure and position of the executives in question before and after the transaction;
  - any new or amended employment agreements entered into in connection with the transaction; and
  - the type of triggers involved (i.e., single vs. double).

- ***Equity-Based Compensation Plan Proposals.*** Glass Lewis evaluates equity-based compensation plan proposals on both a quantitative basis and a qualitative basis.
  - **Quantitative Analysis.** Glass Lewis' quantitative analysis first focuses on plan cost and granting practice to determine whether the proposed plan either exceeds Glass Lewis' absolute limits or is more than one standard deviation away from the average plan for the company's Glass Lewis-identified peer group on a range of criteria, including dilution and projected annual cost relative to the company's financial program. Next, Glass Lewis compares the program's expected annual expense with (1) the business's operating metrics to assess whether the plan is excessive in light of company performance and (2) the enterprise value of the company.
  - **Qualitative Analysis.** Glass Lewis' qualitative analysis focuses on certain aspects of the plan, including plan administration, the method and terms of exercise, express or implied rights to reprice and the presence of evergreen provisions. In addition, Glass Lewis reviews the selection, use and rigor of the performance metrics and targets applicable to plan awards. To the extent that the company has proposed significant changes to the terms of a plan or program, Glass Lewis expects those changes to be explained and clearly indicated in the equity-based compensation plan proposal. Glass Lewis has indicated that other factors, including the company's size and operating environment, may be relevant in its assessment of a plan or the benefits of certain changes. Glass Lewis may also consider a company's broader executive compensation practices.
  - **Overarching Principles.** Glass Lewis has stated that its evaluation of equity-based compensation plan proposals is based on certain overarching principles:
    - Companies should only request more shares when needed and any share request should be designed to last no more than three to four years.
    - Plans with a higher relative cost should grant options to a broader pool (i.e., not limited to senior executives and directors).
    - Dilution of annual net share count or voting power, as well as "overhang" of plans, should be limited.
    - The plan's expected annual cost should be proportional to the value of the company's business.
    - Plans should not permit repricing of stock options.
    - Plans should contain excessively liberal administrative or payment terms.
    - Plans should not count shares in ways that understate the potential dilution or cost to shareholders (i.e., the use of "inverse" full-value award multipliers).

- Applicable performance metrics should be appropriate, challenging and subject to relative performance measurements.
- Stock grants should be subject to sufficient minimum vesting and/or holding period requirements to promote retention and encourage sustainable company performance.

If a company is concerned with either ISS or Glass Lewis voting recommendations on any relevant proposals, it should be sure that the advisory firm's current proxy voting guidelines have been considered and favorable plan features are accurately and adequately described in the relevant proxy proposals.

8.0 Reporting compensation on Form 8-K

Form 8-K requires companies to report specified events within four business days after their occurrence. To focus disclosure on "unquestionably and presumptively material" compensatory arrangements, the SEC consolidated under Item 5.02 all disclosure regarding compensation issues.

8.1 Item 5.02 of Form 8-K

Under Item 5.02 of Form 8-K, companies must file a Form 8-K to report the departure or election of any director, the departure of certain specified officers, including any named executive officer, and the appointment of certain specified officers. A company must also report on Form 8-K if it enters into or materially amends any material compensatory arrangement for a specified officer, including any named executive officer.

Companies Must Report Departure of Certain Specified Executive Officers, Including Any Named Executive Officer. Item 5.02 of Form 8-K requires a company to disclose the date of and the fact of retirement, resignation or other termination of:

- any of these specified officers: principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions; or
- any named executive officer.

The SEC Staff has interpreted this disclosure requirement to be triggered when a director or executive provides notice of his or her decision to resign, retire, terminate or refuse to stand for re-election, whether or not such notice is written, and regardless of whether the resignation, retirement, termination or refusal to stand for re-election is conditional or subject to acceptance.

Companies Must Report Appointment of Any Specified Executive Officer. Item 5.02 of Form 8-K requires a company to disclose the appointment of a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions.

Determine "Named Executive Officers" for Item 5.02 Based on Most Recent Annual Filing. For Item 5.02 disclosure, "named executive officers" means the executive officers for whom a company disclosed required compensation information in its most recent SEC filing that was required to include a Summary Compensation Table.

Companies Must Disclose Compensatory Arrangements with New Directors and New Specified Officers. A company reports on Form 8-K when a new director is elected other than at an annual or special meeting of shareholders convened for such purpose and when it appoints any of the specified executive officers. For a newly appointed director or specified officer, the company must also include a brief description of:

- any material plan, contract or arrangement (whether or not written) entered into in connection with the election or appointment;
- a material amendment to a material plan, contract or arrangement in connection with the election or appointment; or
- a grant or award to a new director or specified officer, or a modification to an existing grant or award, in connection with the election or appointment.

Companies Must Report on Form 8-K When They Enter into or Materially Amend Material Compensatory Arrangements with Named Executive Officers. Item 5.02(e) requires a company to report on Form 8-K and briefly describe the material compensatory plan, contract, arrangement, grant or award, or the material amendment, whenever the company:

- enters into, adopts, commences or materially amends a material compensatory plan, contract or arrangement (whether or not written) in which the company's principal executive officer, principal financial officer, or any of the named executive officers participates or is a party; or
- approves or materially amends any material grant or award under any plan, contract or arrangement (whether involving cash or equity), unless
  - the grants or awards (or modifications) made pursuant to a plan, contract or arrangement are materially consistent with the previously disclosed terms of the plan, contract or arrangement *and*
  - the grants or awards (or modifications) are disclosed in the next proxy statement or when Item 402 of Regulation S-K otherwise requires disclosure.

Grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement (whether involving cash or equity), that are materially consistent with previously disclosed terms of such plan, contract or arrangement, need not be disclosed under Item 5.02(e), provided the company has previously disclosed such terms and the grant, award or modification is disclosed in the Summary Compensation Table and the Grant of Performance-Based Awards Table when Item 402 of Regulation S-K requires such disclosure.

Item 5.02 Excludes Broad-Based Compensation Arrangements. Any compensation plan, contract or arrangement that does not discriminate in favor of executive officers and that is available generally to all salaried employees is not "material" for purposes of Item 5.02 of Form 8-K.

8.2 Item 5.07 of Form 8-K

Under Item 5.07 of Form 8-K, companies must disclose the results of a shareholder vote, including a shareholder vote on a compensation proposal, within four business days after the date on which the vote occurs. A company must also report on Form 8-K the outcome of a vote on the frequency of shareholder advisory votes on executive compensation. In situations where a company may not have definitive results within four business days after the meeting date, the company must report the preliminary voting results on Form 8-K within four business days after the preliminary voting results are determined. Once the company certifies the final voting results, the company must then file an amended report on Form 8-K within four business days to disclose those final results.

Companies Must Report Shareholder Voting Results on Form 8-K When a Meeting Involved the Election of Directors. If a shareholder vote involves the election of directors, Form 8-K requires a company to disclose:

- the name of each director elected at the meeting;
- a brief description of each other matter voted upon at the meeting; and
- for each such matter, the number of votes for, against or withheld and the number of abstentions and broker non-votes, including a tabulation with respect to each nominee for office.

Companies Must Report Shareholder Voting Results on the Frequency of Shareholder Advisory Votes on Executive Compensation. Form 8-K requires a company to disclose the results of a vote on the frequency of shareholder advisory votes on executive compensation, including the number of votes cast for each of one year, two years, and three years, as well as the number of abstentions. No later than 150 days after such vote occurs, but in no event later than 60 days prior to the deadline for shareholder proposal submissions, a company must disclose its decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials. A company must report such disclosure in the Form 8-K reporting the shareholder voting results on the frequency of shareholder advisory votes on executive compensation, in an amendment to the most recent Form 8-K filed or, alternatively, in a periodic report instead of Form 8-K.

- **FORM 8-K COMPENSATION DISCLOSURE FOR EXECUTIVES AND DIRECTORS**

  Form 8-K Not Required for Compensation Changes for Continuing Directors. Companies are not required to report director compensation on Form 8-K unless the director is elected other than by a vote of shareholders at a meeting convened for that purpose (e.g., if the board of directors appoints the director to fill a vacancy).

  Companies Must Disclose Compensatory Arrangements for New Directors and Specified Officers. Companies must disclose material compensatory arrangements or material amendments to those arrangements entered into in connection with a director's election or a specified officer's appointment. Companies will also disclose *all* grants or awards, irrespective of size or materiality, under a material compensatory arrangement or amendments to grants or awards made in connection with a director's election or a specified officer's appointment.

  Shareholder Approval of a New Compensatory Plan Triggers Form 8-K Filing. When a company adopts a new material compensatory plan or arrangement, or approves a material amendment to an existing material compensatory plan or arrangement, that includes the company's principal executive officer, principal financial officer, or any named executive officers and becomes effective on receipt of shareholder approval, the date of the shareholder approval is the trigger date for the obligation to report the plan under Item 5.02(e) of Form 8-K.

  Companies Need Not File Form 8-K to Disclose Specific Performance Goals if Materially Consistent with Previously Disclosed Terms of Plan. A company is not required to file a Form 8-K to report the establishment of specific performance goals or business criteria under a compensatory plan or arrangement if the specific performance goals and business criteria set for the performance period are materially consistent with the previously disclosed terms of the plan or arrangement. For example, if the specific goals and criteria are among the previously disclosed performance goals and business criteria (such as EBITDA, return on equity or other applicable measure) that the plan may apply or has applied.

  Companies Must Also File Form 8-K to Disclose Omitted Salary or Bonus Amounts. A company may omit from the Summary Compensation Table the value of the salary or bonus earned by a named executive officer if it cannot calculate the value prior to filing its annual report or proxy statement. If a company omits this information, Item 5.02(f) requires the company to file a Form 8-K to report this information as soon as the amounts are calculable in whole or in part. In addition, the company must also include a new total compensation amount that reflects the new salary or bonus information.

Limited Safe Harbor Covers Item 5.02(e). The limited safe harbor from liability under Rule 10b-5 and Section 10(b) of the Exchange Act applies to a company's failure to timely file reports required by Item 5.02(e) of Form 8-K. This safe harbor extends only until the due date of the next periodic report for the relevant period in which the Form 8-K was not timely filed. Companies that fail to timely file reports on Form 8-K required solely by Item 5.02(e) will not lose their eligibility to use Form S-3 registration statements as a result of those failures to file timely, so long as the company files the disclosure required by Item 5.02(e) of Form 8-K on or before the date on which it files a Form S-3.

9.0 Beneficial ownership table

The Beneficial Ownership Table requires companies to disclose the number and percentage of the company's shares beneficially owned by each named executive officer, director and nominee and by the company's executive officers and directors as a group. Under these rules, companies must also disclose information regarding stock pledges and directors' qualifying shares. The Beneficial Ownership Table also requires disclosure of beneficial ownership information with respect to greater than 5% security holders.

9.1 Management shares subject to stock pledges

Companies must disclose in footnotes to the Beneficial Ownership Table the number of shares of company stock pledged as security by each named executive officer, each director and director nominee, and all executive officers, directors and director nominees as a group "as of the most recent practicable date."

The more limited disclosure required under the prior rules, which required disclosure of pledges only if they might result in a change in control of the company, still applies to more than 5% security holders.

The beneficial ownership disclosure rules do not require disclosure of hedging arrangements that alter the executive's economic interest in the executive's beneficially owned shares unless the arrangements also involve pledges of the underlying shares, which must be disclosed. Hedging transactions frequently involve the purchase or sale of a derivative security that the executive must report within two business days under Section 16(a) of the Exchange Act. In addition, companies must discuss in the CD&A any company policies regarding hedging arrangements. Finally, in December 2018, the SEC adopted Item 407(i) of Regulation S-K which requires companies to disclose whether it allows any director, officer, or employee (or any of their designees) to engage in any transaction to hedge or offset any decrease in the market value of equity securities granted to the individual as compensation or held, directly or indirectly, by the individual. For additional details, see Section 13 below.

9.2 Directors' qualifying shares

Companies must also disclose in the Beneficial Ownership Table directors' qualifying shares, which are shares held by directors pursuant to minimum shareholding requirements mandated by applicable law or a company's charter.

10.0 Related person transactions

Under Item 404 of Regulation S-K, a company must provide detailed disclosure about any transaction since the beginning of its last fiscal year, or any currently proposed transaction, in which the company was or is to be a participant where the amount involved exceeds $120,000, and any related person had or will have a direct or indirect material interest in the transaction. While the disclosure requirements of Item 404 are expansive and largely principles-based, Item 404 does include some exceptions that seek to eliminate duplicative disclosures that could otherwise exist due to the interplay between Items 402 and 404 of Regulation S-K.

10.1 Broad principle for disclosure

Under Item 404(a) of Regulation S-K, a company must disclose and describe (as provided in Item 404(a) of Regulation S-K) in its proxy statement any "transaction," since the beginning of the company's last fiscal year, or any currently proposed transaction, in which:

(1) the company was or is to be a participant;

(2) the amount involved exceeds $120,000; and

(3) any "related person" had or will have a direct or indirect material interest.

A "transaction" includes any series of similar or related transactions.

A "related person" includes:

(1) any person who is, or was, a director or executive officer of the company at any time since the beginning of the company's last fiscal year;

(2) any director nominee;

(3) anyone who was an "immediate family member" of any of the foregoing since the beginning of the company's last fiscal year; and

(4) any security holder known to the company to beneficially own more than 5% of any class of the company's voting securities or any "immediate family member" of any such person, when a transaction in which such security holder or family member had a direct or indirect material interest occurred or existed.

An "immediate family member" includes any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law and sister-in-law, and any person (other than a tenant or employee) sharing the household of any director, nominee for director, executive officer, or significant shareholder of the company.

An individual who was a "related person" at any point since the beginning of the company's last fiscal year (other than a significant shareholder or an immediate family member of such shareholder)—such as a director who resigns during the year—remains a "related person" for purposes of the next proxy statement even after his or her relationship with the company has ended.

The SEC has stated that the materiality of an interest is to be determined based on the significance of the information to investors in light of all the circumstances. Factors to consider include:

(1) the relationship of the related person to the transaction;

(2) the importance of the interest to the related person; and

(3) the amount involved in the transaction.

In addition, a related person who has a position at an entity engaging in a transaction with the company could have an indirect material interest in the transaction as a result of this position. An instruction to Item 404(a) specifies certain situations where an indirect interest will not be deemed material—specifically, where the interest arises:

- Only: (1) from the person's position as a director of another entity that is a party to the transaction; or (2) the direct or indirect ownership by that person and all other related persons, in the aggregate, of less than a 10% equity interest in another entity (not including a partnership) that is a party to the transaction; or (3) both; or
- Only from the person's position as a limited partner in a partnership in which the person and all other related persons have an interest of less than 10%, provided the person is not a general partner of and does not hold another position in the partnership.

10.2 Interplay with Item 402 of Regulation S-K

Absent an exception, related persons' compensation arrangements that exceed $120,000 per year would typically be subject to Item 404(a) disclosure. However, Instruction 5 to Item 404(a) provides that (1) disclosure of compensation to a director is not required if the compensation is reported pursuant to the director compensation disclosure requirement in Item 402(k) of Regulation S-K; and (2) disclosure of compensation to an executive officer is not required if:

- the compensation is reported pursuant to Item 402 of Regulation S-K; or
- the executive officer is not an immediate family member and such compensation would have been reported under Item 402 as compensation earned for services to the company if the executive officer was a named executive officer, and such compensation had been approved, or recommended to the board of directors of the company for approval, by the compensation

committee of the board of directors (or group of independent directors performing a similar function) of the company.

The SEC Staff has also issued several Compliance and Disclosure Interpretations further clarifying the interplay between Items 402 and 404 of Regulation S-K when it comes to director and executive compensation arrangements. Below is what these exceptions mean in practice:

Employee (vs. Executive) Director Compensation. Instruction 5 does not apply to a situation where a company has a director who is also a paid company employee (but not an executive officer). However, according to the SEC Staff's Compliance and Disclosure Interpretation 227.03, while Item 404(a) requires disclosure of the transaction pursuant to which the director is compensated for services provided as an employee, footnoted (or otherwise described) disclosure of this employee compensation transaction in the Director Compensation Table typically would result in a clearer, more concise presentation of the information. On the other hand, if the director is also an executive officer of the company who does not receive any additional compensation for his or her services as a director, his or her executive officer compensation would not be reportable either under Item 404(a) (assuming the committee or board approval and other Instruction 5 conditions have been met) or in the Director Compensation Table under Item 402(k) of Regulation S-K.

Immediate Family Members Employed by the Company. Instruction 5 to Item 404(a) does not exempt compensation received by any immediate family member employed by the company in a non-executive officer capacity, and such immediate family member's compensation (assuming he or she is not also a director) would have to be disclosed under Item 404(a) if it exceeds $120,000 per year.

Duplication is Still Possible. In spite of Instruction 5 to Item 404(a) that seeks to eliminate duplicative disclosures between Items 402 and 404, there still may be transactions/payments that require disclosure under both Item 402 (for compensation) and 404 (for the transaction giving rise to the compensation). The SEC acknowledged this possibility in its 2006 adopting release, but determined that the possibility of additional disclosure "is preferable to the possibility that compensation is not properly and fully disclosed."

10.3 Procedures for approval of related person transactions

Item 404(b) of Regulation S-K also require a description of the company's policies and procedures for the review, approval or ratification of transactions with related persons that are reportable under Item 404(a). The description must include the material features of these policies or procedures that are necessary to understand them. This disclosure is required even when the company does not have to report any transactions under Item 404(a). Item 404(b) further requires identification of any transactions required to be reported under Item 404(a) where the company's policies and procedures do not require review, approval or ratification or where such policies and procedures have not been followed, although disclosure need not be provided regarding any transaction that occurred at a time before the related person had the relationship that would trigger disclosure under Item 404(a), if the transaction did not continue after the related person had that relationship.

11.0 Emerging growth companies, smaller reporting companies and foreign private issuers

11.1 Emerging growth companies (EGCs)

An emerging growth company is any IPO issuer that completed an IPO after December 8, 2011, and that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. A company that is an emerging growth company on the first day of its fiscal year will no longer qualify as an EGC upon the earliest of:

- the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities in a public offering;
- the last day of a fiscal year during which it had total annual gross revenues of $1.07 billion or more;
- the date on which it has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- the date on which it is deemed to be a "large accelerated filer."

The disclosure rules provide similar relief for emerging growth companies as they do for smaller reporting companies. For example, emerging growth companies are not required to file a CD&A, a compensation committee report, disclosure of compensation policies and practices related to risk management, pay ratio information or provide certain compensation tables otherwise required for other companies. Furthermore, unlike smaller reporting companies, EGCs are not required to conduct say-on-pay, say-on-frequency, or say-on-golden parachute votes.

Emerging growth companies must provide the disclosure required by the tables and other disclosure requirements identified below, along with related narrative (and may voluntarily provide supplemental disclosure):

- the Summary Compensation Table, but may
  - disclose compensation only for the two most recent fiscal years (not three),
  - provide disclosure only for the CEO and two other named executive officers (not five NEOs, and not necessarily the CFO unless his or her compensation places him or her among the next two highest paid executive officers),

- omit disclosure of changes in pension value, and
- identify material items in the All Other Compensation column by narrative discussion (rather than using tabular or footnote disclosure);

- the Outstanding Equity Awards at Fiscal Year-End Table;
- the Director Compensation Table; and
- related person disclosures, but may
  - apply a different disclosure threshold for related person transactions (the lesser of $120,000 and 1% of the average of the company's total assets at the fiscal year-end for the last three fiscal years), and
  - omit disclosure of the company's policies and procedures for reviewing related person transactions.
- omit disclosure regarding compensation committee interlocks and insider participation in compensation decisions.

11.2 Smaller reporting companies

A smaller reporting company is a company with a public float of less than $250 million, regardless of revenue or assets, that is not an investment company, issuer of asset-backed securities, or a majority-owned subsidiary of a parent that is not a smaller reporting company. However, if a company is unable to calculate its public for float—for example, if it has no common stock outstanding or no market price exists for its outstanding common stock—or if it has a public float greater than $250 million but less than $700 million, it must have had less than $100 million in revenue in its most recent fiscal year to qualify as a smaller reporting company. The disclosure rules provide some relief for smaller reporting companies. For example, smaller reporting companies are not required to file a CD&A, a compensation committee report, disclosure of compensation policies and practices related to risk management, pay ratio information or provide certain compensation tables otherwise required for other companies.

Smaller reporting companies must have a say-on-pay vote, say-on-frequency vote, and say-on-golden parachute vote. Smaller reporting companies must also provide the disclosure required by the tables identified below, along with related narrative (and may voluntarily provide supplemental disclosure):

- the Summary Compensation Table, *but* may
  - disclose compensation only for the two most recent fiscal years (not three),
  - provide disclosure only for the CEO and the *two* other most highly compensated officers (not five NEOs, and not necessarily the CFO unless his or her compensation places him or her among the next two highest paid executive officers),

- omit disclosure of changes in pension value, and
- identify material items in the All Other Compensation column by narrative discussion (rather than using tabular or footnote disclosure);

- the Outstanding Equity Awards at Fiscal Year-End Table;
- the Director Compensation Table; and
- related person disclosures, *but* may
  - apply a different disclosure threshold for related person transactions (the lesser of $120,000 and 1% of the average of the company's total assets at the fiscal year-end for the last two fiscal years),
  - omit disclosure of the company's policies and procedures for reviewing related person transactions, and
  - omit disclosure regarding compensation committee interlocks and insider participation in compensation decisions.

11.3 Foreign private issuers

A foreign private issuer is any corporation or other organization incorporated or organized under the laws of any foreign country, other than a foreign government, in which:

- United States residents own 50% or less of the issuer's outstanding voting securities; or
- the majority of the executive officers or directors are not United States citizens or residents, 50% or less of the issuer's assets are located in the United States, and the issuer's business is administered principally outside of the United States.

The SEC has continued to generally exclude foreign private issuers from executive compensation disclosure requirements. Companies that qualify for treatment as foreign private issuers may comply with executive compensation and related person transaction disclosure requirements by providing the information required under Form 20-F. Such information includes, but is not limited to, the aggregate amount of compensation given to directors and officers, including benefits in kind, deferred compensation accrued in the relevant fiscal year and stock option grants. However, a foreign private issuer must also disclose any more detailed information that it makes publicly available or that the company's home jurisdiction or a market in which its securities are listed or traded requires the company to disclose. In addition, a foreign private issuer must file as an exhibit each compensatory plan, contract or arrangement (or a portion of the plan) with management or directors only if the company otherwise publicly disclosed the plan or the company's home country requires the company to publicly file the plan.

12.0 Pay ratio disclosure

In 2015, the SEC adopted Item 402(u) of Regulation S-K, which requires a company to disclose the annual total compensation of its median employee, the annual total compensation of its CEO and the ratio of these two amounts. All companies that are required to provide Summary Compensation Table Disclosure under Item 402(c) of Regulation S-K are required to provide disclosure under Item 402(u). However, as discussed above in Section 11, both emerging growth companies and smaller reporting companies are exempt from disclosure under Item 402(u).

Companies must Disclose the Ratio Between the Annual Total Compensation of its Median Employee and the Annual Total Compensation of the Company's CEO. Item 402(u) of Regulation S-K requires a company to disclose: (1) the annual total compensation of the company's "median" employee, (2) the annual total compensation of the company's CEO and (3) the ratio of these two amounts. In September 2017, the SEC issued interpretive guidance clarifying that companies are permitted to rely on reasonable estimates, assumptions and methodologies, including statistical sampling, to comply with Item 402(u). In keeping with this guidance, the SEC Staff issued a Compliance and Disclosure Interpretation stating that companies are permitted to state that the disclosed pay ratio is a reasonable estimate calculated in a manner consistent with Item 402(u).

- **How Should a Company Identify its "Median Employee?"** Companies must determine the "median employee" from among all of the U.S. and non-U.S. full-time, part-time, temporary and seasonal employees of the company or any of its consolidated subsidiaries (other than the company's CEO or any equivalent position). Item 402(u) does not provide any required calculation methodologies for identifying the median employee. Instead, a company is permitted to the select its preferred methodology, including, for example, statistical sampling, estimation techniques and "consistently applied compensation measures" to identify the median employee. Use of a consistently applied compensation measure may include annual cash compensation and may even be annual total compensation from the prior fiscal year, so long as there have not been significant changes in employee population or compensation arrangements. However, a consistently applied compensation measure would not include hourly or annual pay rates alone as these would not reflect actual hours worked or whether an employee worked an entire year and was actually paid the annual rate of pay. The SEC has confirmed that companies can rely on existing internal records (such as tax and payroll records) that reasonably reflect annual compensation when utilizing a consistently applied compensation measure to identify the median employee, even if those records do not include every element of compensation such as equity awards. Moreover, companies are permitted to use sampling, estimation and other methodologies to eliminate the

"tails" of the compensation curve, thereby decreasing the number of employees for whom compensation must be evaluated.

- **Additional Considerations in Identifying the "Median Employee".** There are several additional key considerations for companies when identify the median employee:
  - ***Frequency of Identification.*** Unless there has been a change in the company's employee population or employee compensation that the company reasonably believes would result in a significant change to its pay ratio disclosure, a company is permitted to determine its median employee once every three years. In addition, during any three-year period, if it is no longer appropriate for a company to use the median employee identified in year one as the median employee in years two or three because of a change in the original median employee's circumstances that the company reasonably believes would result in a significant change in its pay ratio disclosure (e.g., a significant promotion, relocation or termination of employment), the company may use another employee with substantially similar compensation as its median employee. In either case, the company must disclose whether it is using the same median employee used in the prior year or if it has determined to use a different median employee.
  - ***Timing of Identification.*** A company may select the date as of which it determines the employee population for purposes of identifying the median employee, so long as the selected date is within the last three months of its last completed fiscal year (i.e., for calendar-year companies, the selected date can be no earlier than October 1). The determination date must be disclosed as part of the pay ratio disclosure.
  - ***Determining Whether a Worker is an Employee.*** The SEC has indicated that in determining whether a worker is an "employee" under this rule, a company should consider the composition of its workforce and broader employment practices, not merely whether a worker is an "employee" for tax or employment law purposes. A furloughed employee may be an employee for these purposes depending on the circumstances.
  - ***Treatment of Non-U.S. Employees.*** Item 402(u) provides two limited exceptions under which a company may exclude non-U.S. employees from the determination of its median employee. First, subject to certain additional requirements, a company may exclude non-U.S. employees that are employed in non-U.S. jurisdiction where compliance with the rule would cause the company to violate the jurisdiction's data privacy laws or regulations. In our experience, very few, if any, companies have relied upon this exception. Second, under the *de minimis* exemption, a company may exclude up to 5% of its total employees who are non-U.S. employees for any reason. Any employees excluded on data privacy grounds would count against this 5% aggregate cap as well. In addition, if a company excludes any non-U.S. employee in a particular

jurisdiction, it must exclude all non-U.S. employees in that jurisdiction. Thus, if more than 5% of a company's workforce is located in a specific non-U.S. jurisdiction, no employees from that jurisdiction may be excluded. If a company excludes non-U.S. employees under the *de minimis* exemption, it must disclose (i) the jurisdiction or jurisdictions from which those employees are being excluded, (ii) the approximate number of employees excluded from each jurisdiction under the *de minimis* exemption, (iii) the total number of its U.S. and non-U.S. employees irrespective of any exemption (both data privacy and *de minimis*), and (iv) the total number of its U.S. and non-U.S. employees used for its *de minimis* calculation.

- ***Cost-of-Living Adjustments.*** Companies are permitted to apply a cost-of-living adjustment to the compensation in jurisdictions other than the jurisdiction in which the CEO resides in order to adjust the employee compensation to the cost of living in the CEO's jurisdiction. Application of this adjustment will require a company to use the same cost-of-living adjustment in calculating the median employee's annual total compensation and the company will be required to disclose (i) the median employee's jurisdiction, (ii) the median employee's annual total compensation and the pay ratio, both with and without the cost-of-living adjustment as well as (iii) a description of the cost-of-living adjustments utilized. In effect, this requires disclosure of both the adjusted and non-adjusted pay ratio, although the adjusted ratio is the official pay ratio.
- ***Business Combinations and Acquisitions.*** Companies are permitted to exclude any employees of an entity that was acquired by the company during the covered fiscal year. Reliance on this exemption would require a company to identify the acquired business and disclose the approximate number of excluded employees.

- **How Should a Company Determine Total Compensation?** Once a company identifies its median employee, the company must calculate his or her annual total compensation for the last completed fiscal year in accordance with the same rules that apply in determining a named executive officer's total compensation for the Summary Compensation Table.
- **Companies must Provide Description of the Methodology Used.** In addition to disclosing the total compensation for the median employee and the CEO, as well as the ratio between the two amounts, companies must include a brief narrative on the methodology used to identify the median employee and any material assumptions, adjustment or estimates used either to identify the median employee or to determine total compensation (or any element of total compensation). For example, if a company uses statistical sampling, it would be required to disclose the size of both the sample and the estimated total employee population. In addition, any company that changes a previously used methodology would be required to disclose why it made the change.

- **Companies may Rely upon Internal Records, Reasonable Estimates, Assumptions and Methodologies.** In its 2017 guidance, the SEC reaffirmed that companies may rely upon reasonable estimates, assumptions, and methodologies, including statistical sampling, to comply with Item 402(u). For example, reasonable estimates may be used to:
  - analyze the composition of the workforce;
  - characterize the statistical distribution of compensation of employees;
  - calculate annual total compensation or another consistently applied compensation measure;
  - evaluate the likelihood of significant changes in employee compensation from year to year;
  - identify the median employee;
  - identify other employees around the middle of the compensation spectrum; and
  - use the mid-point of a compensation range to estimate compensation

In addition, by citing a variety of different statistical sampling approaches that can be applied under Item 402(u), the SEC reaffirmed its flexibility and deference to companies to determine which reasonable and appropriate sampling methods may work best.

- **Consider Placement of Pay Ratio Disclosure.** Under Item 402(u), companies are required to include the pay ratio disclosure in the body of the company's proxy statement or Annual Report on Form 10-K. However, Item 402(u) does not require inclusion of the pay ratio disclosure in the CD&A. Similarly, the pay ratio disclosure is not required to be in a stand-alone section of the proxy statement. Accordingly, companies have flexibility with respect to where the pay ratio disclosure is provided. Some companies may not wish to include the pay ratio disclosure in the CD&A, as it would make the disclosure subject to the say-on-pay vote. Even though the pay ratio disclosure is not required to be included in the CD&A, companies may need to address the pay ratio information in its CD&A when discussing the extent to which internal pay equity is considered when determining executive compensation levels.
- **Pay Ratio Disclosure is "Filed" not "Furnished."** Under Item 402(u), pay ratio disclosure, as with other information disclosed under Item 402 of Regulation S-K, as "filed" for purposes of the Exchange Act, and, therefore, subject to potential liabilities under those statutes, including liability under Section 18 of the Exchange Act.

13.0 Employee and director hedging disclosure

Under Item 407(i) of Regulation S-K, adopted by the SEC in December 2018, companies are required to disclose in proxy and information statements covering the election of directors whether it allows any director, officer, or employee (or any of their designees) to engage in any transaction to hedge or offset any decrease in the market value of equity securities granted to the individual as compensation or held, directly or indirectly, by the individual. For most companies, the hedging disclosure requirement became first effective for fiscal years beginning on or after July 1, 2019; however, companies that qualify as smaller reporting companies or emerging growth companies were provided with an extra year to comply with Item 407(i).

Companies must Provide a "Fair and Accurate" Summary of its Hedging Policies and Practices or Disclose Practices and Policies in Full. Under Item 407(i), companies must provide a "fair and accurate" summary of any practices or policies it has adopted (whether written or not) with respect to hedging, including the categories of persons covered and any categories of hedging transactions that are specifically permitted or specifically disallowed, or disclose such policies and practices in full. In keeping with the principles-based approach taken by the SEC with respect to other executive compensation disclosure requirements, Item 407(i) was drafted broadly to covers a range of individuals and broad range of transactions and securities.

- **Companies must Disclose if No Hedging Policy has been Adopted.** Notably, Item 407(i) does not require companies to have practices or polices in place regarding hedging nor does it establish standards for the content and parameters of such practice or policy. However, if a company has not adopted practices or polices regarding hedging, it must disclose that fact and/or state that the company generally permits hedging transactions.
- **Disclosure must Indicate Which Individuals are Covered by the Company's Policies and Practices**. As noted above, Item 407(i) covers all employees, officers or directors, or any of their "designees." Accordingly, the disclosure provided must specifically indicate to whom a company's hedging policies and practices apply. Just as companies are not required to adopt such policies and practices, the SEC has indicated that a company's policy is not required to cover the company's broad employee base. Accordingly, a company is only required to disclose what subset of individuals is covered by an applicable policy and is not required to separately disclose that it does not have a policy applicable to other employees, officers or directors.
- **Disclosure must Indicate which Specific Categories of Hedging Transactions are Permitted and Prohibited.** The hedging disclosure must state which specific categories of hedging transactions it permits and which categories of transactions it prohibits. Alternatively, a company may indicate that it expressly permits or prohibits all hedging transactions by directors, officers, or employees,

or, if applicable, a company may list the transactions that it permits or prohibits and indicate that all other transactions are prohibited or permitted, respectively. In addition, a company is required to disclose any differences in the types of individuals that it permits or prohibits from engaging in any category of hedging transactions. Notably, Item 407(i) applies to policies and practices that cover all transactions that protect against a decrease in the value of a company's securities. The SEC has indicated that companies must make their own principles-based determination as to whether a given transaction should be subject to disclosure under Item 407(i).

- **Hedging Policies must be Disclosed Regardless of Materiality.** Item 402(b)(2)(xiii) of Regulation S-K, which was in place before the adoption of Item 407(i), already required public companies to disclose in their CD&A, to the extent material to an understanding of named executive officer compensation, the company's policies regarding hedging of economic risk of security ownership by named executive officers. Item 407(i) is broader in scope than Item 402(b)(2)(xiii) and requires discussion of hedging policies regardless of the materiality of such policies in relation to named executive officer compensation. The SEC has indicated that companies should broadly apply the terminology in Item 407(i) when evaluating what must be disclosed with respect to hedging policies and practices.
- **Consider Placement of Hedging Disclosure.** Because Item 407(i) does not specify where the hedging disclosure should appear, companies have flexibility with respect to its placement. At many companies, the CD&A already addresses hedging policies and practices as they apply to named executive officers. In light of this, the SEC has noted that companies have three options for placement of the hedging disclosure: (1) in the CD&A; (2) outside the CD&A, with separate disclosure for named executive officers in the CD&A; or (3) outside the CD&A, with incorporation into the CD&A by cross-reference. Some companies may not wish to include the new hedging disclosure in the CD&A, as it would result in CD&A disclosure about compensation policies for individuals other than named executive officers and make the disclosure subject to the say-on-pay vote. As an alternative, companies could include the new disclosure in a proxy section discussing general corporate governance best practices or next to the pay ratio disclosure.

14.0 Pay vs. performance disclosure

14.1 Overview

Section 953(a) of Dodd-Frank required the SEC to adopt rules requiring public companies to disclose in their annual meeting proxy statements the relationship between executive compensation "actually paid" and company financial performance. In response, the SEC adopted final rules in August 2022 that added Item 402(v) to Regulation S-K and require proxy statements or information statements setting forth executive compensation disclosures for fiscal years ending on or after December 16, 2022 to include, in summary, (1) a new compensation table setting forth for each of the five most recently completed fiscal years, total compensation as disclosed in the Summary Compensation Table, the "executive compensation actually paid" (as defined by the final rules), the company's total shareholder return (TSR), its peer group TSR, the company's net income and a company-selected financial measure, (2) based on the information set forth in the new table, a clear description of the relationship between executive compensation actually paid to the company's named executive officers and the company's TSR, executive compensation actually paid to the company's named executive officers and the company's net income, executive compensation actually paid to the company's named executive officers and the company-selected measure, and a comparison of the company's TSR and the peer group TSR, and (3) a tabular list of three to seven other financial performance measures.

More specifically, proposed Item 402(v) would require companies to include in a tabular format:

- The total compensation reported in the Summary Compensation Table for the PEO and the "executive compensation actually paid" to the PEO.
- An average of the total compensation reported in the Summary Compensation Table for the remaining named executive officers and an average of the "executive compensation actually paid" to the remaining named executive officers. Footnote disclosure of the names of individual named executive officers and the years in which they are included is also required.
- The company's cumulative annual TSR calculated in accordance with Item 201(e) of Regulation S-K (i.e., in the same manner as in the Stock Price Performance Graph required in annual reports to shareholders).
- The cumulative annual TSR of the companies in a peer group chosen by the company (which may be the same index or peer group used for the purposes of Item 201(e)(1)(ii) or the peer group used in the Compensation Discussion and Analysis for benchmarking purposes).
- The company's net income calculated in accordance with U.S. GAAP.

- A financial performance measure chosen by the company that the company has determined represents the "most important financial performance measure" that the company uses to link compensation actually paid to the named executive officers to company performance for the most recently completed fiscal year. If such measure is a non-GAAP measure, disclosure must be provided as to how the number is calculated from the issuer's audited financial statements, but a full reconciliation is not required.

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Value of Initial Fixed $100 Investment Based On:		Net Income	[Company-Selected Measure]
					Total Shareholder Return	Peer Group Total Shareholder Return		

In addition, the final rules require companies to accompany the new table with disclosure that "use[s] the information provided in the table … to provide a clear description of the relationship" between:

- Executive compensation actually paid to the named executive officers and the company's TSR across the last five fiscal years;
- Executive compensation actually paid to the named executive officers and the company's net income across the last five fiscal years;
- Executive compensation actually paid to the named executive officers and the company-selected financial measure; and
- the company's TSR and the TSR of its peer group.

These descriptions could include narrative or graphic disclosure (or a combination of the two). If any additional, voluntary performance measures are included in the table, the disclosure must also include a description of the relationship between executive compensation actually paid to the named executive officers and the additional performance measure across the last five fiscal years.

In addition, companies must provide a tabular list of three to seven other financial performance measures that the company has determined represent the most important financial performance measures used to link compensation actually paid for the most recent fiscal year to company performance. So long as at least three of the measures are financial performance measures, the company may include non-financial performance measures in the tabular list. If fewer than three financial performance measures were used by the company to link compensation and performance, such list must include all such measures, if any, that were used.

14.2 "Executive compensation actually paid"

Under the final rule, "executive compensation actually paid" is defined as the total compensation reported in the Summary Compensation Table, with adjustments made to the amounts reported for pension values and equity awards.

Pension Values. With respect to pension values, the aggregate change in the actuarial present value of all defined benefit and actuarial pension plans will be deducted from the reported total compensation, and instead "executive compensation actually paid" will include both (1) the actuarially determined service cost for services rendered by the executive during the applicable year ("service cost") and (2) the entire cost of benefits granted in a plan amendment (or initial plan adoption) during the applicable year that are attributed by the benefit formula to services rendered in periods prior to the plan amendment or adoption ("prior service cost"), in each case, calculated in accordance with U.S. GAAP. If the prior service cost is a negative amount as a result of an amendment that reduces benefits relating to prior periods of service, then such amount would reduce the compensation actually paid.

Equity Awards. With respect to the stock award and option award values, the amounts included in the Summary Compensation Table, representing the grant date fair value of any awards granted in the relevant fiscal year, will be deducted, and the following adjustments will be made, in each case, with fair value calculated in accordance with U.S. GAAP:

- For awards granted in the covered fiscal year:
  - add the year-end fair value if the award is outstanding and unvested as of the end of the covered fiscal year; and
  - add the fair value as of the vesting date for awards that vested during the year.
- For any awards granted in prior years:
  - add or subtract any change in fair value as of the end of the covered fiscal year compared to the end of the prior fiscal year if the award is outstanding and unvested as of the end of the covered fiscal year;
  - add or subtract any change in fair value as of the vesting date (compared to the end of the prior fiscal year) if the award vested during the year; and
  - subtract the amount equal to the fair value at the end of the prior fiscal year if the award was forfeited during the covered fiscal year.

- Add the dollar value of any dividends or other earnings paid on stock awards or options in the covered fiscal year prior to the vesting date that are not otherwise reflected in the fair value of such award or included in any other component of total compensation for the covered fiscal year.

Footnote disclosure is required to identify the amount of each adjustment, as well as valuation assumptions used in determining any equity award adjustments that are materially different from those disclosed as of the grant date of such equity awards.

14.3 Additional Considerations

Filings and Timing of Disclosures. Companies will be required to include the pay versus performance disclosure in all proxy and information statements that are required to include executive compensations disclosures under Item 402 of Regulation S-K for fiscal years ending on or after December 16, 2022. Under the transition rules, companies will only be required to provide disclosure for three years in the first proxy or information statement in which disclosure is provided, adding one additional year in each of the two subsequent years. In addition, disclosure is only required for fiscal years in which the company was a reporting company. The Item 402(v) disclosure will be treated as "filed" for the purposes of the Exchange Act.

Issuers Subject to the Final Rules. The final rules require pay versus performance disclosure for all companies other than emerging growth companies (which are statutorily exempt from the requirements pursuant to the Jumpstart Our Business Startups Act), foreign private issuers, and registered investment companies.

XBRL. Companies will also be required to tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points within the footnote disclosures in interactive data format using eXtensible Business Reporting Language, or XBRL.

14.4 Smaller reporting companies

Smaller reporting companies are subject to scaled disclosure requirements. In the table and accompanying comparative description, smaller reporting companies are not required to provide a peer group TSR or any company-selected measure. In addition, the calculation of executive compensation actually paid will exclude the adjustments relating to pensions.

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Value of Initial Fixed $100 Investment Based On Total Shareholder Return	Net Income

Smaller reporting companies are only required to provide disclosure for the most recent three years and are allowed initially to provide disclosure for two years, adding one additional year in the next year. Smaller reporting companies also are afforded a transition period with respect to XBRL requirements and are not required to provide inline XBRL data until the third filing in which it provides the pay versus performance disclosure.

14.5 WTW Pay vs. performance blog

The below represents an updated version of an article first published by WTW in August 2022, updated for inclusion in this Executive Compensation Disclosure Handbook February 2023 Edition.

Authors: Heather Marshall, Steve Seelig

On August 25, 2022, the Securities and Exchange Commission (SEC) adopted final rules implementing the pay versus performance (PVP) requirement in the Dodd-Frank Act. First proposed in April 2015

Below we provide discussion of the rules, along with our observations of issues to confront and resolve. While there are many questions around interpretation in the absence of frequently asked questions from the SEC, we cover the key action steps WTW has suggested to companies just starting the process in the fall of 2022. Calendar year companies likely will already have taken these steps on the path to their first disclosure, while others will just be starting their process.

Suggested immediate action steps

1. Acquaint the key decision makers with the details of the rules. Senior management, the compensation committee, legal, finance and investor relations will all have a role to play in making strategic and tactical decisions, and then in populating the tables.
2. Have each of those groups identify who will be responsible for which aspects of the disclosure, and make sure they have the bandwidth to accomplish each task required within the required timeline.

3. Determine a process for identifying the most important performance measures in respect of compensation actually paid for the year based on the weighted relevance of performance measures for 2022 actual compensation.

4. Calculate compensation actually paid for anticipated named executive officers (NEOs) on the various measurement dates. Given that calculation of equity fair values on this new basis was not required under prior rules, it will be important to identify who will perform the required valuations.

5. Determine a total shareholder return (TSR) peer group, conducting the appropriate back-testing using each of the permissible peer groups. Identify potential disconnects with other disclosures, such as outcomes under relative TSR performance conditions in case the SEC PVP methodology yields significantly different values.

6. Secure space in the proxy statement and determine where you intend to locate the PVP disclosures. The disclosure requires a number of supplemental tables, so make sure you have enough room. Start early in updating the CD&A, looking for potential areas of overlap or complication (such as more prominent disclosures related to realizable or realized pay that could be confusing to investors). Ensure the reporting team is prepared for the required XBRL tagging which will be a new requirement for the proxy statement.

How to complete the PVP table

It is worthwhile to understand the gap seen by the SEC in the existing compensation disclosure framework. The SEC sees the existing compensation disclosure as overly prospective in nature with different companies taking different approaches, if any, in viewing compensation paid to executives with a backward-looking lens. The SEC wanted to fill this gap by requiring companies to fulfill the Dodd-Frank mandate of disclosing “compensation actually paid” compared with company performance to provide investors with a more informed view of executive compensation. Whether or not the SEC has chosen the best way to depict the notion of PVP will remain an open question; reasonable minds can differ. But our experience has been that once a particular disclosure is created, it tends to become generally accepted as the favored standard.

The required form of the PVP table is shown below:

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Value of Initial Fixed $100 Investment Based On:		Net Income	[Company-Selected Measure]
					Total Shareholder Return	Peer Group Total Shareholder Return		
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Y1								
Y2								
Y3								
Y4								
Y5								

- **Compensation actually paid** is defined as "adjusted" summary compensation table (SCT) compensation. The adjustments involve: 1) calculating pension values as service cost and prior service cost (if any) from the company's financial statements, and 2) determining equity award values based on the change in fair value for the year for both outstanding and vested equity (rather than at the date granted per the SCT).
- **Principal executive officer (PEO) and the average of other NEO compensation appear** with both SCT values (columns [b] and [d]) and compensation actually paid values (columns [c] and [e]).
- **If you have multiple PEOs** during the reporting period, columns (b) and (c) must be replicated for each incumbent PEO.
- **Performance measures to be disclosed** in the PVP table are company TSR (column [f]), TSR for the company's chosen peer group (column [g]), net income (loss) (column [h]) on a GAAP basis, and a company-selected measure of financial performance (column [i]). Smaller reporting companies (SRCs) need not include peer group TSR nor a company-selected measure.
- **Five years of history** are required to be disclosed eventually, with SRCs only required to show three years. For the first fiscal year ending on or after December 16, 2022, only three years of disclosure will be required (two for SRCs), then increasing by one year each year until five (or three) years are shown.

As noted, SRCs have reduced reporting requirements while foreign private issuers, registered investment companies and emerging growth companies are exempt from the disclosure requirements.

Footnotes will be required detailing differences between SCT values and actual compensation values, in effect reflecting the key assumptions and values used in respect of the equity figures. For companies with multiple overlapping equity grants or multiple pension plans, these footnotes could be quite extensive.

For equity awards, footnotes must disclose an assumption made in the valuation of an award that differs materially from those disclosed as of the grant date of such equity awards. While most companies will likely use broadly consistent assumptions (e.g., how the volatility, dividend yield and expected life assumptions are derived) some many still choose to footnote these, particularly if the resulting values vary significantly from the grant date fair value inputs. Companies will also be required to separately tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points (such as quantitative amounts) within the footnote disclosures, all in Inline XBRL. This will mean that shareholders, competitors, consultants and journalists will have direct access to the data provided with relative ease, to the extent they have experience with Inline XBRL SEC filings. Real-time access to these data will create far greater transparency and is likely to increase broader stakeholder scrutiny and analysis of executive compensation proxy data.

For pensions, because the assumptions used for determining service cost and prior service cost are already included in the 10-K, it is not required that those be included in a footnote for the pension figures.

As with all disclosures that have been mandated over the years, the question will arise as to whether this extensive disclosure about how pay programs work may lead to companies adopting more homogenous pay program designs to avoid increased scrutiny as potential outliers. This would undoubtedly be a negative and potentially unintended consequence of the rule if it reduces the alignment of pay programs with a company's business, talent and compensation strategies. Early indicators suggest this will not be the case, although the rule may prompt companies to 'tidy up' aspects of their compensation program. An example is removing monthly vesting provisions under equity plans, which creates a high volume of equity plan valuations. While this may be necessary to compete for talent for senior and management level participants, it is arguably less necessary at the c-suite level.

Calculating pension values

To determine actual compensation, remove the defined benefit (DB) pension compensation included in the SCT (which is the difference between the end-of-year and beginning-of-year values from the pension benefits table, adjusted for benefit payments), and substitute a new calculation for the DB pension benefits, as follows:

- Add the ASC 715 service cost for all DB plans for the executive for the year.

- Add the increase or reduction in the projected benefit obligation (i.e., the prior service cost/credit) for all DB plans for the participant for the year caused by a plan amendment made during the fiscal year.

Observations: Rising interest rates during 2022 may mean that many SCT pension values for the year will be $0, because the present value of accumulated DB pension benefits may be lower at the end of 2022 than at the end of 2021. If the plan is not frozen, however, there would still be a benefit accruing during the year, and therefore a service cost, resulting in a pension value being included in the PVP table actual compensation figures. In years where interest rates are more stable, the PVP table actual compensation figures will likely be lower than the SCT values since interest on the beginning-of-year SCT values or changes in pension benefits due to actual compensation during the year will not be included.

Calculating equity values

Deduct the grant date fair value figures included in the SCT and add back (or subtract) the value of the categories of equity shown in the table below. The SEC determined that it prefers an approach that considers the values of all equity outstanding during a fiscal year, not just the equity awards that vested during the year. This is more of a running total akin to the concept of "realizable pay" that may be earned at the ultimate vesting date. This differs markedly from other measures of 'actual' compensation, which might be more akin to the W-2 values recognized by an executive for the year.

These are the categories and calculation methodologies:

Calculation methodology

	When granted	When vested or not	Calculation methodology
1	Granted during the covered fiscal year	Remains outstanding and unvested at the end of the covered fiscal year	Add the fair value calculated as at the end of the covered fiscal year
2	Granted during the covered fiscal year	Vested during the fiscal year	Add the fair value as of the vesting date
3	Granted during any prior fiscal year	Remains outstanding and unvested as of the end of the covered fiscal year	Add the change in fair value as at the end of the covered fiscal year relative to the prior fiscal year (whether positive or negative)

	When granted	When vested or not	Calculation methodology
4	Granted during any prior fiscal year	Vested during the fiscal year	Add the change in fair value as of the vesting date relative to the prior fiscal year value (whether positive or negative)
5	Granted during any prior fiscal year	Fail to meet the applicable vesting conditions during the covered fiscal year	Subtract the amount equal to the fair value at the end of the prior fiscal year

Calculating a measurement date fair value

While we are all familiar with the notion of grant date fair values as currently contemplated in the SCT, the notion of a vesting date or year-end fair value will be new to many. For stock options, an annual revaluation will be required, as opposed to performing that valuation only once at grant date. One reason cited by the SEC for requiring an annual revaluation and a valuation on vesting (as opposed to a simple calculation of the presiding intrinsic value of the option) is to ensure the value of a stock option appropriately recognizes potential value beyond the vesting date.

The SEC believes this calculation will be reasonably uncomplicated and can generally be accomplished by reevaluating the appropriate inputs and entering these into the existing valuation models. The assumptions used in those calculations would be disclosed via footnotes. While conceptually straightforward, it will increase the number of valuations required and the number of assumptions (e.g., expected lives, dividend yields and volatility rates), particularly for companies with misaligned vesting dates. Importantly, companies will need to carefully assess how the expected life will change over time as the options move in or out of the money.

Another reason for the change cited by the SEC is to enable shareholders to better tabulate the outstanding values of all in-flight full-value grants so that shareholders and compensation committees can monitor all the equity compensation on the table for executives. On this last point, because the PVP disclosure now becomes a part of the say on pay vote (which is based on any compensation disclosures in the proxy), it means compensation committees should be obligated to understand the full value that can be realized, when measured for the prior fiscal year as it makes decisions on compensation levels to grant for the upcoming year.

For performance shares without a market condition, a revaluation must take place each year, applying an adjustment related to the probability the award would vest based on a year-end reassessment. The exercise may cause some concern as the regulations make clear that footnote disclosure is required about

how the assumptions used to calculate the value of equity awards at year-end may differ materially from those disclosed as of the grant date of such equity awards (on an award-by-award basis, rather than in aggregate). The SEC believes this requirement to reassess these probable outcomes should provide insight into the company's evaluation, which will be something new for investors to ponder. This will be a level of transparency not otherwise required, either in the proxy statement or the 10-K, as we believe updated probability factors will be required for each performance-based equity award that remained outstanding or vested during the year. It is likely companies will have heightened sensitivity to this point. These updated probability factors would be disclosed only for years when they differ from the assumptions used on the grant date, which for most companies would not be until just before the final year of the vesting cycle.

For those performance shares subject to market-based measures, similar to stock options, updated valuation models that align with those used to calculate grant date fair values must be used to determine updated fair values. For companies that are used to valuing a relative TSR award just once at its grant date, the new disclosures will require each outstanding relative TSR award to be revalued at the end of each fiscal year. This is also an increase in the number of valuations that need to be prepared annually. The year-end measurements will consider how the value has changed over time due to actual TSR experience for the company and the peer companies, as well as changes in economic assumptions (e.g., volatility rates, dividend yields and interest rates).

Observations: It is important to determine who will perform these analyses, whether within the company or with outside help. There will be a finite amount of time to perform these calculations after year-end, at a time when these valuation resources already are very busy working on other things, including valuations of new grants for the current year and closing the financial statements for the 10-k filings. So many nuances are involved in performing these calculations, some of which have never been done before, including determining new assumptions to be applied to prior year grants, that waiting until after year-end to think through how they work will be problematic. In the first year of disclosure, starting early and establishing precedents will be important and set a foundation for subsequent years.

There is also the question about what footnotes will be required to meet the disclosure requirements. This includes the reconciliations between SCT pay and CAP, as well as the equity valuation assumptions. As an example, at the light-touch end of the spectrum some believe it is sufficient to disclose three categories for reconciliations: (i) equity adjustments, (ii) pension adjustments and (ii) dividends. Others believe that the reconciliations should be broken down into each of the steps set out in the rules as shown in the table above for equity valuations). This should be discussed with SEC counsel to ensure all stakeholders are comfortable with the approach being taken in the first year. Additionally, your finance department and SEC counsel will need to think about whether the information created for these tables and footnotes, which

does not appear on the Form 10-K, will need to be reviewed by outside auditors. Our amateur view is that because those data will be XBRL-tagged, making it very easy for shareholders and competitors to find, companies will want some form of review before it is published in the proxy given what could be inferred about future financial performance.

Company and peer TSR comparisons

The PVP table will require companies to include values for their own as well as peer TSR. While the requirements are consistent with those underpinning the total return chart required in 10-Ks, companies are permitted the ability to opt for a different peer comparison — namely one that is included in the CD&A for the purposes of "compensation benchmarking practice." For those not familiar, the 10-K stock price chart simply shows cumulative TSR based on the value of an initial $100 investment, calculated on a spot basis as of the last trading day of each of the fiscal years being reported on. The peer TSR must be weighted according to the respective constituents' market capitalization at the beginning of each period, which adds a degree of complexity if a custom group is being used.

This will be a spot cumulative calculation over the five-year period rather than a smoothed average calculation as is used in most relative TSR performance conditions. Also, in contrast to most TSR performance conditions, the calculation does not track percentage change, which will provide another point of departure if companies seek to provide a perspective on how this table differs from the operation of their incentive plans. While not a concern in the first year of disclosure, if a peer group changes in future PVP tables, a footnote must explain the reasons for the change and compare the company's cumulative total return with both the newly selected peer group and the peer group for the prior year, thereby increasing the burden of disclosure. This may encourage companies to consider groups that are more likely to remain stable from one year to the next.

Observations: Determining the peer group to use will be the first challenge for companies. Using the peer group already included in the 10-K (restricted to a custom group or line of business or industry index) reduces the need for additional work and should be a broadly relevant external reference. Even so, how those peers compare with those used for target pay benchmarking purposes will likely inform whether it works in the PVP context. Given that companies don't benchmark compensation on a market cap weighted basis there are likely to be differences regardless of the group selected.

There are subtle (but potentially material) differences in calculation methodology between what's required in the PVP table and how TSR comparisons are made in other places (for example, spot versus smoothed; and weighted by market cap versus unweighted). This may result in confusing messages to stakeholders if

one calculation yields an above median performance assessment, while another yields a below median performance assessment. Companies should get ahead of this disconnect and be prepared to explain it.

Other financial measures — net income and a company-selected measure or measures

The PVP table will require companies to include values for net income calculated in accordance with generally accepted accounting principles and a company-selected measure of financial performance. When identifying the company-selected measure, it must be the "most important financial performance measure" that is not otherwise required in the disclosed table used to link actual compensation to company performance for the most recently completed fiscal year. If TSR (absolute or relative) happens to be the most important measure, then the company must select the next most important measure (similarly for net income). Companies can decide to add an additional measure to the table, but this will then require the additional explanatory narrative/graphical disclosure explaining the link between compensation actually paid and any additional measures voluntarily included. Further, if the company-selected measure changes from year to year, comparisons must be made to both the new and former measure (in the narrative). Early indications suggest most companies are unlikely to include a supplemental measure beyond those required.

"Most important" measure tabular list

In addition to deciding on the "most important" measure, which must be included in the PVP column (i), companies will have to include a tabular disclosure that details the company's three to seven most important performance measures used to link compensation actually paid during the fiscal year to company performance, over the most recently completed fiscal year. This is a change from the proposed regulation that would require the determination to be made over the prior five years.

Tabular list—"Most Important" Measure

"Most Important" Measure Tabular List

Measure (1) – must be financial

Measure (2) – must be financial

Measure (3) – must be financial

Measure 4 – 7 as determined, and do not need to be financial in nature

The list can include non-financial measures only if the company has disclosed at least the three most important financial measures, defined as those in or derived from the company's financial statements, stock price or TSR. Performance measures do not need to be ranked by relative importance. If fewer than three financial performance measures were used by the company, all such measures used must be included in the tabular list. These can change from year to year without the need to offer an explanation, although we expect companies would want to do so in many cases. This list can appear as one tabular list, as two separate tabular lists (one for the PEO and one for all other NEOs), or as separate tabular lists for the PEO and each other NEOs.

Unlike the PVP table, there is no descriptive narrative/graphical requirement for this table that requires companies to describe how the measure is calculated; however, a company may elect to include a narrative if it would be helpful for investors to understand the selected measures or if needed to prevent the disclosure from being confusing or misleading. A company may also cross-reference to existing disclosures that describe how NEO compensation is calculated using these performance measures.

The required "company-selected measure" in PVP table, column (i) must be included in this list given it itself is derived from the list in the first place.

Observations: Most companies are taking a fairly pragmatic and logical approach to selecting both their company selected measure and determining the broader tabular list of measures by simply focusing on those measures that accounted for the greatest proportion of their incentive awards for the most recent fiscal year. This typically means that the 'most important' measure is the highest weighted measure applicable to performance-based equity grants in 2022, with the balance of the tabular list comprising other featured measures, typically listed alphabetically to avoid any inference of relative rank. However, there are some taking a more liberal interpretation and looking beyond the incentive plan measures to identify their most important measures. Most typically this has involved considering and/or selecting stock price, given the material impact this has on the compensation actually paid figures in any given year. Companies considering this approach should ensure their SEC counsel is comfortable this is compliant with the requirements. Companies should also reflect on whether stakeholders may cynically suspect the company of trying to hide poor alignment with pay of other measures of financial performance.

At this stage, most companies appear to be leaning towards using a single list, focusing on measures with a clearly significant weighting and not necessarily looking to utilize the full seven spots available. For example, if PSUs are subject to two equally weighted financial measures (per the PVP definition) and the annual incentive has two financial measures weighted at 25%+, it is likely that the list will be limited to

those (up to) four measures. For companies where other non-financial measures form an important discretionary overlay (e.g., safety being a consideration that may result in the Compensation Committee unilaterally reducing outcomes), these may also feature to ensure their importance is clearly demonstrated.

The narrative/graphical disclosure requirements

After the determination of how the PVP table will be presented with the required and selected financial measures, companies will need to decide what presentation will follow. Companies must provide a ***clear*** narrative and/or graphical description of the relationships between executive compensation actually paid and each of the financial measures in the PVP table. This is required, according to the SEC, to meet the statutory requirement that companies disclose the "relationship" between executive compensation and company performance. This must be done both for the PEO(s) and the average for all other NEOs.

The SEC even suggested an approach, both for the TSR comparison and for that of the other financial measures on the table: "The required relationship disclosure could include, for example, a graph providing executive compensation actually paid and change in the financial performance measure(s) (TSR, net income, or Company-Selected Measure) on parallel axes and plotting compensation and such measure(s) over the required time period. Alternatively, the required relationship disclosure could include narrative or tabular disclosure showing the percentage change over each year of the required time period in both executive compensation actually paid and the financial performance measure(s) together with a brief discussion of how those changes are related."

These comparisons are required to be made over a five-year period, although they should be covered by the transitional relief, meaning that in year one only a three-year lookback is required (two for SRCs).

Observations: At this stage, most companies appear to be leaning toward graphical explanations, given the inherent complexity underlying compensation actually paid calculations which often include dozens of component values. There is a general apprehension to including too much narrative (or indeed any at all), with many likely to take a 'wait and see' approach – both in terms of how their peers disclose information, and what is acceptable to external stakeholders based on year one feedback.

Where to put this in the proxy statement?

Because this is a stand-alone disclosure required in a separate section of the SEC regulations, the SEC permits companies the flexibility to determine where the PVP disclosure will appear, just as with other stand-alone disclosures, such as the CEO pay ratio.

Companies may choose to embed the PVP disclosure within the CD&A as a standalone section, and there is likely value in addressing the highlights in any relevant executive summaries, whether for the proxy as a whole or the CD&A more specifically. Given the potential lengthy footnotes, consideration of relative placement versus other important content will be a challenging decision.

Observations: Most companies appear to be leaning towards maintaining a stand-alone PVP section of the proxy in year one. Much like the decisions detailed above, companies will then reflect on whether this is appropriate in year two based on peer practices and stakeholder feedback.

Beyond year one

While there are many unanswered questions at this time, December year-end companies' mindsets seem to be focused on ensuring compliance in year one with an open ear to feedback following publication. At this time little is known as to what 'good' or 'bad' will look like –in terms of the numbers, the degree of alignment, the methodologies selected and the quality of disclosure. It is anticipated that proxy advisors, large institutional investors and potentially the SEC, will provide feedback that will inform not only year two disclosure, but potentially expected standards for first time filers who have later fiscal year ends.

15.0 Recovery of erroneously awarded compensation

Section 954 of Dodd-Frank mandated that the SEC adopt rules requiring national securities exchanges and associations to establish listing standards that require each listed company to develop and implement a policy providing that, in the event of a financial restatement due to material noncompliance with financial reporting standards, the listed company will recover from its executive officers incentive-based compensation received during the three-year period preceding the restatement in excess of what would have been paid but for the financial reporting error. In October 2022, the SEC adopted Exchange Act Rule 10D-1 ("Rule 10D-1"), which directs nation securities exchanges to establish listing standards that require companies to adopt and comply with written clawback policies meeting strict conditions as set forth in Rule 10D-1.

15.1 Overview

Clawback policies adopted under Rule 10D-1 must provide for the following:

- In the event the company is required to prepare an account restatement due to the material noncompliance of the company with any financial reporting requirement under the federal securities laws, the company will recover (on a pre-tax basis) the amount of "incentive-based compensation" received by its current and former "executive officers" in excess of the amount of incentive-based compensation that would have been received had such compensation been determined based on the restated amount, subject to limited exceptions.
- Compensation recoupment is required regardless of whether the executive officer engaged in any misconduct and regardless of fault.
- The policy must apply to compensation "received"—which is defined as occurring when the financial reporting measures was attained regardless of when an award is granted or payment is actually made—during the three-year "recovery period" preceding the date the company is required to prepare the accounting restatement.
- It must apply to both material accounting errors that require a restatement of prior years' financial results, as well as to errors that are corrected in the current year's results.

15.2 Covered individuals

Current and former "executive officers" are subject to clawback of incentive-based compensation under Rule 10D-1. "Executive officer" includes the company's president, principal financial officer, principal accounting officer, any vice president in charge of a principal business unit, division or function, and any

other person who performs policymaking functions for the company and otherwise conforms to the full scope of the definition of officer under Section 16 of the Exchange Act. The final Rule 10D-1 only requires recovery of incentive-based compensation received by a person (i) after beginning service as an executive officer and (ii) if that person served as an executive officer at any time during the recovery period. Recovery of compensation received prior to becoming an executive officer will not be required, although compensation received during the recovery period by former executive officers is covered. In addition, recovery of compensation "received" prior to the effectiveness of stock exchange listing standards implementing Rule 10D-1 will also not be required.

15.3 Restatements triggering application

Rule 10D-1 requires recoupment of erroneously awarded compensation (i) when the company is required to prepare an accounting restatement that corrects an error in previously issued financial statements that is material to the previously issued financial statements (commonly referred to as "Big R" restatement) and (ii) when the company is required to prepare an accounting restatement that corrects an error that is not material to previously issued financial statements, but that would result in a material misstatement if (A) the error was left uncorrected in the current report or (B) the error correction was recognized in the current period (commonly referred to as "little r" restatements). Application of the recovery policy would not be triggered by an "out-of-period adjustment"—a situation where the error is immaterial to the previously issued financial statements and the correction of the error is also immaterial to the current period. The recovery policy also would not be triggered by changes to prior period financial statements that do not arise due to error corrections, such as retrospective revisions to financial statements due to changes in accounting principles or segments.

The recovery period begins from the earlier of: (i) the date the company's board of directors, committee of the board, or the officer or officers of the company authorized to take such action, concludes, or reasonably should have concluded, that the company is required to prepare an accounting statement due to the material noncompliance with any financial reporting requirement under the securities laws; or (ii) the date a court, regulator, or other legally authorized body directs the company to prepare an accounting restatement. In general, this should coincide with the date disclosed in the Item 4.02(a) Form 8-K the is required.

15.4 Definition of incentive-based compensation

"Incentive-based compensation" is any compensation (including cash and equity) granted, earned or vested based in whole or in part on the attainment of a "financial reporting measure." "Financial reporting measures" are measures that are determined and presented in accordance with the accounting principles

used in preparing the company's financial statements, and any measures derived in whole or in part from such measures, as well as stock price and TSR. A financial reporting measure is subject to the rule even if it is not actually presented in the issuer's financial statements or included in an SEC filing. Incentive-based compensation does not include compensation that is based solely on continued employment for a specified period of time (e.g., time-vesting awards, including time-vesting stock options), unless such awards were granted or vested based in whole or in part on a financial reporting measure. Incentive-based compensation also does not include base salary (other than salary increases earned wholly or in part based upon the attainment of a financial reporting measure), compensation awarded solely at the board's discretion, or compensation awarded upon the achievement of subjective, strategic or operational measures that are not financial reporting measures (such as the achievement of non-financial ESG goals).

The Dodd-Frank Act specified that the compensation subject to clawback is that which was received by the executive during a recovery period that is defined as "the three-year period preceding the date on which the issuer is required to prepare an accounting restatement." The final rules provide that incentive-based compensation is "received," and thus subject to clawback, in the fiscal period during which the applicable financial reporting measure is attained, even if the payment or grant occurs after the end of that period. In other words, the date of "receipt" of such compensation is tied to the satisfaction of the financial reporting measure goal, irrespective of applicable vesting, grant or payment dates. An award subject to both time- and performance-based vesting conditions is considered received upon satisfaction of the performance metric even if the award continues to be subject to time-based vesting criteria.

15.5 Calculating the amount of clawback

The amount required to be recouped is the amount of incentive-based compensation received by the executive in excess of what would have been received if the incentive-based compensation was determined based on the restated financial statements. To the extent the incentive-based compensation was based on stock price or TSR, such excess amount must be based on a reasonable estimate of the effect of the accounting restatement on the applicable measure. The company must maintain documentation of the determination of that reasonable estimate and provide it to the relevant exchange. In all cases, the calculation of erroneously awarded compensation would be calculated on a pre-tax basis.

15.6 Minimal discretion regarding recovery and its enforcement

Rule 10D-1 requires a company to recover erroneously awarded compensation in compliance with its recovery policy subject only to limited exceptions. Recovery is not required only if the company's board or compensation committee has determined that recovery is impracticable for one of three reasons:

- because the direct expenses paid to third parties to assist in enforcing the policy would exceed the amount to be recovered and the company has made a reasonable attempt to recover;

- in the case of a foreign private issuer, because pursuing such recovery would violate home country law in effect prior to publication of the final rules in the Federal Register and where the company provides an opinion of counsel to that effect to the exchange; or
- because recovery would likely cause an otherwise tax-qualified retirement plan to fail to meet the requirements of Section 401(a)(13) or 411(a) of the Internal Revenue Code.

Clawback must be evaluated on a "no fault" basis—i.e., without regard to whether any misconduct occurred or whether an executive bears responsibility. Executives may not be indemnified for the clawback, nor may issuers pay premiums on an insurance policy that would cover an executive's potential clawback obligations. Rule 10D-1 requires that companies pursue recovery "reasonably promptly," which suggests that boards may not allow covered executives to repay any clawed back amount in installments under a payment plan of any extended duration, barring any unreasonable economic hardship to the executive.

15.7 Disclosure requirements

Clawback Policy Exhibit Requirement. Each company must file a copy of its policy as an exhibit to its Form 10-K, 20-F, 40-F or N-CSR, as applicable.

Item 402 Disclosures. Item 402 of Regulation S-K requires issuers to disclose how they have applied their recovery policies. If, during its last completed fiscal year, the company either completed a restatement that required recovery, or there was an outstanding balance of excess incentive-based compensation relating to a prior restatement, the company must disclose the following information for each restatement in any Form 10-K, proxy or information statement that includes executive compensation disclosure:

- the date on which the company was required to prepare each accounting restatement and the aggregate dollar amount of excess incentive-based compensation attributable to the restatement, including an analysis of how the recoverable amount was calculated (an expansion of the proposed rules), or if the clawback amount has not been determined yet, an explanation of the reasons why it has not, and subsequent disclosure in the next filing that is subject to Item 402 of Regulation S-K;
- if the compensation is related to a stock price or TSR metric, the estimates used to determine the amount of erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;
- the aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of the company's last completed fiscal year;

- where a company is invoking an impracticability exception, for each current and former named executive officer and for all other current and former executive officers as a group, the amount of recovery forgone and a brief description of the reason the company decided not to pursue recovery, as well as (to the extent applicable to the invoked impracticability exception) a brief explanation of the types of direct expenses paid to a third party to assist in enforcing the recovery policy, identification of the provision of foreign law the recovery policy would violate, or how the recovery policy would cause an otherwise tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code; and
- for each current and former named executive officer, the amounts of incentive-based compensation that are subject to a clawback but remain outstanding for more than 180 days since the date the company determined the amount owed.

The final rules also add a new instruction to the Summary Compensation Table to require that any amounts recovered pursuant to a company's compensation recovery policy reduce the amount reported in the applicable column, as well as the "total" column for the fiscal year in which the amount recovered initially was reported, with the clawback identified by footnote.

The final rules require information mirroring the above Item 402 disclosures to be included in annual reports on Form N-CSR and in proxy statements and information statements relating to the election of directors; on Form 20-F or, if the foreign private issuer elects to use the registration and reporting forms that U.S. issuers use, on Form 10-K; and on Form 40-F.

New Check Boxes. Rule 10D-1 also requires that companies add two checkboxes to the cover page of their annual reports: one checkbox to indicate whether the financial statements included in the filing reflect the correction of an error to previously issued financial statements, and one to indicate whether any of the error corrections require a recovery analysis under the company's Rule 10D-1 clawback policy.

15.8 Additional considerations

Each exchange will be required to propose rules or rule amendments consistent with Rule 10D-1 no later than 90 days following the date of the publication of the rules in the Federal Register, which occurred on November 28, 2022. The listing standards must be effective no later than November 28, 2023. Each company subject to such listing standards must adopt a compliant recovery policy no later than 60 days following the date on which the applicable listing standards become effective. The mandated clawback policies must apply to any incentive-based compensation that is received by current or former executive officers on or

after the effective date of the applicable listing standard. Compliance with the disclosure requirements is required in the first annual report or proxy or information statement required to be filed after the effective date of the new listing standards.

All listed companies are covered by the rule, including foreign private issuers, emerging growth companies, smaller reporting companies, controlled companies and companies with only listed debt securities, but certain registered investment companies are excluded to the extent they have not provided incentive-based compensation to any current or former executive officer of the fund in the last three fiscal years. A company would be subject to delisting if it does not adopt and comply with an exchange-compliant clawback policy.

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Appendix A
Full Text of Regulation S-K Items 402, 403, 404 and 407 (as amended through February 14, 2023)[1]

§229.402 (Item 402) Executive compensation.

(a) General—(1) Treatment of foreign private issuers. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Items 6.B, 6.E.2, and 6.F of Form 20-F (17 CFR 249.220f), with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded, or paragraph (19) of General Instruction B of Form 40-F (17 CFR 249.240f), as applicable. A foreign private issuer that elects to provide domestic Item 402 disclosure must provide the disclosure required by Item 402(w) in its annual report or registration statement, as applicable.

(2) All compensation covered. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this Item, and directors covered by paragraph (k) of this Item, by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the registrant and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(3) Persons covered. Disclosure shall be provided pursuant to this Item for each of the following (the "named executive officers"):

(i) All individuals serving as the registrant's principal executive officer or acting in a similar capacity during the last completed fiscal year ("PEO"), regardless of compensation level;

[1] ***Author's Note:*** *This excerpt from Regulation S-K is reprinted from the version posted on the Electronic Code of Federal Regulations (e-CFR) at http://www.ecfr.gov/. The Electronic Code of Federal Regulations (e-CFR) is a currently updated version of the Code of Federal Regulations (CFR). It is not an official legal edition of the CFR. The e-CFR is an editorial compilation of CFR material and Federal Register amendments produced by the National Archives and Records Administration's Office of the Federal Register (OFR) and the Government Printing Office. The OFR updates the material in the e-CFR on a daily basis.*

(ii) All individuals serving as the registrant's principal financial officer or acting in a similar capacity during the last completed fiscal year ("PFO"), regardless of compensation level;

(iii) The registrant's three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year; and

(iv) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(3)(iii) of this Item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

Instructions to Item 402(a)(3). 1. Determination of most highly compensated executive officers. The determination as to which executive officers are most highly compensated shall be made by reference to total compensation for the last completed fiscal year (as required to be disclosed pursuant to paragraph (c)(2)(x) of this Item) reduced by the amount required to be disclosed pursuant to paragraph (c)(2)(viii) of this Item, provided, however, that no disclosure need be provided for any executive officer, other than the PEO and PFO, whose total compensation, as so reduced, does not exceed $100,000.

2. Inclusion of executive officer of subsidiary. It may be appropriate for a registrant to include as named executive officers one or more executive officers or other employees of subsidiaries in the disclosure required by this Item. See Rule 3b-7 under the Exchange Act (17 CFR 240.3b-7).

3. Exclusion of executive officer due to overseas compensation. It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this Item an individual, other than its PEO or PFO, who is one of the registrant's most highly compensated executive officers due to the payment of amounts of cash compensation relating to overseas assignments attributed predominantly to such assignments.

(4) Information for full fiscal year. If the PEO or PFO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the PEO or PFO) served as an executive officer of the registrant (whether or not in the same position) during any part of the fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(5) Omission of table or column. A table or column may be omitted if there has been no compensation awarded to, earned by, or paid to any of the named executive officers or directors required to be reported in that table or column in any fiscal year covered by that table.

(6) Definitions. For purposes of this Item:

(i) The term stock means instruments such as common stock, restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or any similar instruments that do not have option-like features, and the term option means instruments such as stock options, stock appreciation rights and similar instruments with option-like features. The term stock appreciation rights ("SARs") refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer. The term equity is used to refer generally to stock and/or options.

(ii) The term plan includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal document, pursuant to which cash, securities, similar instruments, or any other property may be received. A plan may be applicable to one person. Except with respect to the disclosure required by paragraph (t) of this Item, registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term incentive plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other performance measure. An equity incentive plan is an incentive plan or portion of an incentive plan under which awards are granted that fall within the scope of FASB ASC Topic 718, Compensation—Stock Compensation. A non-equity incentive plan is an incentive plan or portion of an incentive plan that is not an equity incentive plan. The term incentive plan award means an award provided under an incentive plan.

(iv) The terms date of grant or grant date refer to the grant date determined for financial statement reporting purposes pursuant to FASB ASC Topic 718.

(v) Closing market price is defined as the price at which the registrant's security was last sold in the principal United States market for such security as of the date for which the closing market price is determined.

(b) Compensation Discussion and Analysis. (1) Discuss the compensation awarded to, earned by, or paid to the named executive officers. The discussion shall explain all material elements of the registrant's compensation of the named executive officers. The discussion shall describe the following:

(i) The objectives of the registrant's compensation programs;

(ii) What the compensation program is designed to reward;

(iii) Each element of compensation;

(iv) Why the registrant chooses to pay each element;

(v) How the registrant determines the amount (and, where applicable, the formula) for each element to pay;

(vi) How each compensation element and the registrant's decisions regarding that element fit into the registrant's overall compensation objectives and affect decisions regarding other elements; and

(vii) Whether and, if so, how the registrant has considered the results of the most recent shareholder advisory vote on executive compensation required by section 14A of the Exchange Act (15 U.S.C. 78n-1) or §240.14a-20 of this chapter in determining compensation policies and decisions and, if so, how that consideration has affected the registrant's executive compensation decisions and policies.

(2) While the material information to be disclosed under Compensation Discussion and Analysis will vary depending upon the facts and circumstances, examples of such information may include, in a given case, among other things, the following:

(i) The policies for allocating between long-term and currently paid out compensation;

(ii) The policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation;

(iii) For long-term compensation, the basis for allocating compensation to each different form of award (such as relationship of the award to the achievement of the registrant's long-term goals, management's exposure to downside equity performance risk, correlation between cost to registrant and expected benefits to the registrant);

(iv) How the determination is made as to when awards are granted, including awards of equity-based compensation such as options;

(v) What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;

(vi) How specific forms of compensation are structured and implemented to reflect these items of the registrant's performance, including whether discretion can be or has been exercised (either to award compensation absent attainment of the relevant performance goal(s) or to reduce or increase the size of any award or payout), identifying any particular exercise of discretion, and stating whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goal(s);

(vii) How specific forms of compensation are structured and implemented to reflect the named executive officer's individual performance and/or individual contribution to these items of the registrant's performance, describing the elements of individual performance and/or contribution that are taken into account;

(viii) Registrant policies and decisions regarding the adjustment or recovery of awards or payments if the relevant registrant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment;

(ix) The factors considered in decisions to increase or decrease compensation materially;

(x) How compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (e.g., how gains from prior option or stock awards are considered in setting retirement benefits);

(xi) With respect to any contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) at, following, or in connection with any termination or change-in-control, the basis for selecting particular events as triggering payment (e.g., the rationale for providing a single trigger for payment in the event of a change-in-control);

(xii) The impact of the accounting and tax treatments of the particular form of compensation;

(xiii) The registrant's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership), and any registrant policies regarding hedging the economic risk of such ownership;

(xiv) Whether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies); and

(xv) The role of executive officers in determining executive compensation.

Instructions to Item 402(b). 1. The purpose of the Compensation Discussion and Analysis is to provide to investors material information that is necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers.

2. The Compensation Discussion and Analysis should be of the information contained in the tables and otherwise disclosed pursuant to this Item. The Compensation Discussion and Analysis should also cover actions regarding executive compensation that were taken after the registrant's last fiscal year's end. Actions that should be addressed might include, as examples only, the adoption or implementation of new or modified programs and policies or specific decisions that were made or steps that were taken that could affect a fair understanding of the named executive officer's compensation for the last fiscal year. Moreover, in some situations it may be necessary to discuss prior years in order to give context to the disclosure provided.

3. The Compensation Discussion and Analysis should focus on the material principles underlying the registrant's executive compensation policies and decisions and the most important factors relevant to analysis of those policies and decisions. The Compensation Discussion and Analysis shall reflect the individual circumstances of the registrant and shall avoid boilerplate language and repetition of the more detailed information set forth in the tables and narrative disclosures that follow.

4. Registrants are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant. The standard to use when determining whether disclosure would cause competitive harm for the registrant is the same standard that would apply when a registrant requests confidential treatment of confidential trade secrets or confidential commercial or financial information pursuant to Securities Act Rule 406 (17 CFR 230.406) and

Exchange Act Rule 24b-2 (17 CFR 240.24b-2), each of which incorporates the criteria for non-disclosure when relying upon Exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)). A registrant is not required to seek confidential treatment under the procedures in Securities Act Rule 406 and Exchange Act Rule 24b-2 if it determines that the disclosure would cause competitive harm in reliance on this instruction; however, in that case, the registrant must discuss how difficult it will be for the executive or how likely it will be for the registrant to achieve the undisclosed target levels or other factors.

5. Disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G (17 CFR 244.100—102) and Item 10(e) (§229.10(e)); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements.

6. In proxy or information statements with respect to the election of directors, if the information disclosed pursuant to Item 407(i) would satisfy paragraph (b)(2)(xiii) of this Item, a registrant may refer to the information disclosed pursuant to Item 407(i).

(c) *Summary Compensation Table*—(1) General. Provide the information specified in paragraph (c)(2) of this Item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, in a Summary Compensation Table in the tabular format specified below.

Summary Compensation Table

Name and principal position	Year	Salary ($)	Bonus ($)	Stock awards ($)	Option awards ($)	Non-equity incentive plan compensation ($)	Change in pension value and nonqualified deferred compensation earnings ($)	All other compensation ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

(2) The Table shall include:

(i) The name and principal position of the named executive officer (column (a));

(ii) The fiscal year covered (column (b));

(iii) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(iv) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d));

Instructions to Item 402(c)(2)(iii) and (iv). 1. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, a footnote shall be included disclosing that the amount of salary or bonus is not calculable through the latest practicable date and providing the date that the amount of salary or bonus is expected to be determined, and such amount must then be disclosed in a filing under Item 5.02(f) of Form 8-K (17 CFR 249.308).

2. Registrants shall include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer under which stock, equity-based or other forms of non-cash compensation instead have been received by the named executive officer. However, the receipt of any such form of non-cash compensation instead of salary or bonus must be disclosed in a footnote added to the salary or bonus column and, where applicable, referring to the Grants of Plan-Based Awards Table (required by paragraph (d) of this Item) where the stock, option or non-equity incentive plan award elected by the named executive officer is reported.

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (e));

(vi) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (f));

Instruction 1 to Item 402(c)(2)(v) and (vi). For awards reported in columns (e) and (f), include a footnote disclosing all assumptions made in the valuation by reference to a discussion of those assumptions in the registrant's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

Instruction 2 to Item 402(c)(2)(v) and (vi). If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the registrant shall include, as awards required to be reported in column (f), the incremental fair value, computed as of the repricing or modification date in accordance with FASB ASC Topic 718, with respect to that repriced or modified award.

Instruction 3 to Item 402(c)(2)(v) and (vi). For any awards that are subject to performance conditions, report the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. In a footnote to the table, disclose the value of the award at the grant date assuming that the highest level of performance conditions will be achieved if an amount less than the maximum was included in the table.

(vii) The dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-equity incentive plans as defined in paragraph (a)(6)(iii) of this Item, and all earnings on any outstanding awards (column (g));

Instructions to Item 402(c)(2)(vii). 1. If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer.

2. All earnings on non-equity incentive plan compensation must be identified and quantified in a footnote to column (g), whether the earnings were paid during the fiscal year, payable during the period but deferred at the election of the named executive officer, or payable by their terms at a later date.

(viii) The sum of the amounts specified in paragraphs (c)(2)(viii)(A) and (B) of this Item (column (h)) as follows:

(A) The aggregate change in the actuarial present value of the named executive officer's accumulated benefit under all defined benefit and actuarial pension plans (including supplemental plans) from the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the prior completed fiscal year to the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the covered fiscal year; and

(B) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans;

Instructions to Item 402(c)(2)(viii). 1. The disclosure required pursuant to paragraph (c)(2)(viii)(A) of this Item applies to each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental executive retirement plans, but excluding tax-qualified defined contribution plans and nonqualified defined contribution plans. For purposes of this disclosure, the registrant should use the same amounts required to be disclosed pursuant to paragraph (h)(2)(iv) of this Item for the covered fiscal year and the amounts that were or would have been required to be reported for the executive officer pursuant to paragraph (h)(2)(iv) of this Item for the prior completed fiscal year.

2. Regarding paragraph (c)(2)(viii)(B) of this Item, interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as

prescribed under section 1274(d) of the Internal Revenue Code, (26 U.S.C. 1274(d))) at the rate that corresponds most closely to the rate under the registrant's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate. Dividends (and dividend equivalents) on deferred compensation denominated in the registrant's stock ("deferred stock") are preferential only if earned at a rate higher than dividends on the registrant's common stock. Only the preferential portion of the dividends or equivalents must be included. Footnote or narrative disclosure may be provided explaining the registrant's criteria for determining any portion considered to be above-market.

3. The registrant shall identify and quantify by footnote the separate amounts attributable to each of paragraphs (c)(2)(viii)(A) and (B) of this Item. Where such amount pursuant to paragraph (c)(2)(viii)(A) is negative, it should be disclosed by footnote but should not be reflected in the sum reported in column (h).

(ix) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Each compensation item that is not properly reportable in columns (c)-(h), regardless of the amount of the compensation item, must be included in column (i). Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant, the compensation cost, if any, computed in accordance with FASB ASC Topic 718;

(D) The amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(*1*) Any termination, including without limitation through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer's employment with the registrant and its subsidiaries; or

(*2*) A change in control of the registrant;

(E) Registrant contributions or other allocations to vested and unvested defined contribution plans;

(F) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer; and

(G) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (e) or (f); and

Instructions to Item 402(c)(2)(ix). 1. Non-equity incentive plan awards and earnings and earnings on stock and options, except as specified in paragraph (c)(2)(ix)(G) of this Item, are required to be reported elsewhere as provided in this Item and are not reportable as All Other Compensation in column (i).

2. Benefits paid pursuant to defined benefit and actuarial plans are not reportable as All Other Compensation in column (i) unless accelerated pursuant to a change in control; information concerning these plans is reportable pursuant to paragraphs (c)(2)(viii)(A) and (h) of this Item.

3. Any item reported for a named executive officer pursuant to paragraph (c)(2)(ix) of this Item that is not a perquisite or personal benefit and whose value exceeds $10,000 must be identified and quantified in a footnote to column (i). This requirement applies only to compensation for the last fiscal year. All items of compensation are required to be included in the Summary Compensation Table without regard to whether such items are required to be identified other than as specifically noted in this Item.

4. Perquisites and personal benefits may be excluded as long as the total value of all perquisites and personal benefits for a named executive officer is less than $10,000. If the total value of all perquisites and personal benefits is $10,000 or more for any named executive officer, then each perquisite or personal benefit, regardless of its amount, must be identified by type. If perquisites and personal benefits are

required to be reported for a named executive officer pursuant to this rule, then each perquisite or personal benefit that exceeds the greater of $25,000 or 10% of the total amount of perquisites and personal benefits for that officer must be quantified and disclosed in a footnote. The requirements for identification and quantification apply only to compensation for the last fiscal year. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant. With respect to the perquisite or other personal benefit for which footnote quantification is required, the registrant shall describe in the footnote its methodology for computing the aggregate incremental cost. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included in column (i) and are subject to separate quantification and identification as tax reimbursements (paragraph (c)(2)(ix)(B) of this Item) even if the associated perquisites or other personal benefits are not required to be included because the total amount of all perquisites or personal benefits for an individual named executive officer is less than $10,000 or are required to be identified but are not required to be separately quantified.

5. For purposes of paragraph (c)(2)(ix)(D) of this Item, an accrued amount is an amount for which payment has become due.

(x) The dollar value of total compensation for the covered fiscal year (column (j)). With respect to each named executive officer, disclose the sum of all amounts reported in columns (c) through (i).

Instructions to Item 402(c). 1. Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

2. All compensation values reported in the Summary Compensation Table must be reported in dollars and rounded to the nearest dollar. Reported compensation values must be reported numerically, providing a single numerical value for each grid in the table. Where compensation was paid to or received by a named executive officer in a different currency, a footnote must be provided to identify that currency and describe the rate and methodology used to convert the payment amounts to dollars.

3. If a named executive officer is also a director who receives compensation for his or her services as a director, reflect that compensation in the Summary Compensation Table and provide a footnote identifying and itemizing such compensation and amounts. Use the categories in the Director Compensation Table required pursuant to paragraph (k) of this Item.

4. Any amounts deferred, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), or otherwise, shall be included in the appropriate column for the fiscal year in which earned.

5. Reduce the amount reported in the applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation by any amounts recovered pursuant to the compensation recovery policy required by the listing standards adopted pursuant to 17 CFR 240.10D-1, and identify such amounts by footnote.

(d) Grants of Plan-Based Awards Table. (1) Provide the information specified in paragraph (d)(2) of this Item, concerning each grant of an award made to a named executive officer in the last completed fiscal year under any plan, including awards that subsequently have been transferred, in the following tabular format:

Grants of Plan-Based Awards

		Estimated future payouts under non-equity incentive plan awards			Estimated future payouts under equity incentive plan awards			All other stock awards: Number of shares of stock or units	All other option awards: Number of securities underlying options	Exercise or base price of option awards ($/Sh)	Grant date fair value of stock and option awards
Name	**Grant date**	**Threshold ($)**	**Target ($)**	**Maximum ($)**	**Threshold (#)**	**Target (#)**	**Maximum (#)**	**(#)**	**(#)**		
(a)	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**	**(i)**	**(j)**	**(k)**	**(l)**
PEO											
PFO											
A											
B											
C											

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) The grant date for equity-based awards reported in the table (column (b)). If such grant date is different than the date on which the compensation committee (or a committee of the board of directors performing a similar function or the full board of directors) takes action or is deemed to take action to grant such awards, a separate, adjoining column shall be added between columns (b) and (c) showing such date;

(iii) The dollar value of the estimated future payout upon satisfaction of the conditions in question under non-equity incentive plan awards granted in the fiscal year, or the applicable range of estimated payouts denominated in dollars (threshold, target and maximum amount) (columns (c) through (e));

(iv) The number of shares of stock, or the number of shares underlying options to be paid out or vested upon satisfaction of the conditions in question under equity incentive plan awards granted in the fiscal year, or the applicable range of estimated payouts denominated in the number of shares of stock, or the number of shares underlying options under the award (threshold, target and maximum amount) (columns (f) through (h));

(v) The number of shares of stock granted in the fiscal year that are not required to be disclosed in columns (f) through (h) (column (i));

(vi) The number of securities underlying options granted in the fiscal year that are not required to be disclosed in columns (f) through (h) (column (j));

(vii) The per-share exercise or base price of the options granted in the fiscal year (column (k)). If such exercise or base price is less than the closing market price of the underlying security on the date of the grant, a separate, adjoining column showing the closing market price on the date of the grant shall be added after column (k) and

(viii) The grant date fair value of each equity award computed in accordance with FASB ASC Topic 718 (column (l)). If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise or base price of options, SARs or similar option-like instruments previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the incremental fair value, computed as of the repricing or modification date in accordance with FASB ASC Topic 718, with respect to that repriced or modified award, shall be reported.

Instructions to Item 402(d). 1. Disclosure on a separate line shall be provided in the Table for each grant of an award made to a named executive officer during the fiscal year. If grants of awards were made to a

named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such grant was made.

2. For grants of incentive plan awards, provide the information called for by columns (c), (d) and (e), or (f), (g) and (h), as applicable. For columns (c) and (f), threshold refers to the minimum amount payable for a certain level of performance under the plan. For columns (d) and (g), target refers to the amount payable if the specified performance target(s) are reached. For columns (e) and (h), maximum refers to the maximum payout possible under the plan. If the award provides only for a single estimated payout, that amount must be reported as the target in columns (d) and (g). In columns (d) and (g), registrants must provide a representative amount based on the previous fiscal year's performance if the target amount is not determinable.

3. In determining if the exercise or base price of an option is less than the closing market price of the underlying security on the date of the grant, the registrant may use either the closing market price as specified in paragraph (a)(6)(v) of this Item, or if no market exists, any other formula prescribed for the security. Whenever the exercise or base price reported in column (k) is not the closing market price, describe the methodology for determining the exercise or base price either by a footnote or accompanying textual narrative.

4. A tandem grant of two instruments, only one of which is granted under an incentive plan, such as an option granted in tandem with a performance share, need be reported only in column (i) or (j), as applicable. For example, an option granted in tandem with a performance share would be reported only as an option grant in column (j), with the tandem feature noted either by a footnote or accompanying textual narrative.

5. Disclose the dollar amount of consideration, if any, paid by the executive officer for the award in a footnote to the appropriate column.

6. If non-equity incentive plan awards are denominated in units or other rights, a separate, adjoining column between columns (b) and (c) shall be added quantifying the units or other rights awarded.

7. Options, SARs and similar option-like instruments granted in connection with a repricing transaction or other material modification shall be reported in this Table. However, the disclosure required by this Table does not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

8. For any equity awards that are subject to performance conditions, report in column (l) the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures.

(e) Narrative disclosure to summary compensation table and grants of plan-based awards table. (1) Provide a narrative description of any material factors necessary to an understanding of the information disclosed in the tables required by paragraphs (c) and (d) of this Item. Examples of such factors may include, in given cases, among other things:

(i) The material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten;

(ii) If at any time during the last fiscal year, any outstanding option or other equity-based award was repriced or otherwise materially modified (such as by extension of exercise periods, the change of vesting or forfeiture conditions, the change or elimination of applicable performance criteria, or the change of the bases upon which returns are determined), a description of each such repricing or other material modification;

(iii) The material terms of any award reported in response to paragraph (d) of this Item, including a general description of the formula or criteria to be applied in determining the amounts payable, and the vesting schedule. For example, state where applicable that dividends will be paid on stock, and if so, the applicable dividend rate and whether that rate is preferential. Describe any performance-based conditions, and any other material conditions, that are applicable to the award. For purposes of the Table required by paragraph (d) of this Item and the narrative disclosure required by paragraph (e) of this Item, performance-based conditions include both performance conditions and market conditions, as those terms are defined in FASB ASC Topic 718; and

(iv) An explanation of the amount of salary and bonus in proportion to total compensation.

Instructions to Item 402(e)(1). 1. The disclosure required by paragraph (e)(1)(ii) of this Item would not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

2. Instructions 4 and 5 to Item 402(b) apply regarding disclosure pursuant to paragraph (e)(1) of this Item of target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant.

(2) [Reserved]

(f) Outstanding Equity Awards at Fiscal Year-End Table. (1) Provide the information specified in paragraph (f)(2) of this Item, concerning unexercised options; stock that has not vested; and equity incentive plan awards for each named executive officer outstanding as of the end of the registrant's last completed fiscal year in the following tabular format:

Outstanding Equity Awards at Fiscal Year-End

	Option awards					Stock awards			
Name	**Number of securities underlying unexercised options (#) exercisable**	**Number of securities underlying unexercised options (#) unexercisable**	**Equity incentive plan awards: number of securities underlying unexercised unearned options (#)**	**Option exercise price ($)**	**Option expiration date**	**Number of shares or units of stock that have not vested (#)**	**Market value of shares or units of stock that have not vested (#)**	**Equity incentive plan awards: number of unearned shares, units or other rights that have not vested (#)**	**Equity incentive plan awards: market or payout value of unearned shares, units or other rights that have not vested ($)**
(a)	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**	**(i)**	**(j)**
PEO									
PFO									
A									
B									
C									

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are exercisable and that are not reported in column (d) (column (b));

(iii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are unexercisable and that are not reported in column (d) (column (c));

(iv) On an award-by-award basis, the total number of shares underlying unexercised options awarded under any equity incentive plan that have not been earned (column (d));

(v) For each instrument reported in columns (b), (c) and (d), as applicable, the exercise or base price (column (e));

(vi) For each instrument reported in columns (b), (c) and (d), as applicable, the expiration date (column (f));

(vii) The total number of shares of stock that have not vested and that are not reported in column (i) (column (g));

(viii) The aggregate market value of shares of stock that have not vested and that are not reported in column (j) (column (h));

(ix) The total number of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned, and, if applicable the number of shares underlying any such unit or right (column (i)); and

(x) The aggregate market or payout value of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned (column (j)).

Instructions to Item 402(f)(2). 1. Identify by footnote any award that has been transferred other than for value, disclosing the nature of the transfer.

2. The vesting dates of options, shares of stock and equity incentive plan awards held at fiscal-year end must be disclosed by footnote to the applicable column where the outstanding award is reported.

3. Compute the market value of stock reported in column (h) and equity incentive plan awards of stock reported in column (j) by multiplying the closing market price of the registrant's stock at the end of the last completed fiscal year by the number of shares or units of stock or the amount of equity incentive plan awards, respectively. The number of shares or units reported in columns (d) or (i), and the payout value reported in column (j), shall be based on achieving threshold performance goals, except that if the previous fiscal year's performance has exceeded the threshold, the disclosure shall be based on the next higher performance measure (target or maximum) that exceeds the previous fiscal year's performance. If the award provides only for a single estimated payout, that amount should be reported. If the target amount is not determinable, registrants must provide a representative amount based on the previous fiscal year's performance.

4. Multiple awards may be aggregated where the expiration date and the exercise and/or base price of the instruments is identical. A single award consisting of a combination of options, SARs and/or similar option-like instruments shall be reported as separate awards with respect to each tranche with a different exercise and/or base price or expiration date.

5. Options or stock awarded under an equity incentive plan are reported in columns (d) or (i) and (j), respectively, until the relevant performance condition has been satisfied. Once the relevant performance condition has been satisfied, even if the option or stock award is subject to forfeiture conditions, options are reported in column (b) or (c), as appropriate, until they are exercised or expire, or stock is reported in columns (g) and (h) until it vests.

(g) Option Exercises and Stock Vested Table. (1) Provide the information specified in paragraph (g)(2) of this Item, concerning each exercise of stock options, SARs and similar instruments, and each vesting of stock, including restricted stock, restricted stock units and similar instruments, during the last completed fiscal year for each of the named executive officers on an aggregated basis in the following tabular format:

Option Exercises and Stock Vested

Name	Option awards		Stock awards	
	Number of shares Acquired on Exercise (#)	Value Realized on Exercise ($)	Number of shares acquired on vesting (#)	Value realized on vesting ($)
(a)	(b)	(c)	(d)	(e)
PEO				
PFO				
A				
B				
C				

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of securities for which the options were exercised (column (b));

(iii) The aggregate dollar value realized upon exercise of options, or upon the transfer of an award for value (column (c));

(iv) The number of shares of stock that have vested (column (d)); and

(v) The aggregate dollar value realized upon vesting of stock, or upon the transfer of an award for value (column (e)).

I*nstruction to Item 402(g)(2).* Report in column (c) the aggregate dollar amount realized by the named executive officer upon exercise of the options or upon the transfer of such instruments for value. Compute the dollar amount realized upon exercise by determining the difference between the market price of the underlying securities at exercise and the exercise or base price of the options. Do not include the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes. (Any such payment or other consideration provided by the registrant is required to be disclosed in accordance with paragraph (c)(2)(ix) of this Item.) Report in column (e) the aggregate dollar amount realized by the named executive officer upon the vesting of stock or the transfer of such instruments for value. Compute the aggregate dollar amount realized upon vesting by multiplying the number of shares of stock or units by the market value of the underlying shares on the vesting date. For any amount realized upon exercise or vesting for which receipt has been deferred, provide a footnote quantifying the amount and disclosing the terms of the deferral.

(h) *Pension Benefits*. (1) Provide the information specified in paragraph (h)(2) of this Item with respect to each plan that provides for payments or other benefits at, following, or in connection with retirement, in the following tabular format:

Pension Benefits

Name	Plan name	Number of years credited service (#)	Present value of accumulated benefit ($)	Payments during last fiscal year ($)
(a)	**(b)**	**(c)**	**(d)**	**(e)**
PEO				
PFO				
A				
B				
C				

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The name of the plan (column (b));

(iii) The number of years of service credited to the named executive officer under the plan, computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the last completed fiscal year (column (c));

(iv) The actuarial present value of the named executive officer's accumulated benefit under the plan, computed as of the same pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the last completed fiscal year (column (d)); and

(v) The dollar amount of any payments and benefits paid to the named executive officer during the registrant's last completed fiscal year (column (e)).

Instructions to Item 402(h)(2). 1. The disclosure required pursuant to this Table applies to each plan that provides for specified retirement payments and benefits, or payments and benefits that will be provided primarily following retirement, including but not limited to tax-qualified defined benefit plans and supplemental executive retirement plans, but excluding tax-qualified defined contribution plans and nonqualified defined contribution plans. Provide a separate row for each such plan in which the named executive officer participates.

2. For purposes of the amount(s) reported in column (d), the registrant must use the same assumptions used for financial reporting purposes under generally accepted accounting principles, except that retirement age shall be assumed to be the normal retirement age as defined in the plan, or if not so defined, the earliest time at which a participant may retire under the plan without any benefit reduction due to age. The registrant must disclose in the accompanying textual narrative the valuation method and all material assumptions applied in quantifying the present value of the current accrued benefit. A benefit specified in the plan document or the executive's contract itself is not an assumption. Registrants may satisfy all or part of this disclosure by reference to a discussion of those assumptions in the registrant's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

3. For purposes of allocating the current accrued benefit between tax qualified defined benefit plans and related supplemental plans, apply the limitations applicable to tax qualified defined benefit plans established by the Internal Revenue Code and the regulations thereunder that applied as of the pension plan measurement date.

4. If a named executive officer's number of years of credited service with respect to any plan is different from the named executive officer's number of actual years of service with the registrant, provide footnote disclosure quantifying the difference and any resulting benefit augmentation.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each plan covered by the tabular disclosure required by this paragraph. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) The material terms and conditions of payments and benefits available under the plan, including the plan's normal retirement payment and benefit formula and eligibility standards, and the effect of the form of benefit elected on the amount of annual benefits. For this purpose, normal retirement means retirement at the normal retirement age as defined in the plan, or if not so defined, the earliest time at which a participant may retire under the plan without any benefit reduction due to age;

(ii) If any named executive officer is currently eligible for early retirement under any plan, identify that named executive officer and the plan, and describe the plan's early retirement payment and benefit formula and eligibility standards. For this purpose, early retirement means retirement at the early retirement age as defined in the plan, or otherwise available to the executive under the plan;

(iii) The specific elements of compensation (e.g., salary, bonus, etc.) included in applying the payment and benefit formula, identifying each such element;

(iv) With respect to named executive officers' participation in multiple plans, the different purposes for each plan; and

(v) Registrant policies with regard to such matters as granting extra years of credited service.

(i) *Nonqualified Defined Contribution and Other Nonqualified Deferred Compensation Plans.* (1) Provide the information specified in paragraph (i)(2) of this Item with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified in the following tabular format:

Nonqualified Deferred Compensation

Name	Executive contributions in last FY ($)	Registrant contributions in last FY ($)	Aggregate earnings in last FY ($)	Aggregate withdrawals/ distributions ($)	Aggregate balance at last FYE ($)
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The dollar amount of aggregate executive contributions during the registrant's last fiscal year (column (b));

(iii) The dollar amount of aggregate registrant contributions during the registrant's last fiscal year (column (c));

(iv) The dollar amount of aggregate interest or other earnings accrued during the registrant's last fiscal year (column (d));

(v) The aggregate dollar amount of all withdrawals by and distributions to the executive during the registrant's last fiscal year (column (e)); and

(vi) The dollar amount of total balance of the executive's account as of the end of the registrant's last fiscal year (column (f)).

Instruction to Item 402(i)(2). Provide a footnote quantifying the extent to which amounts reported in the contributions and earnings columns are reported as compensation in the last completed fiscal year in the registrant's Summary Compensation Table and amounts reported in the aggregate balance at last fiscal year end (column (f)) previously were reported as compensation to the named executive officer in the registrant's Summary Compensation Table for previous years.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each plan covered by tabular disclosure required by this paragraph. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) The type(s) of compensation permitted to be deferred, and any limitations (by percentage of compensation or otherwise) on the extent to which deferral is permitted;

(ii) The measures for calculating interest or other plan earnings (including whether such measure(s) are selected by the executive or the registrant and the frequency and manner in which selections may be changed), quantifying interest rates and other earnings measures applicable during the registrant's last fiscal year; and

(iii) Material terms with respect to payouts, withdrawals and other distributions.

(j) *Potential Payments Upon Termination or Change-in-Control.* Regarding each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer's responsibilities, with respect to each named executive officer:

(1) Describe and explain the specific circumstances that would trigger payment(s) or the provision of other benefits, including perquisites and health care benefits;

(2) Describe and quantify the estimated payments and benefits that would be provided in each covered circumstance, whether they would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided;

(3) Describe and explain how the appropriate payment and benefit levels are determined under the various circumstances that trigger payments or provision of benefits;

(4) Describe and explain any material conditions or obligations applicable to the receipt of payments or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver of breach of such agreements; and

(5) Describe any other material factors regarding each such contract, agreement, plan or arrangement.

Instructions to Item 402(j). 1. The registrant must provide quantitative disclosure under these requirements, applying the assumptions that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate (or a reasonable estimated range of amounts) applicable to the payment or benefit and disclose material assumptions underlying such estimates or estimated ranges in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

2. Perquisites and other personal benefits or property may be excluded only if the aggregate amount of such compensation will be less than $10,000. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to paragraph (c)(2)(ix) of this Item. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

3. To the extent that the form and amount of any payment or benefit that would be provided in connection with any triggering event is fully disclosed pursuant to paragraph (h) or (i) of this Item, reference may be made to that disclosure. However, to the extent that the form or amount of any such payment or benefit would be enhanced or its vesting or other provisions accelerated in connection with any triggering event, such enhancement or acceleration must be disclosed pursuant to this paragraph.

4. Where a triggering event has actually occurred for a named executive officer and that individual was not serving as a named executive officer of the registrant at the end of the last completed fiscal year, the disclosure required by this paragraph for that named executive officer shall apply only to that triggering event.

5. The registrant need not provide information with respect to contracts, agreements, plans or arrangements to the extent they do not discriminate in scope, terms or operation, in favor of executive officers of the registrant and that are available generally to all salaried employees.

(k) *Compensation of Directors.* (1) Provide the information specified in paragraph (k)(2) of this Item, concerning the compensation of the directors for the registrant's last completed fiscal year, in the following tabular format:

Director Compensation

Name	Fees earned or paid in cash ($)	Stock awards ($)	Option awards ($)	Non-equity incentive plan compensation ($)	Change in pension value and nonqualified deferred compensation earnings	All other compensation	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
A							
B							
C							
D							
E							

(2) The Table shall include:

(i) The name of each director unless such director is also a named executive officer under paragraph (a) of this Item and his or her compensation for service as a director is fully reflected in the Summary Compensation Table pursuant to paragraph (c) of this Item and otherwise as required pursuant to paragraphs (d) through (j) of this Item (column (a));

(ii) The aggregate dollar amount of all fees earned or paid in cash for services as a director, including annual retainer fees, committee and/or chairmanship fees, and meeting fees (column (b));

(iii) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (c));

(iv) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (d));

Instruction to Item 402(k)(2)(iii) and (iv). For each director, disclose by footnote to the appropriate column: the grant date fair value of each equity award computed in accordance with FASB ASC Topic 718; for each option, SAR or similar option like instrument for which the registrant has adjusted or amended the exercise or base price during the last completed fiscal year, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the incremental fair value, computed as of the repricing or modification date in accordance with FASB ASC Topic 718; and the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end. However, the disclosure required by this Instruction does not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

(v) The dollar value of all earnings for services performed during the fiscal year pursuant to non-equity incentive plans as defined in paragraph (a)(6)(iii) of this Item, and all earnings on any outstanding awards (column (e));

(vi) The sum of the amounts specified in paragraphs (k)(2)(vi)(A) and (B) of this Item (column (f)) as follows:

(A) The aggregate change in the actuarial present value of the director's accumulated benefit under all defined benefit and actuarial pension plans (including supplemental plans) from the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the prior completed fiscal year to the pension plan measurement date used for financial statement reporting purposes with respect to the registrant's audited financial statements for the covered fiscal year; and

(B) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans;

(vii) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Director Compensation Table (column (g)). Each compensation item that is not properly reportable in columns (b)-(f), regardless of the amount of the compensation item, must be included in column (g). Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant, the compensation cost, if any, computed in accordance with FASB ASC Topic 718;

(D) The amount paid or accrued to any director pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such director; or

(2) A change in control of the registrant;

(E) Registrant contributions or other allocations to vested and unvested defined contribution plans;

(F) Consulting fees earned from, or paid or payable by the registrant and/or its subsidiaries (including joint ventures);

(G) The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs;

(H) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a director; and

(I) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (c) or (d); and

Instructions to Item 402(k)(2)(vii). 1. Programs in which registrants agree to make donations to one or more charitable institutions in a director's name, payable by the registrant currently or upon a designated event, such as the retirement or death of the director, are charitable awards programs or director legacy programs for purposes of the disclosure required by paragraph (k)(2)(vii)(G) of this Item. Provide footnote disclosure of the total dollar amount payable under the program and other material terms of each such program for which tabular disclosure is provided.

2. Any item reported for a director pursuant to paragraph (k)(2)(vii) of this Item that is not a perquisite or personal benefit and whose value exceeds $10,000 must be identified and quantified in a footnote to

column (g). All items of compensation are required to be included in the Director Compensation Table without regard to whether such items are required to be identified other than as specifically noted in this Item.

3. Perquisites and personal benefits may be excluded as long as the total value of all perquisites and personal benefits for a director is less than $10,000.

If the total value of all perquisites and personal benefits is $10,000 or more for any director, then each perquisite or personal benefit, regardless of its amount, must be identified by type. If perquisites and personal benefits are required to be reported for a director pursuant to this rule, then each perquisite or personal benefit that exceeds the greater of $25,000 or 10% of the total amount of perquisites and personal benefits for that director must be quantified and disclosed in a footnote. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant. With respect to the perquisite or other personal benefit for which footnote quantification is required, the registrant shall describe in the footnote its methodology for computing the aggregate incremental cost. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included in column (g) and are subject to separate quantification and identification as tax reimbursements (paragraph (k)(2)(vii)(B) of this Item) even if the associated perquisites or other personal benefits are not required to be included because the total amount of all perquisites or personal benefits for an individual director is less than $10,000 or are required to be identified but are not required to be separately quantified.

(viii) The dollar value of total compensation for the covered fiscal year (column (h)). With respect to each director, disclose the sum of all amounts reported in columns (b) through (g).

Instruction to Item 402(k)(2). Two or more directors may be grouped in a single row in the Table if all elements of their compensation are identical. The names of the directors for whom disclosure is presented on a group basis should be clear from the Table.

(3) Narrative to director compensation table. Provide a narrative description of any material factors necessary to an understanding of the director compensation disclosed in this Table. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and

(ii) Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.

Instruction to Item 402(k). In addition to the Instruction to paragraphs (k)(2)(iii) and (iv) and the Instructions to paragraph (k)(2)(vii) of this Item, the following apply equally to paragraph (k) of this Item: Instructions 2 and 4 to paragraph (c) of this Item; Instructions to paragraphs (c)(2)(iii) and (iv) of this Item; Instructions to paragraphs (c)(2)(v) and (vi) of this Item; Instructions to paragraph (c)(2)(vii) of this Item; Instructions to paragraph (c)(2)(viii) of this Item; and Instructions 1 and 5 to paragraph (c)(2)(ix) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (k) of this Item that correspond to analogous disclosures provided for in paragraph (c) of this Item to which they refer.

(l) *Smaller Reporting Companies and Emerging Growth Companies*. A registrant that qualifies as a "smaller reporting company," as defined by Item 10(f) (§229.10(f)(1)), or is an "emerging growth company," as defined in Rule 405 of the Securities Act (§230.405 of this chapter) or Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter), may provide the scaled disclosure in paragraphs (m) through (r) instead of paragraphs (a) through (k), (s), and (u) of this Item.

(m) *Smaller Reporting Companies—General—(1) All Compensation Covered*. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (m)(2) of this Item, and directors covered by paragraph (r) of this Item, by any person for all services rendered in all capacities to the smaller reporting company and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the smaller reporting company and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(2) *Persons Covered*. Disclosure shall be provided pursuant to this Item for each of the following (the "named executive officers"):

(i) All individuals serving as the smaller reporting company's principal executive officer or acting in a similar capacity during the last completed fiscal year ("PEO"), regardless of compensation level;

(ii) The smaller reporting company's two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (m)(2)(ii) of this Item but for the fact that the individual was not serving as an executive officer of the smaller reporting company at the end of the last completed fiscal year.

Instructions to Item 402(m)(2). 1. Determination of most highly compensated executive officers. The determination as to which executive officers are most highly compensated shall be made by reference to total compensation for the last completed fiscal year (as required to be disclosed pursuant to paragraph (n)(2)(x) of this Item) reduced by the amount required to be disclosed pursuant to paragraph (n)(2)(viii) of this Item, provided, however, that no disclosure need be provided for any executive officer, other than the PEO, whose total compensation, as so reduced, does not exceed $100,000.

2. *Inclusion of Executive Officer of a Subsidiary.* It may be appropriate for a smaller reporting company to include as named executive officers one or more executive officers or other employees of subsidiaries in the disclosure required by this Item. See Rule 3b-7 under the Exchange Act (17 CFR 240.3b-7).

3. *Exclusion of Executive Officer Due to Overseas Compensation.* It may be appropriate in limited circumstances for a smaller reporting company not to include in the disclosure required by this Item an individual, other than its PEO, who is one of the smaller reporting company's most highly compensated executive officers due to the payment of amounts of cash compensation relating to overseas assignments attributed predominantly to such assignments.

(3) *Information for Full Fiscal Year.* If the PEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the PEO) served as an executive officer of the smaller reporting company (whether or not in the same position) during any part of the fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(4) *Omission of Table or Column.* A table or column may be omitted if there has been no compensation awarded to, earned by, or paid to any of the named executive officers or directors required to be reported in that table or column in any fiscal year covered by that table.

(5) *Definitions.* For purposes of this Item:

(i) The term stock means instruments such as common stock, restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or any similar instruments that do

not have option-like features, and the term option means instruments such as stock options, stock appreciation rights and similar instruments with option-like features. The term stock appreciation rights ("SARs") refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the smaller reporting company or a named executive officer. The term equity is used to refer generally to stock and/or options.

(ii) The term plan includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal document, pursuant to which cash, securities, similar instruments, or any other property may be received. A plan may be applicable to one person. Except with respect to disclosure required by paragraph (t) of this Item, smaller reporting companies may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the smaller reporting company and that are available generally to all salaried employees.

(iii) The term incentive plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the smaller reporting company or an affiliate, the smaller reporting company's stock price, or any other performance measure. An equity incentive plan is an incentive plan or portion of an incentive plan under which awards are granted that fall within the scope of FASB ASC Topic 718. A non-equity incentive plan is an incentive plan or portion of an incentive plan that is not an equity incentive plan. The term incentive plan award means an award provided under an incentive plan.

(iv) The terms date of grant or grant date refer to the grant date determined for financial statement reporting purposes pursuant to FASB ASC Topic 718.

(v) Closing market price is defined as the price at which the smaller reporting company's security was last sold in the principal United States market for such security as of the date for which the closing market price is determined.

(n) Smaller Reporting Companies—Summary Compensation Table—(1) General. Provide the information specified in paragraph (n)(2) of this Item, concerning the compensation of the named executive officers for each of the smaller reporting company's last two completed fiscal years, in a Summary Compensation Table in the tabular format specified below.

Summary Compensation Table

Name and principal position	Year	Salary ($)	Bonus ($)	Stock awards ($)	Option awards ($)	Nonequity incentive plan compensation ($)	Nonqualified deferred compensation earnings ($)	All other compensation ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
A									
B									

(2) The Table shall include:

(i) The name and principal position of the named executive officer (column (a));

(ii) The fiscal year covered (column (b));

(iii) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(iv) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d));

Instructions to Item 402(n)(2)(iii) and (iv). 1. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, a footnote shall be included disclosing that the amount of salary or bonus is not calculable through the latest practicable date and providing the date that the amount of salary or bonus is expected to be determined, and such amount must then be disclosed in a filing under Item 5.02(f) of Form 8-K (17 CFR 249.308).

2. Smaller reporting companies shall include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer under which stock, equity-based or other forms of non-cash compensation instead have been received by the named executive officer. However, the receipt of any such form of non-cash compensation instead of salary or bonus must be disclosed in a footnote added to the salary or bonus column and, where applicable, referring to the narrative disclosure to the Summary Compensation Table (required by paragraph (o) of this Item) where the material terms of the stock, option or non-equity incentive plan award elected by the named executive officer are reported.

(v) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (e));

(vi) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (f));

Instruction 1 to Item 402(n)(2)(v) and (n)(2)(vi). For awards reported in columns (e) and (f), include a footnote disclosing all assumptions made in the valuation by reference to a discussion of those assumptions in the smaller reporting company's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

Instruction 2 to Item 402(n)(2)(v) and (n)(2)(vi). If at any time during the last completed fiscal year, the smaller reporting company has adjusted or amended the exercise price of options or SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), or otherwise has materially modified such awards, the smaller reporting company shall include, as awards required to be reported in column (f), the incremental fair value, computed as of the repricing or modification date in accordance with FASB ASC Topic 718, with respect to that repriced or modified award.

Instruction 3 to Item 402(n)(2)(v) and (vi). For any awards that are subject to performance conditions, report the value at the grant date based upon the probable outcome of such conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. In a footnote to the table, disclose the value of the award at the grant date assuming that the highest level of performance conditions will be achieved if an amount less than the maximum was included in the table.

(vii) The dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-equity incentive plans as defined in paragraph (m)(5)(iii) of this Item, and all earnings on any outstanding awards (column (g));

Instructions to Item 402(n)(2)(vii). 1. If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer.

2. All earnings on non-equity incentive plan compensation must be identified and quantified in a footnote to column (g), whether the earnings were paid during the fiscal year, payable during the period but deferred at the election of the named executive officer, or payable by their terms at a later date.

(viii) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans (column (h));

Instruction to Item 402(n)(2)(viii). Interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, (26 U.S.C. 1274(d))) at the rate that corresponds most closely to the rate under the smaller reporting company's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate. Dividends (and dividend equivalents) on deferred compensation denominated in the smaller reporting company's stock ("deferred stock") are preferential only if earned at a rate higher than dividends on the smaller reporting company's common stock. Only the preferential portion of the dividends or equivalents must be included. Footnote or narrative disclosure may be provided explaining the smaller reporting company's criteria for determining any portion considered to be above-market.

(ix) All other compensation for the covered fiscal year that the smaller reporting company could not properly report in any other column of the Summary Compensation Table (column (i)). Each compensation item that is not properly reportable in columns (c) through (h), regardless of the amount of the compensation item, must be included in column (i). Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the smaller reporting company or its subsidiaries purchased from the smaller reporting company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the smaller reporting company, the compensation cost, if any, computed in accordance with FASB ASC Topic 718;

(D) The amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) Any termination, including without limitation through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer's employment with the smaller reporting company and its subsidiaries; or

(2) A change in control of the smaller reporting company;

(E) Smaller reporting company contributions or other allocations to vested and unvested defined contribution plans;

(F) The dollar value of any insurance premiums paid by, or on behalf of, the smaller reporting company during the covered fiscal year with respect to life insurance for the benefit of a named executive officer; and

(G) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (e) or (f); and

Instructions to Item 402(n)(2)(ix). 1. Non-equity incentive plan awards and earnings and earnings on stock or options, except as specified in paragraph (n)(2)(ix)(G) of this Item, are required to be reported elsewhere as provided in this Item and are not reportable as All Other Compensation in column (i).

2. Benefits paid pursuant to defined benefit and actuarial plans are not reportable as All Other Compensation in column (i) unless accelerated pursuant to a change in control; information concerning these plans is reportable pursuant to paragraph (q)(1) of this Item.

3. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included in the columns as tax reimbursements (paragraph (n)(2)(ix)(B) of this Item) even if the associated perquisites or other personal benefits are not required to be included because the aggregate amount of such compensation is less than $10,000.

4. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the smaller reporting company.

5. For purposes of paragraph (n)(2)(ix)(D) of this Item, an accrued amount is an amount for which payment has become due.

(x) The dollar value of total compensation for the covered fiscal year (column (j)). With respect to each named executive officer, disclose the sum of all amounts reported in columns (c) through (i).

Instructions to Item 402(n). 1. Information with respect to the fiscal year prior to the last completed fiscal year will not be required if the smaller reporting company was not a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) at any time during that year, except that the smaller reporting company will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

2. All compensation values reported in the Summary Compensation Table must be reported in dollars and rounded to the nearest dollar. Reported compensation values must be reported numerically, providing a single numerical value for each grid in the table. Where compensation was paid to or received by a named executive officer in a different currency, a footnote must be provided to identify that currency and describe the rate and methodology used to convert the payment amounts to dollars.

3. If a named executive officer is also a director who receives compensation for his or her services as a director, reflect that compensation in the Summary Compensation Table and provide a footnote identifying and itemizing such compensation and amounts. Use the categories in the Director Compensation Table required pursuant to paragraph (r) of this Item.

4. Any amounts deferred, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), or otherwise, shall be included in the appropriate column for the fiscal year in which earned.

5. Reduce the amount reported in the applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation by any amounts recovered pursuant to the compensation recovery policy required by the listing standards adopted pursuant to 17 CFR 240.10D-1, and identify such amounts by footnote.

(o) Smaller Reporting Companies—Narrative Disclosure to Summary Compensation Table. Provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Table required by paragraph (n) of this Item. Examples of such factors may include, in given cases, among other things:

(1) The material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten;

(2) If at any time during the last fiscal year, any outstanding option or other equity-based award was repriced or otherwise materially modified (such as by extension of exercise periods, the change of vesting or forfeiture conditions, the change or elimination of applicable performance criteria, or the change of the bases upon which returns are determined), a description of each such repricing or other material modification;

(3) The waiver or modification of any specified performance target, goal or condition to payout with respect to any amount included in non-stock incentive plan compensation or payouts reported in column (g) to the Summary Compensation Table required by paragraph (n) of this Item, stating whether the waiver or modification applied to one or more specified named executive officers or to all compensation subject to the target, goal or condition;

(4) The material terms of each grant, including but not limited to the date of exercisability, any conditions to exercisability, any tandem feature, any reload feature, any tax-reimbursement feature, and any provision that could cause the exercise price to be lowered;

(5) The material terms of any non-equity incentive plan award made to a named executive officer during the last completed fiscal year, including a general description of the formula or criteria to be applied in determining the amounts payable and vesting schedule;

(6) The method of calculating earnings on nonqualified deferred compensation plans including nonqualified defined contribution plans; and

(7) An identification to the extent material of any item included under All Other Compensation (column (i)) in the Summary Compensation Table. Identification of an item shall not be considered material if it does not exceed the greater of $25,000 or 10% of all items included in the specified category in question set forth in paragraph (n)(2)(ix) of this Item. All items of compensation are required to be included in the Summary Compensation Table without regard to whether such items are required to be identified.

Instruction to Item 402(o). The disclosure required by paragraph (o)(2) of this Item would not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

(p) Smaller Reporting Companies—Outstanding Equity Awards at Fiscal Year-End Table. (1) Provide the information specified in paragraph (p)(2) of this Item, concerning unexercised options; stock that has not vested; and equity incentive plan awards for each named executive officer outstanding as of the end of the smaller reporting company's last completed fiscal year in the following tabular format:

Outstanding Equity Awards at Fiscal Year End

	Option awards					Stock awards			
Name	**Number of securities underlying unexercised options (#) Exercisable**	**Number of securities underlying unexercised options (#) Unexercisable**	**Equity incentive plan awards: Number of securities underlying unexercised unearned options (#)**	**Option exercise price ($)**	**Option expiration date**	**Number of shares or units of stock that have not vested (#)**	**Market value of shares of units of stock that have not vested ($)**	**Equity incentive plan awards: Number of unearned shares, units or other rights that have not vested (#)**	**Equity incentive plan awards: Market or payout value of unearned shares, units or other rights that have not vested ($)**
(a)	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**	**(i)**	**(j)**
PEO									
A									
B									

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are exercisable and that are not reported in column (d) (column (b));

(iii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are unexercisable and that are not reported in column (d) (column (c));

(iv) On an award-by-award basis, the total number of shares underlying unexercised options awarded under any equity incentive plan that have not been earned (column (d));

(v) For each instrument reported in columns (b), (c) and (d), as applicable, the exercise or base price (column (e));

(vi) For each instrument reported in columns (b), (c) and (d), as applicable, the expiration date (column (f));

(vii) The total number of shares of stock that have not vested and that are not reported in column (i) (column (g));

(viii) The aggregate market value of shares of stock that have not vested and that are not reported in column (j) (column (h));

(ix) The total number of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned, and, if applicable the number of shares underlying any such unit or right (column (i)); and

(x) The aggregate market or payout value of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned (column (j)).

Instructions to Item 402(p)(2). 1. Identify by footnote any award that has been transferred other than for value, disclosing the nature of the transfer.

2. The vesting dates of options, shares of stock and equity incentive plan awards held at fiscal-year end must be disclosed by footnote to the applicable column where the outstanding award is reported.

3. Compute the market value of stock reported in column (h) and equity incentive plan awards of stock reported in column (j) by multiplying the closing market price of the smaller reporting company's stock at

the end of the last completed fiscal year by the number of shares or units of stock or the amount of equity incentive plan awards, respectively. The number of shares or units reported in column (d) or (i), and the payout value reported in column (j), shall be based on achieving threshold performance goals, except that if the previous fiscal year's performance has exceeded the threshold, the disclosure shall be based on the next higher performance measure (target or maximum) that exceeds the previous fiscal year's performance. If the award provides only for a single estimated payout, that amount should be reported. If the target amount is not determinable, smaller reporting companies must provide a representative amount based on the previous fiscal year's performance.

4. Multiple awards may be aggregated where the expiration date and the exercise and/or base price of the instruments is identical. A single award consisting of a combination of options, SARs and/or similar option-like instruments shall be reported as separate awards with respect to each tranche with a different exercise and/or base price or expiration date.

5. Options or stock awarded under an equity incentive plan are reported in columns (d) or (i) and (j), respectively, until the relevant performance condition has been satisfied. Once the relevant performance condition has been satisfied, even if the option or stock award is subject to forfeiture conditions, options are reported in column (b) or (c), as appropriate, until they are exercised or expire, or stock is reported in columns (g) and (h) until it vests.

(q) Smaller Reporting Companies—Additional Narrative Disclosure. Provide a narrative description of the following to the extent material:

(1) The material terms of each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans, supplemental executive retirement plans, tax-qualified defined contribution plans and nonqualified defined contribution plans.

(2) The material terms of each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with the resignation, retirement or other termination of a named executive officer, or a change in control of the smaller reporting company or a change in the named executive officer's responsibilities following a change in control, with respect to each named executive officer.

(r) Smaller Reporting Companies—Compensation of Directors. (1) Provide the information specified in paragraph (r)(2) of this Item, concerning the compensation of the directors for the smaller reporting company's last completed fiscal year, in the following tabular format:

Director Compensation

Name	Fees earned or paid in cash ($)	Stock awards ($)	Option awards ($)	Non-equity incentive plan compensation ($)	Nonqualified deferred compensation earnings ($)	All other compensation ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
A							
B							
C							
D							
E							

(2) The Table shall include:

(i) The name of each director unless such director is also a named executive officer under paragraph (m) of this Item and his or her compensation for service as a director is fully reflected in the Summary Compensation Table pursuant to paragraph (n) of this Item and otherwise as required pursuant to paragraphs (o) through (q) of this Item (column (a));

(ii) The aggregate dollar amount of all fees earned or paid in cash for services as a director, including annual retainer fees, committee and/or chairmanship fees, and meeting fees (column (b));

(iii) For awards of stock, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (c));

(iv) For awards of options, with or without tandem SARs (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 (column (d));

Instruction to Item 402(r)(2)(iii) and (iv). For each director, disclose by footnote to the appropriate column, the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end.

(v) The dollar value of all earnings for services performed during the fiscal year pursuant to non-equity incentive plans as defined in paragraph (m)(5)(iii) of this Item, and all earnings on any outstanding awards (column (e));

(vi) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans (column (f));

(vii) All other compensation for the covered fiscal year that the smaller reporting company could not properly report in any other column of the Director Compensation Table (column (g)). Each compensation item that is not properly reportable in columns (b) through (f), regardless of the amount of the compensation item, must be included in column (g) and must be identified and quantified in a footnote if it is deemed material in accordance with paragraph (o)(7) of this Item. Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the smaller reporting company or its subsidiaries purchased from the smaller reporting company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the smaller reporting company, the compensation cost, if any, computed in accordance with FASB ASC Topic 718;

(D) The amount paid or accrued to any director pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such director; or

(2) A change in control of the smaller reporting company;

(E) Smaller reporting company contributions or other allocations to vested and unvested defined contribution plans;

(F) Consulting fees earned from, or paid or payable by the smaller reporting company and/or its subsidiaries (including joint ventures);

(G) The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs;

(H) The dollar value of any insurance premiums paid by, or on behalf of, the smaller reporting company during the covered fiscal year with respect to life insurance for the benefit of a director; and

(I) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award in column (c) or (d); and

Instruction to Item 402(r)(2)(vii). Programs in which smaller reporting companies agree to make donations to one or more charitable institutions in a director's name, payable by the smaller reporting company currently or upon a designated event, such as the retirement or death of the director, are charitable awards programs or director legacy programs for purposes of the disclosure required by paragraph (r)(2)(vii)(G) of this Item. Provide footnote disclosure of the total dollar amount payable under the program and other material terms of each such program for which tabular disclosure is provided.

(viii) The dollar value of total compensation for the covered fiscal year (column (h)). With respect to each director, disclose the sum of all amounts reported in columns (b) through (g).

Instruction to Item 402(r)(2). Two or more directors may be grouped in a single row in the Table if all elements of their compensation are identical. The names of the directors for whom disclosure is presented on a group basis should be clear from the Table.

(3) Narrative to Director Compensation Table. Provide a narrative description of any material factors necessary to an understanding of the director compensation disclosed in this Table. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and

(ii) Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.

Instruction to Item 402(r). In addition to the Instruction to paragraph (r)(2)(vii) of this Item, the following apply equally to paragraph (r) of this Item: Instructions 2 and 4 to paragraph (n) of this Item; the

Instructions to paragraphs (n)(2)(iii) and (iv) of this Item; the Instructions to paragraphs (n)(2)(v) and (vi) of this Item; the Instructions to paragraph (n)(2)(vii) of this Item; the Instruction to paragraph (n)(2)(viii) of this Item; the Instructions to paragraph (n)(2)(ix) of this Item; and paragraph (o)(7) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (r) of this Item that correspond to analogous disclosures provided for in paragraph (n) of this Item to which they refer.

(s) *Narrative Disclosure of the Registrant's Compensation Policies and Practices as they Relate to the Registrant's Risk Management.* To the extent that risks arising from the registrant's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the registrant, discuss the registrant's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives. While the situations requiring disclosure will vary depending on the particular registrant and compensation policies and practices, situations that may trigger disclosure include, among others, compensation policies and practices: at a business unit of the company that carries a significant portion of the registrant's risk profile; at a business unit with compensation structured significantly differently than other units within the registrant; at a business unit that is significantly more profitable than others within the registrant; at a business unit where compensation expense is a significant percentage of the unit's revenues; and that vary significantly from the overall risk and reward structure of the registrant, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the registrant from the task extend over a significantly longer period of time. The purpose of this paragraph(s) is to provide investors material information concerning how the registrant compensates and incentivizes its employees that may create risks that are reasonably likely to have a material adverse effect on the registrant. While the information to be disclosed pursuant to this paragraph(s) will vary depending upon the nature of the registrant's business and the compensation approach, the following are examples of the issues that the registrant may need to address for the business units or employees discussed:

(1) The general design philosophy of the registrant's compensation policies and practices for employees whose behavior would be most affected by the incentives established by the policies and practices, as such policies and practices relate to or affect risk taking by employees on behalf of the registrant, and the manner of their implementation;

(2) The registrant's risk assessment or incentive considerations, if any, in structuring its compensation policies and practices or in awarding and paying compensation;

(3) How the registrant's compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring claw backs or imposing holding periods;

(4) The registrant's policies regarding adjustments to its compensation policies and practices to address changes in its risk profile;

(5) Material adjustments the registrant has made to its compensation policies and practices as a result of changes in its risk profile; and

(6) The extent to which the registrant monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees.

(t) *Golden Parachute Compensation.* (1) In connection with any proxy or consent solicitation material providing the disclosure required by section 14A(b)(1) of the Exchange Act (15 U.S.C. 78n-1(b)(1)) or any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§240.14a-101 of this chapter) pursuant to Note A of Schedule 14A (excluding any proxy or consent solicitation of an "emerging growth company," as defined in Rule 405 of the Securities Act (§230.405 of this chapter) or Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter)), with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer, as follows:

Golden Parachute Compensation

Name	Cash ($)	Equity ($)	Pension/ NQDC ($)	Perquisites/ benefits ($)	Tax reimbursement ($)	Other ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
PEO							
PFO							
A							
B							
C							

(2) The table shall include, for each named executive officer:

(i) The name of the named executive officer (column (a));

(ii) The aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments (column (b));

(iii) The aggregate dollar value of:

(A) Stock awards for which vesting would be accelerated;

(B) In-the-money option awards for which vesting would be accelerated; and

(C) Payments in cancellation of stock and option awards (column (c));

(iv) The aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements (column (d));

(v) The aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits (column (e));

(vi) The aggregate dollar value of any tax reimbursements (column (f));

(vii) The aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reported in columns (b) through (f) (column (g)); and

(viii) The aggregate dollar value of the sum of all amounts reported in columns (b) through (g) (column (h)).

Instructions to Item 402(t)(2). 1. If this disclosure is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of the registrant, or in a proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§240.14a-101) pursuant to Note A of Schedule 14A, the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date, and that the price per share of the registrant's securities shall be determined as follows: If the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of the registrant's securities over the first five business days following the first public announcement of the

transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the issuer's most recent filing with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.) that required disclosure pursuant to Item 402(c).

2. If this disclosure is included in a proxy solicitation for the annual meeting at which directors are elected for purposes of subjecting the disclosed agreements or understandings to a shareholder vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

3. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

4. For each of columns (b) through (g), include a footnote quantifying each separate form of compensation included in the aggregate total reported. Include the value of all perquisites and other personal benefits or property. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to Item 402(c)(2)(ix) of this section. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

5. For each of columns (b) through (h), include a footnote quantifying the amount payable attributable to a double-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable attributable to a single-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

6. A registrant conducting a shareholder advisory vote pursuant to §240.14a-21(c) of this chapter to cover new arrangements and understandings, and/or revised terms of agreements and understandings that were

previously subject to a shareholder advisory vote pursuant to §240.14a-21(a) of this chapter, shall provide two separate tables. One table shall disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a shareholder advisory vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)) and §240.14a-21(a) of this chapter and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote. The second table shall disclose only the new arrangements and/or revised terms subject to the separate shareholder vote under section 14A(b)(2) of the Exchange Act and §240.14a-21(c) of this chapter.

7. In cases where this Item 402(t)(2) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, the registrant shall clarify whether these agreements are included in the separate shareholder advisory vote pursuant to §240.14a-21(c) of this chapter by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by section 14A(b)(2) of the Exchange Act (15 U.S.C. 78n-1(b)(2)) and §240.14a-21(c) of this chapter, if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the tabular disclosure required by this paragraph. Such factors shall include, but not be limited to a description of:

(i) The specific circumstances that would trigger payment(s);

(ii) Whether the payments would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided; and

(iii) Any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

Instructions to Item 402(t). 1. A registrant that does not qualify as a "smaller reporting company," as defined by §229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of this section. A registrant that qualifies as a "smaller reporting company," as defined by §229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(m)(2)(i) and (ii) of this section.

2. The obligation to provide the information in this Item 402(t) shall not apply to agreements and understandings described in paragraph (t)(1) of this section with senior management of foreign private issuers, as defined in §240.3b-4 of this chapter.

(u) Pay Ratio Disclosure—(1) Disclose. (i) The median of the annual total compensation of all employees of the registrant, except the PEO of the registrant;

(ii) The annual total compensation of the PEO of the registrant; and

(iii) The ratio of the amount in paragraph (u)(1)(i) of this Item to the amount in paragraph (u)(1)(ii) of this Item. For purposes of the ratio required by this paragraph (u)(1)(iii), the amount in paragraph (u)(1)(i) of this Item shall equal one, or, alternatively, the ratio may be expressed narratively as the multiple that the amount in paragraph (u)(1)(ii) of this Item bears to the amount in paragraph (u)(1)(i) of this Item.

(2) For purposes of this paragraph (u):

(i) *Total compensation* for the median of annual total compensation of all employees of the registrant and the PEO of the registrant shall be determined in accordance with paragraph (c)(2)(x) of this Item. In determining the total compensation, all references to "named executive officer" in this Item and the instructions thereto may be deemed to refer instead, as applicable, to "employee" and, for non-salaried employees, references to "base salary" and "salary" in this Item and the instructions thereto may be deemed to refer instead, as applicable, to "wages plus overtime";

(ii) *Annual total compensation* means total compensation for the registrant's last completed fiscal year; and

(iii) *Registrant* means the registrant and its consolidated subsidiaries.

(3) For purposes of this paragraph (u), employee or employee of the registrant means an individual employed by the registrant or any of its consolidated subsidiaries, whether as a full-time, part-time, seasonal, or temporary worker, as of a date chosen by the registrant within the last three months of the registrant's last completed fiscal year. The definition of employee or employee of the registrant does not include those workers who are employed, and whose compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors or "leased" workers.

(4) For purposes of this paragraph (u), an employee located in a jurisdiction outside the United States (a "non-U.S. employee") may be exempt from the definition of employee or employee of the registrant under either of the following conditions:

(i) The employee is employed in a foreign jurisdiction in which the laws or regulations governing data privacy are such that, despite its reasonable efforts to obtain or process the information necessary for compliance with this paragraph (u), the registrant is unable to do so without violating such data privacy laws or regulations. The registrant's reasonable efforts shall include, at a minimum, using or seeking an exemption or other relief under any governing data privacy laws or regulations. If the registrant chooses to exclude any employees using this exemption, it shall list the excluded jurisdictions, identify the specific data privacy law or regulation, explain how complying with this paragraph (u) violates such data privacy law or regulation (including the efforts made by the registrant to use or seek an exemption or other relief under such law or regulation), and provide the approximate number of employees exempted from each jurisdiction based on this exemption. In addition, if a registrant excludes any non-U.S. employees in a particular jurisdiction under this exemption, it must exclude all non-U.S. employees in that jurisdiction. Further, the registrant shall obtain a legal opinion from counsel that opines on the inability of the registrant to obtain or process the information necessary for compliance with this paragraph (u) without violating the jurisdiction's laws or regulations governing data privacy, including the registrant's inability to obtain an exemption or other relief under any governing laws or regulations. The registrant shall file the legal opinion as an exhibit to the filing in which the pay ratio disclosure is included.

(ii) The registrant's non-U.S. employees account for 5% or less of the registrant's total employees. In that circumstance, if the registrant chooses to exclude any non-U.S. employees under this exemption, it must exclude all non-U.S. employees. Additionally, if a registrant's non-U.S. employees exceed 5% of the registrant's total U.S. and non-U.S. employees, it may exclude up to 5% of its total employees who are non-U.S. employees; provided, however, if a registrant excludes any non-U.S. employees in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction. If more than 5% of a registrant's employees are located in any one non-U.S. jurisdiction, the registrant may not exclude any employees in that jurisdiction under this exemption.

(A) In calculating the number of non-U.S. employees that may be excluded under this Item 402(u)(4)(ii) ("de minimis" exemption), a registrant shall count against the total any non-U.S. employee exempted under the data privacy law exemption under Item 402(u)(4)(i) ("data privacy" exemption). A registrant may exclude any non-U.S. employee from a jurisdiction that meets the data privacy exemption, even if the number of excluded employees exceeds 5% of the registrant's total employees. If, however, the number of employees excluded under the data privacy exemption equals or exceeds 5% of the registrant's total employees, the

registrant may not use the de minimis exemption. Additionally, if the number of employees excluded under the data privacy exemption is less than 5% of the registrant's total employees, the registrant may use the de minimis exemption to exclude no more than the number of non-U.S. employees that, combined with the data privacy exemption, does not exceed 5% of the registrant's total employees.

(B) If a registrant excludes non-U.S. employees under the de minimis exemption, it must disclose the jurisdiction or jurisdictions from which those employees are being excluded, the approximate number of employees excluded from each jurisdiction under the de minimis exemption, the total number of its U.S. and non-U.S. employees irrespective of any exemption (data privacy or de minimis), and the total number of its U.S. and non-U.S. employees used for its de minimis calculation.

Instruction 1 to Item 402(u)—Disclosing the Date Chosen for Identifying the Median Employee. A registrant shall disclose the date within the last three months of its last completed fiscal year that it selected pursuant to paragraph (u)(3) of this Item to identify its median employee. If the registrant changes the date it uses to identify the median employee from the prior year, the registrant shall disclose this change and provide a brief explanation about the reason or reasons for the change.

Instruction 2 to Item 402(u)—Identifying the Median Employee. A registrant is required to identify its median employee only once every three years and calculate total compensation for that employee each year; provided that, during a registrant's last completed fiscal year there has been no change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure. If there have been no changes that the registrant reasonably believes would significantly affect its pay ratio disclosure, the registrant shall disclose that it is using the same median employee in its pay ratio calculation and describe briefly the basis for its reasonable belief. For example, the registrant could disclose that there has been no change in its employee population or employee compensation arrangements that it believes would significantly impact the pay ratio disclosure. If there has been a change in the registrant's employee population or employee compensation arrangements that the registrant reasonably believes would result in a significant change in its pay ratio disclosure, the registrant shall re-identify the median employee for that fiscal year. If it is no longer appropriate for the registrant to use the median employee identified in year one as the median employee in years two or three because of a change in the original median employee's circumstances that the registrant reasonably believes would result in a significant change in its pay ratio disclosure, the registrant may use another employee whose compensation is substantially similar to the original median employee based on the compensation measure used to select the original median employee.

Instruction 3 to Item 402(u)—Updating for the Last Completed Fiscal Year. Pay ratio information (i.e., the disclosure called for by paragraph (u)(1) of this Item) with respect to the registrant's last completed fiscal year is not required to be disclosed until the filing of its annual report on Form 10-K for that last completed fiscal year or, if later, the filing of a definitive proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such fiscal year; provided that, the required pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10-K (17 CFR 249.310) not later than 120 days after the end of such fiscal year.

Instruction 4 to Item 402(u)—Methodology and Use of Estimates. 1. Registrants may use reasonable estimates both in the methodology used to identify the median employee and in calculating the annual total compensation or any elements of total compensation for employees other than the PEO.

2. In determining the employees from which the median employee is identified, a registrant may use its employee population or statistical sampling and/or other reasonable methods.

3. A registrant may identify the median employee using annual total compensation or any other compensation measure that is consistently applied to all employees included in the calculation, such as information derived from the registrant's tax and/or payroll records. In using a compensation measure other than annual total compensation to identify the median employee, if that measure is recorded on a basis other than the registrant's fiscal year (such as information derived from tax and/or payroll records), the registrant may use the same annual period that is used to derive those amounts. Where a compensation measure other than annual total compensation is used to identify the median employee, the registrant must disclose the compensation measure used.

4. In identifying the median employee, whether using annual total compensation or any other compensation measure that is consistently applied to all employees included in the calculation, the registrant may make cost-of-living adjustments to the compensation of employees in jurisdictions other than the jurisdiction in which the PEO resides so that the compensation is adjusted to the cost of living in the jurisdiction in which the PEO resides. If the registrant uses a cost-of-living adjustment to identify the median employee, and the median employee identified is an employee in a jurisdiction other than the jurisdiction in which the PEO resides, the registrant must use the same cost-of-living adjustment in calculating the median employee's annual total compensation and disclose the median employee's jurisdiction. The registrant also shall briefly describe the cost-of-living adjustments it used to identify the median employee and briefly describe the cost-of-living adjustments it used to calculate the median employee's annual total compensation, including the measure used as the basis for the cost-of-living adjustment. A registrant electing to present the pay ratio in this manner also shall disclose the median

employee's annual total compensation and pay ratio without the cost-of-living adjustment. To calculate this pay ratio, the registrant will need to identify the median employee without using any cost-of-living adjustments.

5. The registrant shall briefly describe the methodology it used to identify the median employee. It shall also briefly describe any material assumptions, adjustments (including any cost-of-living adjustments), or estimates it used to identify the median employee or to determine total compensation or any elements of total compensation, which shall be consistently applied. The registrant shall clearly identify any estimates used. The required descriptions should be a brief overview; it is not necessary for the registrant to provide technical analyses or formulas. If a registrant changes its methodology or its material assumptions, adjustments, or estimates from those used in its pay ratio disclosure for the prior fiscal year, and if the effects of any such change are significant, the registrant shall briefly describe the change and the reasons for the change. Registrants must also disclose if they changed from using the cost-of-living adjustment to not using that adjustment and if they changed from not using the cost-of-living adjustment to using it.

6. Registrants may, at their discretion, include personal benefits that aggregate less than $10,000 and compensation under non-discriminatory benefit plans in calculating the annual total compensation of the median employee as long as these items are also included in calculating the PEO's annual total compensation. The registrant shall also explain any difference between the PEO's annual total compensation used in the pay ratio disclosure and the total compensation amounts reflected in the Summary Compensation Table, if material.

Instruction 5 to Item 402(u)—Permitted Annualizing Adjustments. A registrant may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the registrant for less than the full fiscal year (such as newly hired employees or permanent employees on an unpaid leave of absence during the period). A registrant may not annualize the total compensation for employees in temporary or seasonal positions. A registrant may not make a full-time equivalent adjustment for any employee.

Instruction 6 to Item 402(u)—PEO Compensation Not Available. A registrant that is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) in connection with the salary or bonus of the PEO for the last completed fiscal year, shall disclose that the pay ratio required by paragraph (u) of this Item is not calculable until the PEO salary or bonus, as applicable, is determined and shall disclose the date that the PEO's actual total compensation is expected to be determined. The disclosure required by paragraph (u) of this Item shall then be disclosed in the filing under Item 5.02(f) of Form 8-K (17 CFR 249.308) that discloses the PEO's salary or bonus in accordance with Instruction 1 to Item 402(c)(2)(iii) and (iv).

Instruction 7 to Item 402(u)—Transition Periods for Registrants. 1. Upon becoming subject to the requirements of Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), a registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year following the year in which it became subject to such requirements, but not for any fiscal year commencing before January 1, 2017. The registrant may omit the disclosure required by paragraph (u) of this Item from any filing until the filing of its annual report on Form 10-K (17 CFR 249.310) for such fiscal year or, if later, the filing of a proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such year; provided that, such disclosure shall, in any event, be filed as provided in General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year.

2. A registrant may omit any employees that became its employees as the result of the business combination or acquisition of a business for the fiscal year in which the transaction becomes effective, but the registrant must disclose the approximate number of employees it is omitting. Those employees shall be included in the total employee count for the triennial calculations of the median employee in the year following the transaction for purposes of evaluating whether a significant change had occurred. The registrant shall identify the acquired business excluded for the fiscal year in which the business combination or acquisition becomes effective.

3. A registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant ceases to be a smaller reporting company, but not for any fiscal year commencing before January 1, 2017.

Instruction 8 to Item 402(u)—Emerging Growth Companies. A registrant is not required to comply with paragraph (u) of this Item if it is an emerging growth company as defined in Section 2(a)(19) of the Securities Act (15 U.S.C. 77(b)(a)(19)) or Section 3(a)(80) of the Exchange Act (15 U.S.C. 78c(a)(80)). A registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant ceases to be an emerging growth company, but not for any fiscal year commencing before January 1, 2017.

Instruction 9 to Item 402(u)—Additional Information. Registrants may present additional information, including additional ratios, to supplement the required ratio, but are not required to do so. Any additional information shall be clearly identified, not misleading, and not presented with greater prominence than the required ratio.

Instruction 10 to Item 402(u)—Multiple PEOs During the Year. A registrant with more than one non-concurrent PEO serving during its fiscal year may calculate the annual total compensation for its PEO in either of the following manners:

1. The registrant may calculate the compensation provided to each person who served as PEO during the year for the time he or she served as PEO and combine those figures; or

2. The registrant may look to the PEO serving in that position on the date it selects to identify the median employee and annualize that PEO's compensation.

Regardless of the alternative selected, the registrant shall disclose which option it chose and how it calculated its PEO's annual total compensation.

Instruction 11 to Item 402(u)—Employees' Personally Identifiable Information. Registrants are not required to, and should not, disclose any personally identifiable information about that employee other than his or her compensation. Registrants may choose to generally identify an employee's position to put the employee's compensation in context, but registrants are not required to provide this information and should not do so if providing the information could identify any specific individual.

(v) Pay versus performance. In connection with any proxy or information statement for which the rules of the Commission require executive compensation disclosure pursuant to this section (excluding any proxy or information statement of an "emerging growth company," as defined in § 230.405 of this chapter or § 240.12b-2 of this chapter):

(1) Provide the information specified in paragraph (v)(2) of this section for each of the registrant's last five completed fiscal years in the following tabular format:

Pay Versus Performance

					Value of initial fixed $100 investment based on:			
Year	Summary compensation table total for PEO	Compensation actually paid to PEO	Average summary compensation table total for non-PEO named executive officers	Average compensation actually paid to non-PEO named executive officers	Total shareholder return	Peer group total shareholder return	Net income	[Company-selected measure]
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)

(2) The table required by paragraph (v)(1) of this section must include:

(i) The fiscal year covered (column (a)).

(ii) The PEO's (as defined in paragraph (a)(3) of this section) total compensation for the covered fiscal year as reported in the Summary Compensation Table pursuant to paragraph (c)(2)(x) of this section, or paragraph (n)(2)(x) of this section for smaller reporting companies (column (b)), and the average total compensation reported for the remaining named executive officers collectively reported pursuant to such applicable paragraph (column (d)). If more than one person served as the registrant's PEO during the covered fiscal year, provide the total compensation, as reported in accordance with the immediately preceding sentence, for each person who served as the PEO during that period separately in an additional column (b) for each such person.

(iii) The executive compensation actually paid to the PEO (column (c)) and the average executive compensation actually paid to the remaining named executive officers collectively (column (e)). If more than one person served as the registrant's PEO during the covered fiscal year, provide the compensation actually paid to each person who served as PEO during that period separately in an additional column (c) for each such person. For purposes of columns (c) and (e) of the table required by paragraph (v)(1) of this

section, executive compensation actually paid must be the total compensation for the covered fiscal year for each named executive officer as provided in paragraph (c)(2)(x) of this section, or paragraph (n)(2)(x) of this section for smaller reporting companies, adjusted to:

(A) Deduct the aggregate change in the actuarial present value of the named executive officer's accumulated benefit under all defined benefit and actuarial pension plans reported in the Summary Compensation Table in accordance with paragraph (c)(2)(viii)(A) of this section;

(B)

(1) Add, for all defined benefit and actuarial pension plans reported in the Summary Compensation Table in accordance with paragraph (c)(2)(viii)(A) of this section, the aggregate of:

(i) Service cost, calculated as the actuarial present value of each named executive officer's benefit under all such plans attributable to services rendered during the covered fiscal year; and

(ii) Prior service cost, calculated as the entire cost of benefits granted (or credit for benefits reduced) in a plan amendment (or initiation) during the covered fiscal year that are attributed by the benefit formula to services rendered in periods prior to the amendment.

(2) "Service cost" and "prior service cost" must be calculated using the same methodology as used for the registrant's financial statements under generally accepted accounting principles.

(C)

(1) Deduct the amounts reported in the Summary Compensation Table pursuant to paragraphs (c)(2)(v) and (vi) of this section and then include an amount calculated as follows for all stock awards, and all option awards, with or without tandem SARs (as defined in paragraph (a)(6)(i) of this section) (including awards that subsequently have been transferred):

(i) Add the fair value as of the end of the covered fiscal year of all awards granted during the covered fiscal year that are outstanding and unvested as of the end of the covered fiscal year;

(ii) Add the amount equal to the change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted in any prior fiscal year that are outstanding and unvested as of the end of the covered fiscal year;

(iii) Add, for awards that are granted and vest in the same year, the fair value as of the vesting date;

(iv) Add the amount equal to the change as of the vesting date (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted in any prior fiscal year for which all applicable vesting conditions were satisfied at the end of or during the covered fiscal year;

(v) Subtract, for any awards granted in any prior fiscal year that fail to meet the applicable vesting conditions during the covered fiscal year, the amount equal to the fair value at the end of the prior fiscal year; and

(vi) Add the dollar value of any dividends or other earnings paid on stock or option awards in the covered fiscal year prior to the vesting date that are not otherwise included in the total compensation for the covered fiscal year.

(2) If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of options or SARs held by a named executive officer, whether through amendment, cancellation or replacement grants, or any other means, or otherwise has materially modified such awards, the changes in fair value included pursuant to this paragraph (v)(2)(iii)(C) must take into account the excess fair value, if any, of any such modified award over the fair value of the original award as of the date of such modification.

3 Fair value amounts must be computed in a manner consistent with the fair value methodology used to account for share-based payments in the registrant's financial statements under generally accepted accounting principles. For any awards that are subject to performance conditions, calculate the change in fair value as of the end of the covered fiscal year based upon the probable outcome of such conditions as of the last day of the fiscal year.

(iv) For purposes of columns (f) and (g) of the table required by paragraph (v)(1) of this section, for each fiscal year disclose the cumulative total shareholder return of the registrant (column (f)) and peer group cumulative total shareholder return (column (g)) calculated, except as set forth below, in the same manner as under § 229.201(e) of this chapter (Item 201(e) of Regulation S-K). For purposes of calculating the cumulative total shareholder return of the registrant and peer group cumulative total shareholder return, the term "measurement period" must be the period beginning at the "measurement point" established by the market close on the last trading day before the registrant's earliest fiscal year in the table, through and including the end of the fiscal year for which cumulative total shareholder return of the registrant or peer group cumulative total shareholder return is being calculated. The closing price at the measurement point

must be converted into a fixed investment of one hundred dollars, stated in dollars, in the registrant's stock (or in the stocks represented by the peer group). For each fiscal year, the amount included in the table must be the value of such fixed investment based on the cumulative total shareholder return as of the end of that year. The same methodology must be used in calculating both the registrant's total shareholder return and that of the peer group. For purposes of determining the total shareholder return of the registrant's peer group, the registrant must use the same index or issuers used by it for purposes of § 229.201(e)(1)(ii) of this chapter or, if applicable, the companies it uses as a peer group for purposes of its disclosures under paragraph (b) of this section. If the peer group is not a published industry or line-of-business index, the identity of the issuers composing the group must be disclosed in a footnote. The returns of each component issuer of the group must be weighted according to the respective issuers' stock market capitalization at the beginning of each period for which a return is indicated. If the registrant selects or otherwise uses a different peer group from the peer group used by it for the immediately preceding fiscal year, explain, in a footnote, the reason(s) for this change and compare the registrant's cumulative total return with that of both the newly selected peer group and the peer group used in the immediately preceding fiscal year.

(v) The registrant's net income for each fiscal year (column (h)).

(vi) An amount for each fiscal year attributable to an additional financial performance measure included in the Tabular List provided pursuant to paragraph (v)(6) of this section, designated as the Company-Selected Measure, which in the registrant's assessment represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance (column (i)). For purposes of this paragraph (v) of this section, "financial performance measures" means measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measures that are derived wholly or in part from such measures, and stock price and total shareholder return. A financial performance measure need not be presented within the registrant's financial statements or otherwise included in a filing with the Commission to be a Company-Selected Measure. Disclosure of any Company-Selected Measure, or any additional measure that the registrant elects to provide, that is not a financial measure under generally accepted accounting principles will not be subject to §§ 244.100 through 102 of this chapter (Regulation G) and § 229.10(e) of this chapter (Item 10(e)); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements.

(3) For each amount disclosed in columns (c) and (e) of the table required by paragraph (v)(1) of this section, disclose in footnotes to the table each of the amounts deducted and added pursuant to paragraph

(v)(2)(iii) of this section, the name of each named executive officer included as a PEO or in the calculation of the average remaining named executive officer compensation, and the fiscal years in which such persons are included. For disclosure of the executive compensation actually paid to named executive officers other than the PEO, provide the amounts required under this paragraph as averages.

(4) For the value of equity awards added pursuant to paragraph (v)(2)(iii)(C) of this section, disclose in a footnote to the table required by paragraph (v)(1) of this section any assumption made in the valuation that differs materially from those disclosed as of the grant date of such equity awards.

(5) In proxy or information statements in which disclosure is required pursuant to this Item, use the information provided in the table required by paragraph (v)(1) of this section to provide a clear description (graphically, narratively, or a combination of the two) of the relationships:

(i) Between:

(A) The executive compensation actually paid by the registrant to the PEO (column (c)) and the average of the executive compensation actually paid to the named executive officers other than the PEO (column (e)) included in the Summary Compensation Table; and

(B) The cumulative total shareholder return of the registrant (column (f)), across the registrant's last five completed fiscal years;

(ii) Between:

(A) The executive compensation actually paid by the registrant to the PEO (column (c)) and the average of the executive compensation actually paid to the named executive officers other than the PEO (column (e)) included in the Summary Compensation Table; and

(B) Net income of the registrant (column (h)), across the registrant's last five completed fiscal years; and

(iii) Between:

(A) The executive compensation actually paid by the registrant to the PEO (column (c)) and the average of the executive compensation actually paid to the named executive officers other than the PEO (column (e)) included in the Summary Compensation Table; and

(B) The Company-Selected Measure (column (i)), across the registrant's last five completed fiscal years.

(iv) The description provided in response to paragraph (v)(5)(i) of this section must also include a comparison of the cumulative total shareholder return of the registrant (column (f)) and cumulative total shareholder return of the registrant's peer group (column (g)) over the same period. If a registrant elects to provide any additional measures in the table, each additional measure must be accompanied by a clear description of the relationship between:

(A) The executive compensation actually paid by the registrant to the PEO (column (c)) and the average of the executive compensation actually paid to the named executive officers other than the PEO (column (e)) included in the Summary Compensation Table; and

(B) That additional measure, across the registrant's last five completed fiscal years. (6) Subject to paragraph (v)(6)(iii) of this section, provide a tabular list of at least three, and up to seven, financial performance measures, which in the registrant's assessment represent the most important financial performance measures used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance ("Tabular List").

(i) The registrant may provide the Tabular List disclosure either as one tabular list, as two separate tabular lists (one for the PEO, and one for all named executive officers other than the PEO), or as separate tabular lists for the PEO and each named executive officer other than the PEO. If the registrant elects to provide multiple tabular lists in accordance with the immediately preceding sentence, each tabular list must include at least three, and up to seven, financial performance measures, which in the registrant's assessment represent the most important financial performance measures used by the registrant to link compensation actually paid to that, or those, particular named executive officer, or officers, for the most recently completed fiscal year, to company performance.

(ii) If fewer than three financial performance measures were used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance, the Tabular List must include all such measures that were used, if any.

(iii) A registrant may include non-financial performance measures (i.e., performance measures other than those that fall within the definition of financial performance measures) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance in the Tabular List, if it determines that such measures are among its

three to seven most important performance measures, and it has disclosed its most important three (or fewer, if the registrant only uses fewer) financial performance measures, in accordance with this paragraph (v)(6).

(iv) The Tabular List may include a maximum of seven performance measures, regardless of whether the registrant elects to include non-financial performance measures in the Tabular List.

(7) The disclosure provided pursuant to this paragraph (v), including, but not limited to, any disclosure provided pursuant to paragraphs (v)(3) and (6) of this section, must appear with, and in the same format as, the rest of the disclosure required to be provided pursuant to this section and, in addition, must be provided in an Interactive Data File in accordance with § 232.405 of this chapter and the EDGAR Filer Manual (referenced in § 232.301 of this chapter).

(8) A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, may provide the information required by this paragraph (v) for three years, instead of five years. A smaller reporting company may provide the disclosure required by this paragraph (v) for only two fiscal years in the first filing in which it provides this disclosure, and is not required to provide the disclosure required by paragraph (v)(2)(iv) or (v)(5) of this section with respect to the total shareholder return of any peer group, or the Company-Selected Measure disclosure required by paragraph (v)(2)(vi) of this section, or the Tabular List provided pursuant to paragraph (v)(6) of this section. For purposes of paragraph (v)(2)(iii) of this section with respect to smaller reporting companies, executive compensation actually paid must be the total compensation for the covered fiscal year for each named executive officer as provided in paragraph (n)(2)(x) of this section, adjusted to deduct the amounts reported in the Summary Compensation Table pursuant to paragraphs (n)(2)(v) and (vi) of this section, and to add in their place the fair value of the amounts added in paragraph (v)(2)(iii)(C) of this section. Disclose in a footnote to the table required pursuant to paragraph (v)(1) of this section for the PEO and average remaining named executive officer compensation the amounts deducted from, and added to, the Summary Compensation Table pursuant to this instruction, the name of each named executive officer included as a PEO or in the calculation of the average remaining named executive officer compensation, and the fiscal years in which they are included. A smaller reporting company is required to comply with paragraph (v)(7) of this section in the third filing in which it provides the disclosure required by this paragraph (v).

Instructions to paragraph (v).

1. Transitional relief. A registrant may provide the disclosure required by this paragraph (v) for three years, instead of five years, in the first filing in which it provides this disclosure, and may provide disclosure for an additional year in each of the two subsequent annual filings in which this disclosure is required.

2. New registrants. Information for fiscal years prior to the last completed fiscal year will not be required if the registrant was not required to report pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) at any time during that year.

3. Incorporation by reference. The information required by paragraph (v) of this section will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

(w) Disclosure of a registrant's action to recover erroneously awarded compensation.

(1) If at any time during or after the last completed fiscal year the registrant was required to prepare an accounting restatement that required recovery of erroneously awarded compensation pursuant to the registrant's compensation recovery policy required by the listing standards adopted pursuant to 17 CFR 240.10D-1, or there was an outstanding balance as of the end of the last completed fiscal year of erroneously awarded compensation to be recovered from the application of the policy to a prior restatement, the registrant must provide the following information:

(i) For each restatement:

(A) The date on which the registrant was required to prepare an accounting restatement;

(B) The aggregate dollar amount of erroneously awarded compensation attributable to such accounting restatement, including an analysis of how the amount was calculated;

(C) If the financial reporting measure as defined in 17 CFR 240.10D-1(d) related to a stock price or total shareholder return metric, the estimates that were used in determining the erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;

(D) The aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of the last completed fiscal year; and

(E) If the aggregate dollar amount of erroneously awarded compensation has not yet been determined, disclose this fact, explain the reason(s) and disclose the information required in paragraphs (w)(1)(i)(B) through (D) of this section in the next filing that is required to include disclosure pursuant to Item 402 of Regulation S-K;

(ii) If recovery would be impracticable pursuant to 17 CFR 240.10D-1(b)(1)(iv), for each current and former named executive officer and for all other current and former executive officers as a group, disclose the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery; and

(iii) For each current and former named executive officer from whom, as of the end of the last completed fiscal year, erroneously awarded compensation had been outstanding for 180 days or longer since the date the registrant determined the amount the individual owed, disclose the dollar amount of outstanding erroneously awarded compensation due from each such individual.

(2) If at any time during or after its last completed fiscal year the registrant was required to prepare an accounting restatement, and the registrant concluded that recovery of erroneously awarded compensation was not required pursuant to the registrant's compensation recovery policy required by the listing standards adopted pursuant to 17 CFR 240.10D-1, briefly explain why application of the recovery policy resulted in this conclusion.

(3) The information must appear with, and in the same format as, the rest of the disclosure required to be provided pursuant to this Item 402. The information is required only in proxy or information statements that call for Item 402 disclosure and the registrant's annual report on Form 10-K, and will not be deemed to be incorporated by reference into any filing under the Securities Act, except to the extent that the listed registrant specifically incorporates it by reference.

(4) The disclosure must be provided in an Interactive Data File in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual.

Instruction to Item 402. Specify the applicable fiscal year in the title to each table required under this Item which calls for disclosure as of or for a completed fiscal year.

[71 FR 53241, Sept. 8, 2006; 71 FR 56225, Sept. 26, 2006, as amended at 71 FR 78350, Dec. 29, 2006; 73 FR 958, Jan. 4, 2008; 74 FR 68362, Dec. 23, 2009; 76 FR 6043, Feb. 2, 2011; 76 FR 50121, Aug. 12, 2011; 80 FR 50184, Aug. 18, 2015; 82 FR 17552, Apr. 12, 2017; 84 FR 50738, Sept. 26, 2019; 87 FR 55193, Sept. 8, 2022; 87 FR 73136, Nov. 28, 2022]

§229.403 (Item 403) Security ownership of certain beneficial owners and management.

(a) Security ownership of certain beneficial owners. Furnish the following information, as of the most recent practicable date, substantially in the tabular form indicated, with respect to any person (including any "group" as that term is used in section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's voting securities. The address given in column (2) may be a business, mailing or residence address. Show in column (3) the total number of shares beneficially owned and in column (4) the percentage of class so owned. Of the number of shares shown in column (3), indicate by footnote or otherwise the amount known to be shares with respect to which such listed beneficial owner has the right to acquire beneficial ownership, as specified in Rule 13d-3(d)(1) under the Exchange Act (§240.13d-3(d)(1) of this chapter).

(1) Title of class	(2) Name and address of beneficial owner	(3) Amount and nature of beneficial ownership	(4) Percent of class

(b) Security ownership of management. Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries, including directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(3) (§229.402(a)(3)), and directors and executive officers of the registrant as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of the class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares that are pledged as security and the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in §240.13d-3(d)(1) of this chapter.

(1) Title of class	(2) Name of beneficial owner	(3) Amount and nature of beneficial ownership	(4) Percent of class

(c) Changes in control. Describe any arrangements, known to the registrant, including any pledge by any person of securities of the registrant or any of its parents, the operation of which may at a subsequent date result in a change in control of the registrant.

Instructions to Item 403: 1. The percentages are to be calculated on the basis of the amount of outstanding securities, excluding securities held by or for the account of the registrant or its subsidiaries, plus securities deemed outstanding pursuant to Rule 13d-3(d)(1) under the Exchange Act 17 (CFR 240.13d-3(d)(1)). For purposes of paragraph (b), if the percentage of shares beneficially owned by any director or nominee, or by all directors and officers of the registrant as a group, does not exceed one percent of the class so owned, the registrant may, in lieu of furnishing a precise percentage, indicate this fact by means of an asterisk and explanatory footnote or other similar means.

2. For the purposes of this Item, beneficial ownership shall be determined in accordance with Rule 13d-3 under the Exchange Act (§240.13d-3 of this chapter). Include such additional subcolumns or other appropriate explanation of column (3) necessary to reflect amounts as to which the beneficial owner has (A) sole voting power, (B) shared voting power, (C) sole investment power, or (D) shared investment power.

3. The registrant shall be deemed to know the contents of any statements filed with the Commission pursuant to section 13(d) or 13(g) of the Exchange Act. When applicable, a registrant may rely upon information set forth in such statements unless the registrant knows or has reason to believe that such information is not complete or accurate or that a statement or amendment should have been filed and was not.

4. For purposes of furnishing information pursuant to paragraph (a) of this Item, the registrant may indicate the source and date of such information.

5. Where more than one beneficial owner is known to be listed for the same securities, appropriate disclosure should be made to avoid confusion. For purposes of paragraph (b), in computing the aggregate number of shares owned by directors and officers of the registrant as a group, the same shares shall not be counted more than once.

6. Paragraph (c) of this Item does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the registrant.

7. Where the holder(s) of voting securities reported pursuant to paragraph (a) hold more than five percent of any class of voting securities of the registrant pursuant to any voting trust or similar agreement, state

the title of such securities, the amount held or to be held pursuant to the trust or agreement (if not clear from the table) and the duration of the agreement. Give the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the trust or agreement.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 51 FR 42056, Nov. 20, 1986; 57 FR 48158, Oct. 21, 1992; 71 FR 53252, Sept. 8, 2006]

§229.404 (Item 404) Transactions with related persons, promoters and certain control persons.

(a) Transactions with related persons. Describe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the registrant was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest. Disclose the following information regarding the transaction:

(1) The name of the related person and the basis on which the person is a related person.

(2) The related person's interest in the transaction with the registrant, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.

(3) The approximate dollar value of the amount involved in the transaction.

(4) The approximate dollar value of the amount of the related person's interest in the transaction, which shall be computed without regard to the amount of profit or loss.

(5) In the case of indebtedness, disclosure of the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.

(6) Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Instructions to Item 404(a). 1. For the purposes of paragraph (a) of this Item, the term related person means:

a. Any person who was in any of the following categories at any time during the specified period for which disclosure under paragraph (a) of this Item is required:

i. Any director or executive officer of the registrant;

ii. Any nominee for director, when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director; or

iii. Any immediate family member of a director or executive officer of the registrant, or of any nominee for director when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such director, executive officer or nominee for director, and any person (other than a tenant or employee) sharing the household of such director, executive officer or nominee for director; and

b. Any person who was in any of the following categories when a transaction in which such person had a direct or indirect material interest occurred or existed:

i. A security holder covered by Item 403(a) (§229.403(a)); or

ii. Any immediate family member of any such security holder, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such security holder, and any person (other than a tenant or employee) sharing the household of such security holder.

2. For purposes of paragraph (a) of this Item, a transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships.

3. The amount involved in the transaction shall be computed by determining the dollar value of the amount involved in the transaction in question, which shall include:

a. In the case of any lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments due on or after the beginning of the registrant's last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transaction providing for periodic payments or installments; and

b. In the case of indebtedness, the largest aggregate amount of all indebtedness outstanding at any time since the beginning of the registrant's last fiscal year and all amounts of interest payable on it during the last fiscal year.

4. In the case of a transaction involving indebtedness:

a. The following items of indebtedness may be excluded from the calculation of the amount of indebtedness and need not be disclosed: Amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business;

b. Disclosure need not be provided of any indebtedness transaction for the related persons specified in Instruction 1.b. to paragraph (a) of this Item; and

c. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T (12 CFR part 220) and the loans are not disclosed as past due, nonaccrual or troubled debt restructurings in the consolidated financial statements, disclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:

i. Were made in the ordinary course of business;

ii. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and

iii. Did not involve more than the normal risk of collectibility or present other unfavorable features.

5.a. Disclosure of an employment relationship or transaction involving an executive officer and any related compensation solely resulting from that employment relationship or transaction need not be provided pursuant to paragraph (a) of this Item if:

i. The compensation arising from the relationship or transaction is reported pursuant to Item 402 (§229.402);

ii. The executive officer is not an immediate family member (as specified in Instruction 1 to paragraph (a) of this Item) and such compensation would have been reported under Item 402 (§229.402) as compensation earned for services to the registrant if the executive officer was a named executive officer as that term is defined in Item 402(a)(3) (§229.402(a)(3)), and such compensation had been approved, or recommended to the board of directors of the registrant for approval, by the compensation committee of the board of directors (or group of independent directors performing a similar function) of the registrant, or

iii. The transaction involves the recovery of erroneously awarded compensation computed as provided in 17 CFR 240.10D-1(b)(1)(iii) and the applicable listing standards for the registrant's securities, that is disclosed pursuant to Item 402(w) (§ 229.402(w)).

b. Disclosure of compensation to a director need not be provided pursuant to paragraph (a) of this Item if the compensation is reported pursuant to Item 402(k) (§229.402(k)).

6. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the registrant shall not be deemed to have an indirect material interest within the meaning of paragraph (a) of this Item where:

a. The interest arises only:

i. From such person's position as a director of another corporation or organization that is a party to the transaction; or

ii. From the direct or indirect ownership by such person and all other persons specified in Instruction 1 to paragraph (a) of this Item, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or

iii. From both such position and ownership; or

b. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in Instruction 1 to paragraph (a) of this Item, have an interest of less than ten percent, and the person is not a general partner of and does not hold another position in the partnership.

7. Disclosure need not be provided pursuant to paragraph (a) of this Item if:

a. The transaction is one where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

b. The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services; or

c. The interest of the related person arises solely from the ownership of a class of equity securities of the registrant and all holders of that class of equity securities of the registrant received the same benefit on a pro rata basis.

(b) Review, approval or ratification of transactions with related persons. (1) Describe the registrant's policies and procedures for the review, approval, or ratification of any transaction required to be reported under paragraph (a) of this Item. While the material features of such policies and procedures will vary

depending on the particular circumstances, examples of such features may include, in given cases, among other things:

(i) The types of transactions that are covered by such policies and procedures;

(ii) The standards to be applied pursuant to such policies and procedures;

(iii) The persons or groups of persons on the board of directors or otherwise who are responsible for applying such policies and procedures; and

(iv) A statement of whether such policies and procedures are in writing and, if not, how such policies and procedures are evidenced.

(2) Identify any transaction required to be reported under paragraph (a) of this Item since the beginning of the registrant's last fiscal year where such policies and procedures did not require review, approval or ratification or where such policies and procedures were not followed.

Instruction to Item 404(b). Disclosure need not be provided pursuant to this paragraph regarding any transaction that occurred at a time before the related person became one of the enumerated persons in Instruction 1.a.i., ii., or iii. to Item 404(a) if such transaction did not continue after the related person became one of the enumerated persons in Instruction 1.a.i., ii., or iii. to Item 404(a).

(c) Promoters and certain control persons. (1) Registrants that are filing a registration statement on Form S-1 under the Securities Act (§239.11 of this chapter) or on Form 10 under the Exchange Act (§249.210 of this chapter) and that had a promoter at any time during the past five fiscal years shall:

(i) State the names of the promoter(s), the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the registrant and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(ii) As to any assets acquired or to be acquired by the registrant from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount, and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the registrant, also state the cost thereof to the promoter.

(2) Registrants shall provide the disclosure required by paragraphs (c)(1)(i) and (c)(1)(ii) of this Item as to any person who acquired control of a registrant that is a shell company, or any person that is part of a group, consisting of two or more persons that agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of a registrant, that acquired control of a registrant that is a shell company. For purposes of this Item, shell company has the same meaning as in Rule 405 under the Securities Act (17 CFR 230.405) and Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2).

(d) Smaller reporting companies. A registrant that qualifies as a "smaller reporting company," as defined by §229.10(f)(1), must provide the following information in order to comply with this Item:

(1) The information required by paragraph (a) of this Item for the period specified there for a transaction in which the amount involved exceeds the lesser of $120,000 or one percent of the average of the smaller reporting company's total assets at year end for the last two completed fiscal years;

(2) The information required by paragraph (c) of this Item; and

(3) A list of all parents of the smaller reporting company showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent, if any.

Instruction to Item 404(d). 1. Include information for any material underwriting discounts and commissions upon the sale of securities by the smaller reporting company where any of the persons specified in paragraph (a) of this Item was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principal underwriter.

2. For smaller reporting companies information shall be given for the period specified in paragraph (a) of this Item and, in addition, for the fiscal year preceding the small reporting company's last fiscal year.

Instructions to Item 404. 1. If the information called for by this Item is being presented in a registration statement filed pursuant to the Securities Act or the Exchange Act, information shall be given for the periods specified in the Item and, in addition, for the two fiscal years preceding the registrant's last fiscal year, unless the information is being incorporated by reference into a registration statement on Form S-4 (17 CFR 239.25), in which case, information shall be given for the periods specified in the Item.

2. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Item 7.B. of Form 20-F (17 CFR 249.220f) with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded. [71 FR 53252, Sept. 8, 2006, as amended at 73 FR 964, Jan. 4, 2008; 85 FR 66140, Oct. 16, 2020; 87 FR 73137, Nov. 28, 2022]

§229.407 (Item 407) Corporate governance.

(a) Director independence. Identify each director and, when the disclosure called for by this paragraph is being presented in a proxy or information statement relating to the election of directors, each nominee for director, that is independent under the independence standards applicable to the registrant under paragraph (a)(1) of this Item. In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such committee independence standards. If the registrant does not have a separately designated audit, nominating or compensation committee or committee performing similar functions, the registrant must provide the disclosure of directors that are not independent with respect to all members of the board of directors applying such committee independence standards.

(1) In determining whether or not the director or nominee for director is independent for the purposes of paragraph (a) of this Item, the registrant shall use the applicable definition of independence, as follows:

(i) If the registrant is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the registrant's definition of independence that it uses for determining if a majority of the board of directors is independent in compliance with the listing standards applicable to the registrant. When determining whether the members of a committee of the board of directors are independent, the registrant's definition of independence that it uses for determining if the members of that specific committee are independent in compliance with the independence standards applicable for the members of the specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent. If the registrant does not have independence standards for a committee, the independence standards for that specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent.

(ii) If the registrant is not a listed issuer, a definition of independence of a national securities exchange or of an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, and state which definition is used. Whatever such definition the registrant chooses, it must use the same definition with respect to all directors and nominees for director. When determining whether the members of a specific committee of the board of directors are independent, if the national securities exchange or national securities association whose standards are used has independence standards for the members of a specific committee, use those committee specific standards.

(iii) If the information called for by paragraph (a) of this Item is being presented in a registration statement on Form S-1 (§239.11 of this chapter) under the Securities Act or on a Form 10 (§249.210 of this chapter) under the Exchange Act where the registrant has applied for listing with a national securities exchange or in an inter-dealer quotation system that has requirements that a majority of the board of directors be independent, the definition of independence that the registrant uses for determining if a majority of the board of directors is independent, and the definition of independence that the registrant uses for determining if members of the specific committee of the board of directors are independent, that is in compliance with the independence listing standards of the national securities exchange or inter-dealer quotation system on which it has applied for listing, or if the registrant has not adopted such definitions, the independence standards for determining if the majority of the board of directors is independent and if members of the committee of the board of directors are independent of that national securities exchange or inter-dealer quotation system.

(2) If the registrant uses its own definitions for determining whether its directors and nominees for director, and members of specific committees of the board of directors, are independent, disclose whether these definitions are available to security holders on the registrant's Web site. If so, provide the registrant's Web site address. If not, include a copy of these policies in an appendix to the registrant's proxy statement or information statement that is provided to security holders at least once every three fiscal years or if the policies have been materially amended since the beginning of the registrant's last fiscal year. If a current copy of the policies is not available to security holders on the registrant's Web site, and is not included as an appendix to the registrant's proxy statement or information statement, identify the most recent fiscal year in which the policies were so included in satisfaction of this requirement.

(3) For each director and nominee for director that is identified as independent, describe, by specific category or type, any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) (§229.404(a)), or for investment companies, Item 22(b) of Schedule 14A (§240.14a-101 of this chapter), that were considered by the board of directors under the applicable independence definitions in determining that the director is independent.

Instructions to Item 407(a). 1. If the registrant is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, and also has exemptions to those requirements (for independence of a majority of the board of directors or committee member independence) upon which the registrant relied, disclose the exemption relied upon and explain the basis for the registrant's conclusion that such exemption is applicable. The same disclosure should be provided if the registrant is not a listed issuer and the national securities exchange or inter-dealer quotation system selected by the registrant has

exemptions that are applicable to the registrant. Any national securities exchange or inter-dealer quotation system which has requirements that at least 50 percent of the members of a small business issuer's board of directors must be independent shall be considered a national securities exchange or inter-dealer quotation system which has requirements that a majority of the board of directors be independent for the purposes of the disclosure required by paragraph (a) of this Item.

2. Registrants shall provide the disclosure required by paragraph (a) of this Item for any person who served as a director during any part of the last completed fiscal year, except that no information called for by paragraph (a) of this Item need be given in a registration statement filed at a time when the registrant is not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) respecting any director who is no longer a director at the time of effectiveness of the registration statement.

3. The description of the specific categories or types of transactions, relationships or arrangements required by paragraph (a)(3) of this Item must be provided in such detail as is necessary to fully describe the nature of the transactions, relationships or arrangements.

(b) Board meetings and committees; annual meeting attendance. (1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

(i) The total number of meetings of the board of directors (held during the period for which he has been a director); and

(ii) The total number of meetings held by all committees of the board on which he served (during the periods that he served).

(2) Describe the registrant's policy, if any, with regard to board members' attendance at annual meetings of security holders and state the number of board members who attended the prior year's annual meeting.

Instruction to Item 407(b)(2). In lieu of providing the information required by paragraph (b)(2) of this Item in the proxy statement, the registrant may instead provide the registrant's Web site address where such information appears.

(3) State whether or not the registrant has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions. If the registrant has such committees,

however designated, identify each committee member, state the number of committee meetings held by each such committee during the last fiscal year and describe briefly the functions performed by each such committee. Such disclosure need not be provided to the extent it is duplicative of disclosure provided in accordance with paragraph (c), (d) or (e) of this Item.

(c) Nominating committee. (1) If the registrant does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of director nominees.

(2) Provide the following information regarding the registrant's director nomination process:

(i) State whether or not the nominating committee has a charter. If the nominating committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the nominating committee charter;

(ii) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

(iii) If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, state that fact and state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a policy;

(iv) If the nominating committee will consider candidates recommended by security holders, describe the procedures to be followed by security holders in submitting such recommendations;

(v) Describe any specific minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the registrant's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the registrant's directors to possess;

(vi) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by

a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy;

(vii) With regard to each nominee approved by the nominating committee for inclusion on the registrant's proxy card (other than nominees who are executive officers or who are directors standing for re-election), state which one or more of the following categories of persons or entities recommended that nominee: Security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other specified source. With regard to each such nominee approved by a nominating committee of an investment company, state which one or more of the following additional categories of persons or entities recommended that nominee: Security holder, director, chief executive officer, other executive officer, or employee of the investment company's investment adviser, principal underwriter, or any affiliated person of the investment adviser or principal underwriter;

(viii) If the registrant pays a fee to any third party or parties to identify or evaluate or assist in identifying or evaluating potential nominees, disclose the function performed by each such third party; and

(ix) If the registrant's nominating committee received, by a date not later than the 120th calendar day before the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the registrant's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the registrant's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identify the candidate and the security holder or security holder group that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

Instructions to Item 407(c)(2)(ix). 1. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a nominating security holder may be determined using information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act (or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, the registrant's most recent report on Form N-CSR

(§§249.331 and 274.128 of this chapter)), unless the party relying on such report knows or has reason to believe that the information contained therein is inaccurate.

2. For purposes of the registrant's obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, where the date of the annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the obligation under that Item will arise where the registrant receives the security holder recommendation a reasonable time before the registrant begins to print and mail its proxy materials.

3. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a recommending security holder, as well as the holding period of those securities, may be determined by the registrant if the security holder is the registered holder of the securities. If the security holder is not the registered owner of the securities, he or she can submit one of the following to the registrant to evidence the required ownership percentage and holding period:

a. A written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

b. If the security holder has filed a Schedule 13D (§240.13d-101 of this chapter), Schedule 13G (§240.13d-102 of this chapter), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter), and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the securities for the one-year period as of the date of the recommendation.

4. For purposes of the registrant's obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, the security holder or group must have provided to the registrant, at the time of the recommendation, the written consent of all parties to be identified and, where the security holder or group members are not registered holders, proof that the security holder or group satisfied the required ownership percentage and holding period as of the date of the recommendation.

Instruction to Item 407(c)(2). For purposes of paragraph (c)(2) of this Item, the term nominating committee refers not only to nominating committees and committees performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

(3) Describe any material changes to the procedures by which security holders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item.

Instructions to Item 407(c)(3). 1. The disclosure required in paragraph (c)(3) of this Item need only be provided in a registrant's quarterly or annual reports.

2. For purposes of paragraph (c)(3) of this Item, adoption of procedures by which security holders may recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

(d) Audit committee. (1) State whether or not the audit committee has a charter. If the audit committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the audit committee charter.

(2) If a listed issuer's board of directors determines, in accordance with the listing standards applicable to the issuer, to appoint a director to the audit committee who is not independent (apart from the requirements in §240.10A-3 of this chapter), including as a result of exceptional or limited or similar circumstances, disclose the nature of the relationship that makes that individual not independent and the reasons for the board of directors' determination.

(3)(i) The audit committee must state whether:

(A) The audit committee has reviewed and discussed the audited financial statements with management;

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the applicable requirements of the Public Company Accounting Oversight Board ("PCAOB") and the Commission;

(C) The audit committee has received the written disclosures and the letter from the independent accountant required by applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence, and has discussed with the independent accountant the independent accountant's independence; and

(D) Based on the review and discussions referred to in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this Item, the audit committee recommended to the board of directors that the audited financial statements be included in the company's annual report on Form 10-K (17 CFR 249.310) (or, for closed-end investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the annual report to shareholders required by section 30(e) of the Investment Company Act of 1940 (15 U.S.C. 80a-29(e)) and Rule 30d-1 (17 CFR 270.30d-1) thereunder) for the last fiscal year for filing with the Commission.

(ii) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by paragraph (d)(3)(i) of this Item.

(4)(i) If the registrant meets the following requirements, provide the disclosure in paragraph (d)(4)(ii) of this Item:

(A) The registrant is a listed issuer, as defined in §240.10A-3 of this chapter;

(B) The registrant is filing an annual report on Form 10-K (§249.310 of this chapter) or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a et seq.) if action is to be taken with respect to the election of directors; and

(C) The registrant is neither:

(1) A subsidiary of another listed issuer that is relying on the exemption in §240.10A-3(c)(2) of this chapter; nor

(2) Relying on any of the exemptions in §240.10A-3(c)(4) through (c)(7) of this chapter.

(ii)(A) State whether or not the registrant has a separately-designated standing audit committee established in accordance with section 3(a)(58)(A) of the Exchange Act (15 U.S.C. 78c(a)(58)(A)), or a committee performing similar functions. If the registrant has such a committee, however designated, identify each committee member. If the entire board of directors is acting as the registrant's audit committee as specified in section 3(a)(58)(B) of the Exchange Act (15 U.S.C. 78c(a)(58)(B)), so state.

(B) If applicable, provide the disclosure required by §240.10A-3(d) of this chapter regarding an exemption from the listing standards for audit committees.

(5) Audit committee financial expert. (i)(A) Disclose that the registrant's board of directors has determined that the registrant either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(1) of this Item, it must disclose the name of the audit committee financial expert and whether that person is independent, as independence for audit committee members is defined in the listing standards applicable to the listed issuer.

(C) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(2) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to Item 407(d)(5)(i). If the registrant's board of directors has determined that the registrant has more than one audit committee financial expert serving on its audit committee, the registrant may, but is not required to, disclose the names of those additional persons. A registrant choosing to identify such persons must indicate whether they are independent pursuant to paragraph (d)(5)(i)(B) of this Item.

(ii) For purposes of this Item, an audit committee financial expert means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal control over financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(D) Other relevant experience.

(iv) Safe harbor. (A) A person who is determined to be an audit committee financial expert will not be deemed an expert for any purpose, including without limitation for purposes of section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item 407 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 407(d)(5). 1. The disclosure under paragraph (d)(5) of this Item is required only in a registrant's annual report. The registrant need not provide the disclosure required by paragraph (d)(5) of this Item in a proxy or information statement unless that registrant is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to General Instruction G(3) to Form 10-K (17 CFR 249.310).

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (d)(5)(iii)(D) of this Item, the registrant shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under Item 401(e) (§229.401(e)).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of paragraph (d)(5) of this Item, the term board of directors means the supervisory or non-management board. In the case of a foreign private issuer meeting the requirements of §240.10A-3(c)(3) of this chapter, for purposes of paragraph (d)(5) of this Item, the term board of directors means the issuer's board of auditors (or similar body) or statutory auditors, as applicable. Also, in the case of a foreign private issuer, the term generally accepted accounting principles in paragraph (d)(5)(ii)(A) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A registrant that is an Asset-Backed Issuer (as defined in §229.1101) is not required to disclose the information required by paragraph (d)(5) of this Item.

Instructions to Item 407(d). 1. The information required by paragraphs (d)(1)-(3) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 through 240.14b-2 or 240.14c-1 through 240.14c-101), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act. Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

2. The disclosure required by paragraphs (d)(1)-(3) of this Item need only be provided one time during any fiscal year.

3. The disclosure required by paragraph (d)(3) of this Item need not be provided in any filings other than a registrant's proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting).

(e) Compensation committee. (1) If the registrant does not have a standing compensation committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.

(2) State whether or not the compensation committee has a charter. If the compensation committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the compensation committee charter.

(3) Provide a narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation, including:

(i)(A) The scope of authority of the compensation committee (or persons performing the equivalent functions); and

(B) The extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority described in paragraph (e)(3)(i)(A) of this Item to other persons, specifying what authority may be so delegated and to whom;

(ii) Any role of executive officers in determining or recommending the amount or form of executive and director compensation; and

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) during the registrant's last completed fiscal year, identifying such consultants, stating whether such consultants were engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement:

(A) If such compensation consultant was engaged by the compensation committee (or persons performing the equivalent functions) to provide advice or recommendations on the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) and the compensation consultant or its affiliates also provided additional services to the registrant or its affiliates in an amount in excess of $120,000 during the registrant's last completed fiscal year, then disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services. Disclose whether the decision to engage the compensation consultant or its affiliates for these other services was made, or recommended, by

management, and whether the compensation committee or the board approved such other services of the compensation consultant or its affiliates.

(B) If the compensation committee (or persons performing the equivalent functions) has not engaged a compensation consultant, but management has engaged a compensation consultant to provide advice or recommendations on the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) and such compensation consultant or its affiliates has provided additional services to the registrant in an amount in excess of $120,000 during the registrant's last completed fiscal year, then disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for any additional services provided by the compensation consultant or its affiliates.

(iv) With regard to any compensation consultant identified in response to Item 407(e)(3)(iii) whose work has raised any conflict of interest, disclose the nature of the conflict and how the conflict is being addressed.

Instruction to Item 407(e)(3)(iv). For purposes of this paragraph (e)(3)(iv), the factors listed in §240.10C-1(b)(4)(i) through (vi) of this chapter are among the factors that should be considered in determining whether a conflict of interest exists.

(4) Under the caption "Compensation Committee Interlocks and Insider Participation":

(i) Identify each person who served as a member of the compensation committee of the registrant's board of directors (or board committee performing equivalent functions) during the last completed fiscal year, indicating each committee member who:

(A) Was, during the fiscal year, an officer or employee of the registrant;

(B) Was formerly an officer of the registrant; or

(C) Had any relationship requiring disclosure by the registrant under any paragraph of Item 404 (§229.404). In this event, the disclosure required by Item 404 (§229.404) shall accompany such identification.

(ii) If the registrant has no compensation committee (or other board committee performing equivalent functions), the registrant shall identify each officer and employee of the registrant, and any former officer

of the registrant, who, during the last completed fiscal year, participated in deliberations of the registrant's board of directors concerning executive officer compensation.

(iii) Describe any of the following relationships that existed during the last completed fiscal year:

(A) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant;

(B) An executive officer of the registrant served as a director of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant; and

(C) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served as a director of the registrant.

(iv) Disclosure required under paragraph (e)(4)(iii) of this Item regarding a compensation committee member or other director of the registrant who also served as an executive officer of another entity shall be accompanied by the disclosure called for by Item 404 with respect to that person.

Instruction to Item 407(e)(4). For purposes of paragraph (e)(4) of this Item, the term entity shall not include an entity exempt from tax under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

(5) Under the caption "Compensation Committee Report:"

(i) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) must state whether:

(A) The compensation committee has reviewed and discussed the Compensation Discussion and Analysis required by Item 402(b) (§229.402(b)) with management; and

(B) Based on the review and discussions referred to in paragraph (e)(5)(i)(A) of this Item, the compensation committee recommended to the board of directors that the Compensation Discussion and Analysis be included in the registrant's annual report on Form 10-K (§249.310 of this chapter), proxy statement on Schedule 14A (§240.14a-101 of this chapter) or information statement on Schedule 14C (§240.14c-101 of this chapter).

(ii) The name of each member of the registrant's compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) must appear below the disclosure required by paragraph (e)(5)(i) of this Item.

Instructions to Item 407(e)(5). 1. The information required by paragraph (e)(5) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 through 240.14b-2 or 240.14c-1 through 240.14c-101), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act.

2. The disclosure required by paragraph (e)(5) of this Item need not be provided in any filings other than an annual report on Form 10-K (§249.310 of this chapter), a proxy statement on Schedule 14A (§240.14a-101 of this chapter) or an information statement on Schedule 14C (§240.14c-101 of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference. If the registrant elects to incorporate this information by reference from the proxy or information statement into its annual report on Form 10-K pursuant to General Instruction G(3) to Form 10-K, the disclosure required by paragraph (e)(5) of this Item will be deemed furnished in the annual report on Form 10-K and will not be deemed incorporated by reference into any filing under the Securities Act or the Exchange Act as a result as a result of furnishing the disclosure in this manner.

3. The disclosure required by paragraph (e)(5) of this Item need only be provided one time during any fiscal year.

(f) Shareholder communications. (1) State whether or not the registrant's board of directors provides a process for security holders to send communications to the board of directors and, if the registrant does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a process.

(2) If the registrant has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the registrant's process for determining which communications will be relayed to board members.

Instructions to Item 407(f). 1. In lieu of providing the information required by paragraph (f)(2) of this Item in the proxy statement, the registrant may instead provide the registrant's Web site address where such information appears.

2. For purposes of the disclosure required by paragraph (f)(2)(ii) of this Item, a registrant's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the registrant's process is approved by a majority of the independent directors or, in the case of a registrant that is an investment company, a majority of the directors who are not "interested persons" of the investment company as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)).

3. For purposes of this paragraph, communications from an officer or director of the registrant will not be viewed as "security holder communications." Communications from an employee or agent of the registrant will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

4. For purposes of this paragraph, security holder proposals submitted pursuant to §240.14a-8 of this chapter, and communications made in connection with such proposals, will not be viewed as "security holder communications."

(g) Smaller reporting companies and emerging growth companies. (1) A registrant that qualifies as a "smaller reporting company," as defined by §229.10(f)(1), is not required to provide:

(i) The disclosure required in paragraph (d)(5) of this Item in its first annual report filed pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) following the effective date of its first registration statement filed under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.); and

(ii) The disclosure required by paragraphs (e)(4) and (e)(5) of this Item.

(2) A registrant that qualifies as an "emerging growth company," as defined in Rule 405 of the Securities Act (§230.405 of this chapter) or Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter), is not required to provide the disclosure required by paragraph (e)(5) of this Item.

(h) Board leadership structure and role in risk oversight. Briefly describe the leadership structure of the registrant's board, such as whether the same person serves as both principal executive officer and

chairman of the board, or whether two individuals serve in those positions, and, in the case of a registrant that is an investment company, whether the chairman of the board is an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act (15 U.S.C. 80a-2(a)(19)). If one person serves as both principal executive officer and chairman of the board, or if the chairman of the board of a registrant that is an investment company is an "interested person" of the registrant, disclose whether the registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the board. This disclosure should indicate why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the registrant. In addition, disclose the extent of the board's role in the risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure.

(i) Employee, officer and director hedging. In proxy or information statements with respect to the election of directors:

(1) Describe any practices or policies that the registrant has adopted regarding the ability of employees (including officers) or directors of the registrant, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities—

(i) Granted to the employee or director by the registrant as part of the compensation of the employee or director; or

(ii) Held, directly or indirectly, by the employee or director.

(2) A description provided pursuant to paragraph (1) shall provide a fair and accurate summary of the practices or policies that apply, including the categories of persons covered, or disclose the practices or policies in full.

(3) A description provided pursuant to paragraph (1) shall also describe any categories of hedging transactions that are specifically permitted and any categories of such transactions specifically disallowed.

(4) If the registrant does not have any such practices or policies regarding hedging, the registrant shall disclose that fact or state that the transactions described in paragraph (1) above are generally permitted.

Instructions to Item 407(i).

1. For purposes of this Item 407(i), "registrant equity securities" means those equity securities as defined in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and §240.3a11-1 of this chapter) that are issued by the registrant or by any parent or subsidiary of the registrant or any subsidiary of any parent of the registrant.

2. The information required by this Item 407(i) will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

Instructions to Item 407. 1. For purposes of this Item:

a. Listed issuer means a listed issuer as defined in §240.10A-3 of this chapter;

b. National securities exchange means a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a));

c. Inter-dealer quotation system means an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)); and

d. National securities association means a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that has been approved by the Commission (as that definition may be modified or supplemented).

2. With respect to paragraphs (c)(2)(i), (d)(1) and (e)(2) of this Item, disclose whether a current copy of the applicable committee charter is available to security holders on the registrant's Web site, and if so, provide the registrant's Web site address. If a current copy of the charter is not available to security holders on the registrant's Web site, include a copy of the charter in an appendix to the registrant's proxy or information statement that is provided to security holders at least once every three fiscal years, or if the charter has been materially amended since the beginning of the registrant's last fiscal year. If a current copy of the charter is not available to security holders on the registrant's Web site, and is not included as an appendix to the registrant's proxy or information statement, identify in which of the prior fiscal years the charter was so included in satisfaction of this requirement.

[71 FR 53254, Sept. 8, 2006, as amended at 73 FR 964, Jan. 4, 2008; 73 FR 57238, Oct. 2, 2008; 74 FR 68364, Dec. 23, 2009; 77 FR 38453, July 27, 2012; 84 FR 2425, Mar. 8, 2019; 84 FR 12717, Apr. 2, 2019]

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Appendix B
Applicable SEC Compliance and Disclosure Interpretations

Regulation S-K

Last Update: February 10, 2023

These Compliance & Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of Regulation S-K. Some of these C&DIs were first published in prior Division publications and have been revised in some cases.

The bracketed date following each C&DI is the latest date of publication or revision. We have not changed the date of the C&DIs that reflect only non-substantive changes.

Questions and Answers of General Applicability

Section 101. Regulation S-K—General Guidance

None

Section 102. Item 10—General

Question 102.01

Question: Could a company with a fiscal year ended December 31, 2018 be both a "smaller reporting company," as defined in Item 10(f), and an "accelerated filer," as defined in Rule 12b-2 under the Exchange Act, for filings due in 2019, if it was an accelerated filer with respect to filings due in 2018 and had a public float of $80 million on the last business day of its second fiscal quarter of 2018?

Answer: Yes. A company must look to the definitions of "smaller reporting company" and "accelerated filer" to determine if it qualifies as a smaller reporting company and non-accelerated filer for each year. This company will qualify as a smaller reporting company for filings due in 2019 because on the last business

day of its second fiscal quarter of 2018 it had a public float below $250 million. However, because the company was an accelerated filer with respect to filings due in 2018, it is required to have less than $50 million in public float on the last business day of its second fiscal quarter in 2018 to exit accelerated filer status for filings due in 2019, as provided in paragraph (3)(ii) of the definition of "accelerated filer" in Rule 12b-2. This company had a public float of $80 million on the last business day of its second fiscal quarter of 2018, and therefore is unable to transition to non-accelerated filer status. As this example illustrates, a company can be both an accelerated filer and a smaller reporting company at the same time. Such a company may use the scaled disclosure rules for smaller reporting companies in its annual report on Form 10-K, but the report is due 75 days after the end of its fiscal year and must include the Sarbanes-Oxley Section 404 auditor attestation report described in Item 308(b) of Regulation S-K. [November 7, 2018]

Question 102.02

Question: Will a company that does not qualify as a smaller reporting company for filings due in a particular year be able to qualify as a smaller reporting company if its public float or annual revenues later decrease?

Answer: Once a reporting company determines that it does not qualify as a smaller reporting company, it will remain unqualified unless when making a subsequent annual determination either:

- It determines that its public float is less than $200 million; or
- It determines that:
  - for any threshold that it previously exceeded, it is below the subsequent annual determination threshold (public float of less than $560 million and annual revenues of less than $80 million); and
  - for any threshold that it previously met, it remains below the initial determination threshold (public float of less than $700 million or no public float and annual revenues of less than $100 million). *See* Amendments to the Smaller Reporting Company Definition—Compliance Guide for more information.

Example: A company has a December 31 fiscal year end. Its public float as of June 28, 2019 was $710 million and its annual revenues for the fiscal year ended December 31, 2018 were $90 million. It therefore does not qualify as a smaller reporting company. At the next determination date, June 30, 2020, it will remain unqualified unless it determines that its public float as of June 30, 2020 was less than $560 million and its annual revenues for the fiscal year ended December 31, 2019 remained less than $100 million. [November 7, 2018]

Question 102.03

Question: Under the definition of "smaller reporting company" in Item 10(f) of Regulation S-K, does the corporate parent of a majority-owned subsidiary have to satisfy the public float or revenue requirements of the definition in order for the majority-owned subsidiary to qualify as a smaller reporting company?

Answer: Yes, the definition of "smaller reporting company" excludes a majority-owned subsidiary if its corporate parent does not also meet the requirements of a smaller reporting company. [July 3, 2008]

Question 102.04

Question: Under the definition of "smaller reporting company" in Item 10(f) of Regulation S-K, must the corporate parent of a majority-owned subsidiary be required to file reports under Section 13(a) or Section 15(d) of the Exchange Act in order for the majority-owned subsidiary to qualify as a smaller reporting company?

Answer: No. [July 3, 2008]

Question 102.05

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a "non-GAAP financial measure" for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a "non-GAAP financial measure" under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

Section 103. Item 101—Description of Business

Question 103.01

Question: Does Item 101 require a discussion of the entry into a new segment after the close of the fiscal year for which the Form 10-K is being prepared?

Answer: No. [July 3, 2008]

Section 104. Item 102—Description of Property

None

Section 105. Item 103—Legal Proceedings

Question 105.01

Question: Are costs anticipated to be incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601) (otherwise known as the "Superfund" law), pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally considered "sanctions" within Instruction 5(C) to Item 103?

Answer: No. The Division's former view that all environmental legal proceedings involving $100,000 or more instituted by a governmental authority are subject to the disclosure provisions of Instruction 5(C) to Item 103 of Regulation S-K, regardless of whether the money involved is characterized as damages (as in the Superfund cases) or fines, has been superseded by Footnote 30 of Release No. 33-6835 (May 18, 1989) and the letter to Thomas A. Cole (Jan. 17, 1989). Footnote 30 and the Cole letter clarify that, while there are many ways a Superfund "potential monetary sanction" may be triggered, including the stipulated penalty clause in a remedial agreement, the costs anticipated to be incurred under Superfund, pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally are not "sanctions" within Instruction 5(C) to Item 103. [July 3, 2008]

Question 105.02

Question: Does the reference in Instruction 5 to Item 103 to an administrative or judicial proceeding arising under "local provisions" require disclosure of environmental actions brought by a foreign government?

Answer: Yes. The reference in Instruction 5 to an administrative or judicial proceeding arising under "local provisions" is sufficiently broad to require disclosure of environmental actions brought by a foreign government. [July 3, 2008]

Question 105.03

Question: Should a proceeding against an officer of the registrant, which could require the registrant to indemnify the officer for damages, be considered a proceeding in which the officer has a material interest adverse to the registrant that should be disclosed pursuant to Instruction 4 to Item 103?

Answer: The mere possibility that a registrant may be required to indemnify an officer for a material claim would not trigger disclosure pursuant to Instruction 4 to Item 103. Under state corporation law, indemnification is potentially available to any officer in any suit or proceeding in which the officer is named by reason of the fact that the person is an officer of the registrant. Whether or not an officer's material interest is "adverse" to the registrant depends on the facts and circumstances of each proceeding. [July 3, 2008]

Section 106. Item 201—Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters

Question 106.01

Question: Is the Item 201(d) disclosure required in Part II of Form 10-K, given that Item 5 of Form 10-K indicates that the registrant is required to furnish the information required under Item 201, or should the Item 201(d) disclosure be included (or incorporated by reference) in Part III of Form 10-K given that Item 12 indicates that the registrant is required to furnish the information required under Item 201(d)?

Answer: The Item 201(d) disclosure should be included in Part III, Item 12 of Form 10-K. An issuer may rely on General Instruction G.3 to Form 10-K to incorporate by reference the Item 201(d) disclosure from its proxy statement or information statement, even if the issuer did not submit a compensation plan for security holder action at its annual meeting of security holders. See American Bar Association (Jan. 30, 2004). [Mar. 13, 2007]

Question 106.02

Question: Is restricted stock that has been granted subject to forfeiture pursuant to an equity compensation plan reportable in the Item 201(d) Equity Compensation Plan Information table?

Answer: No. Once issued, the shares of restricted stock that have been granted subject to forfeiture are neither "to be issued upon exercise of outstanding options, warrants and rights" (column (a)) nor "available for future issuance" (column (c)). If the shares of restricted stock so granted are later forfeited, however, they would be reportable in column (c) until granted again. [Mar. 13, 2007]

Question 106.03

Question: Should shares that may be issued under performance share awards if specified targets are met and shares that are credited as phantom shares under a deferred compensation plan be reported in column (a) of the Equity Compensation Plan Information table as securities to be issued upon exercise of outstanding options, warrants and rights?

Answer: Yes. Shares that may be issued under performance share awards if specified targets are met (i.e., an award denominated in shares has been made, but no shares will be issued until the performance targets are met), and shares credited as phantom shares under a deferred compensation plan that will be issued as actual shares upon termination of employment, must be reported in column (a). A footnote to the table should describe the nature of the awards and explain that the weighted-average exercise price in column (b) does not take these awards into account. If the number of shares subject to these awards overstates expected dilution (such as where the award reflects the maximum number of shares to be awarded under best-case targets that are unlikely to be achieved), the footnote can address that situation. [Mar. 13, 2007]

Question 106.04

Question: A company maintains an employee stock purchase plan covered by Section 423 of the Internal Revenue Code, under which there are outstanding rights to purchase company common stock at a floating exercise price (85% of the lower of (i) market price at the start of the purchase period or (ii) market price at the future close of the purchase period). How should the company report the shares subject to these outstanding rights in the Equity Compensation Plan Information table?

Answer: Shares subject to these outstanding rights should be reported in column (c) of the Equity Compensation Plan Information table, together with other shares remaining issuable under the plan. A

footnote should disclose the total number of shares remaining available, as well as the number of shares subject to purchase during any current purchase period. Shares subject to the outstanding rights should *not* be reported in column (a) as subject to outstanding options. [Mar. 13, 2007]

Question 106.05

Question: Column (a) of the Equity Compensation Plan Information table requires disclosure of the number of securities to be issued upon exercise of outstanding options, warrants and rights, and column (b) requires disclosure of the weighted-average exercise price of these outstanding instruments. If some of a company's outstanding rights can be exercised for no consideration, and therefore their inclusion substantially reduces the weighted-average exercise price, how does the company disclose this information in the table?

Answer: In this circumstance, the company should include footnote disclosure of this fact and the footnote should include the weighted-average exercise price of the outstanding instruments excluding those that can be exercised for no consideration. [Mar. 13, 2007]

Question 106.06

Question: May a registrant plot monthly or quarterly returns in the performance graph required by Item 201(e)?

Answer: A registrant may plot monthly or quarterly returns provided that each return is plotted at the same interval, and the annual changes in cumulative total return are reflected clearly. [Mar. 13, 2007]

Question 106.07

Question: How should a registrant that presents in the performance graph a self-constructed peer or market capitalization index weight the returns of the component entities of that index?

Answer: A registrant that presents a self-constructed peer or market capitalization index should weight the returns of the component entities of that index according to their market capitalization as of the beginning of each period for which a return is indicated. [Mar. 13, 2007]

Question 106.08

Question: May a registrant-constructed peer or market capitalization index exclude the registrant?

Answer: Yes. [Mar. 13, 2007]

Question 106.09

Question: May issuers choose between using the price shown in the registration statement for an initial public offering, the opening price on the first trading day, or the closing market price on the first trading day when preparing the performance graph?

Answer: No. The issuer should use the closing market price at the end of the first trading day. [Mar. 13, 2007]

Question 106.10

Question: Is the performance graph required to be included in Form 10-K, given that Item 5 of Form 10-K indicates that the registrant is required to furnish the information required under Item 201?

Answer: No. Instruction 7 to Item 201(e) specifies that the performance graph need not be provided in any filings other than an annual report to security holders required by Exchange Act Rule 14a-3 or Exchange Act Rule 14c-3 that precedes or accompanies a registrant's proxy statement or information statement relating to an annual meeting of security holders at which directors are to be elected (or a special meeting or written consents in lieu of such meeting). [Mar. 13, 2007]

Question 106.11

Question: If a company includes the performance graph in its Form 10-K, can the company omit the performance graph from its annual report to shareholders required under Exchange Act Rule 14a-3 or Rule 14c-3?

Answer: The performance graph is required to be in the annual report to shareholders pursuant to Exchange Act Rule 14a-3 or Rule 14c-3, so unless the company is using a "Form 10-K wrap" approach to satisfy the requirements of Rule 14a-3 or Rule 14c-3, the inclusion of the performance graph in the Form 10-K would not satisfy these requirements. [Mar. 13, 2007]

Question 106.12

Question: May a registrant include the performance graph in the proxy statement?

Answer: Yes, provided that the performance graph is also included in the annual report that accompanies or precedes the proxy statement and therefore complies with Exchange Act Rules 14a-3 or 14c-3. [Mar. 13, 2007]

Section 107. Item 202—Description of Registrant's Securities

Question 107.01

Question: Items 202(a)(1)(x) and (xi) require disclosure of certain restrictions on ownership of the registrant's securities. Are the purchase and sale restrictions imposed by Section 16 of the Exchange Act the types of restrictions required to be disclosed under these items?

Answer: No. [July 3, 2008]

Section 108. Item 301—Selected Financial Data

Question 108.01

Question: Item 301 of Regulation S-K requires a foreign private issuer to disclose the exchange rate into U.S. currency of the foreign currency in which the financial statements are denominated. For purposes of this requirement, Item 301 provides that the rate of exchange means the noon buying rate in New York City for cable transfers in foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York. The Federal Reserve Bank of New York has recently ceased publishing these exchange rates on its web site. What source of exchange rate information must be used for purposes of Item 301?

Answer: Although the Federal Reserve Bank of New York is no longer publishing the foreign exchange rates on its web site, it is still certifying them for customs purposes. The Board of Governors of the Federal Reserve Bank publishes these exchange rates on a weekly basis on its web site at http://www.federalreserve.gov/releases/h10/Update. You should use this source of exchange rate information for purposes of Item 301 of Regulation S-K. [Apr. 24, 2009]

Section 109. Item 302—Supplementary Financial Information

None

Section 110. Item 303—Management's Discussion and Analysis of Financial Condition and Results of Operations

Question 110.01

[Withdrawn, November 7, 2018]

Question 110.02

Question: A registrant providing financial statements covering three years in a filing relies on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years and includes the required statement that identifies the location of such discussion in a prior filing. Does the statement identifying the disclosure in a prior filing incorporate such disclosure by reference into the current filing?

Answer: No. A statement merely identifying the location in a prior filing where the omitted discussion can be found does not incorporate such disclosure into the filing unless the registrant expressly states that the information is incorporated by reference. See Securities Act Rule 411(e) and Exchange Act Rule 12b-23(e). [Jan. 24, 2020]

Question 110.03

Question: May a registrant rely on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years from its current MD&A if it believes a discussion of that year is necessary?

Answer: No. Item 303(a) requires that the registrant provide such information that it believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. A registrant must assess its information about the earliest of three years and, if it is required by Item 303(a), include it in the current disclosure or expressly incorporate by reference its discussion from a previous filing. [Jan. 24, 2020]

Question 110.04

Question: A registrant has an effective registration statement that incorporates by reference its Form 10-K for the fiscal year ended December 31, 2018. In its Form 10-K for the fiscal year ended December 31, 2019, the registrant will omit the discussion of its results for the fiscal year ended December 31, 2017 pursuant to Instruction 1 to Item 303(a) and include a statement identifying the location of the discussion presented in

its Form 10-K for the fiscal year ended December 31, 2018. The filing of the Form 10-K for the fiscal year ended December 31, 2019 will operate as the Section 10(a)(3) update to the registration statement. After the company files the Form 10-K for the fiscal year ended December 31, 2019, will the company's discussion of its results for the fiscal year ended December 31, 2017 be incorporated by reference in the registration statement?

Answer: No. The filing of the Form 10-K for the fiscal year ended December 31, 2019 establishes a new effective date for the registration statement. As of the new effective date, the registration statement incorporates by reference only the Form 10-K for the fiscal year ended December 31, 2019, which does not contain the company's discussion of results for the fiscal year ended December 31, 2017 unless, as indicated in Question 110.02, the information is expressly incorporated by reference. [Jan. 24, 2020]

Section 111. Item 304—Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

Question 111.01

Question: If a registrant's principal accountant resigns, declines to stand for re-election or is dismissed, Items 304(a)(1)(iv) and (v) require the registrant to disclose any disagreements and reportable events during the registrant's two most recent fiscal years and any "subsequent interim period" preceding the resignation, declination or dismissal. For purposes of this requirement, what period of time does "subsequent interim period" cover?

Answer: The "subsequent interim period" is the period from the end of the registrant's most recent fiscal year through the date of the former principal accountant's resignation, declination to stand for re-election or dismissal. This period is not limited to the end of the most recent fiscal quarterly period. Similarly, the "subsequent interim period" referred to in Item 304(a)(2), which requires disclosure of the engagement of a new principal accountant, is the period from the end of the registrant's most recent fiscal year through the date on which the new principal accountant is engaged. [Jan. 14, 2011]

Question 111.02

Question: Item 304(a)(1)(iv) requires affirmative disclosure if there are no disagreements. If a registrant has no reportable events, is the registrant required to disclose that fact?

Answer: No. [Jan. 14, 2011]

Question 111.03

Question: During the two most recent fiscal years and subsequent interim period, the principal accountant advised the registrant that internal controls necessary to develop reliable financial statements did not exist, and the remediation of the internal control deficiency or deficiencies occurred before the end of the subsequent interim period. Is the registrant still required to disclose, pursuant to Item 304(a)(1)(v)(A), that the former principal accountant advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist?

Answer: Yes. The fact that the remediation occurred before the end of the subsequent interim period does not relieve the registrant of its disclosure obligation pursuant to Item 304(a)(1)(v)(A). [Jan. 14, 2011]

Question 111.04

Question: Under Item 304(a)(1)(v)(A), is a registrant required to disclose whether, during the two most recent fiscal years and any subsequent interim period, the former principal accountant advised that there was a "material weakness" or "significant deficiency" in internal control over financial reporting, as those terms are defined in Rule 1-02(a)(4) of Regulation S-X?

Answer: A "material weakness" is defined as "a deficiency, or combination of deficiencies, in internal control over financial reporting…such that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis." Advising the registrant that there is a material weakness in internal control over financial reporting is, for purposes of Item 304(a)(1)(v)(A), equivalent to advising the registrant that the "internal controls necessary for the registrant to develop reliable financial statements do not exist." Consequently, if the former principal accountant advised the registrant that there was a material weakness, then the registrant has a reportable event under Item 304(a)(1)(v)(A).

By contrast, if the former principal accountant advised the registrant that one or more significant deficiencies in internal control over financial reporting existed, but did not also advise that there was a material weakness, then that would not be a reportable event under Item 304(a)(1)(v)(A). However, the factors that led to a significant deficiency could result in the conclusion that there are other reportable events that require disclosure. For example, the former principal accountant may have determined that, because of the significant deficiency, there was a need to significantly expand the scope of the audit, which could, in appropriate circumstances, create a reportable event under Item 304(a)(1)(v)(C). [Jan. 14, 2011]

Question 111.05

Question: A registrant's principal accountant issued an audit report on the registrant's financial statements in the last two fiscal years containing an explanatory paragraph regarding a registrant's ability to continue as a going concern. Is this required to be disclosed under Item 304(a)(1)(ii)?

Answer: Yes. The explanatory paragraph represents a modification of the principal accountant's audit report for an uncertainty, thereby requiring disclosure under Item 304(a)(1)(ii). [Jan. 14, 2011]

Question 111.06

Question: A registrant's principal accountant issued a report on the registrant's internal control over financial reporting in the last two fiscal years containing an explanatory paragraph, adverse opinion or a disclaimer of opinion. Is this required to be disclosed under Item 304(a)(1)(ii)?

Answer: No. Item 304(a)(1)(ii) refers only to the principal accountant's "report on the financial statements." Registrants can voluntarily disclose information about reports on internal control over financial reporting; however, if such reports contain an adverse opinion with respect to the effectiveness of internal control over financial reporting, then that would be reportable pursuant to Item 304(a)(1)(v)(A). See Question 111.04. [Jan. 14, 2011]

Question 111.07

Question: If a principal accountant resigns, declines to stand for re-election or is dismissed because its registration with the PCAOB has been revoked, should the registrant disclose this fact when filing an Item 4.01 Form 8-K to report a change in certifying accountant?

Answer: Yes. Disclosure of the revocation of the accountant's PCAOB registration is necessary to understanding the required disclosure with respect to whether the former accountant resigned, declined to stand for re-election or was dismissed. [Jan. 14, 2011]

Section 112. Item 305—Quantitative and Qualitative Disclosures about Market Risk

Question 112.01

Question: Is a registrant required to include Item 305 market risk disclosure in its Form 10-Q?

Answer: A registrant does not have to include Item 305 disclosure in its Form 10-Q unless there is a material change to the Item 305 information disclosed in its most recently filed Form 10-K. [July 3, 2008]

Section 113. Item 306 [***Reserved***]

None

Section 114. Item 307—Disclosure Controls and Procedures

None

Section 115. Items 308 and 308T—Internal Control over Financial Reporting

Question 115.01

Question: Is a Form 11-K required to include internal control reports?

Answer: No. Item 308 does not apply to Form 11-K. [July 3, 2008]

Question 115.02

Question: In annual reports for fiscal years ending on or after December 15, 2007 but before December 15, 2009, non-accelerated filers are required to provide management's report on internal control over financial reporting pursuant to Item 308T of Regulation S-K. The report is deemed not to be "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. Does a non-accelerated filer's failure to provide management's report in its Form 10-K under Item 308T(a) affect its form eligibility or the ability to use Rule 144?

Answer: It is the Division's view that the failure to provide this management report renders the annual report materially deficient. As a result, if management did not complete the evaluation and provide the

report as required by Item 308T(a), the company would not be timely or current in its Exchange Act reporting. This would result in the company not being eligible to file new Form S-3 or Form S-8 registration statements and the loss of the availability of Rule 144. Because the filing of the Form 10-K constitutes the Section 10(a)(3) update for any effective Forms S-3 or S-8, the company also would be required to suspend any sales under already effective registration statements.

However, if the company subsequently amends its Form 10-K to provide management's report on whether or not internal control is effective, the company can file new Forms S-8 and resume making sales under already effective Forms S-8, and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied). This would be the case regardless of whether management reached an effective or ineffective conclusion about its internal control. Although amending the Form 10-K to provide management's report may result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. [July 3, 2008]

Section 116. Item 401—Directors, Executive Officers, Promoters and Control Persons

Question 116.01

Question: Should the Item 401(b) information presented in the Form 10-K be furnished for current officers, rather than for those officers who held such positions during the last fiscal year?

Answer: Yes. [July 3, 2008]

Question 116.02

Question: Does Item 401(e) information with respect to executive officers need to be included in proxy statements if it is included separately in the Form 10-K?

Answer: No. Although Instruction 3 to Item 401(b) does not refer to Item 401(e), which requires disclosure about business experience, Item 401(e) information need not be included in the proxy statement if it is presented in the Form 10-K. [July 3, 2008]

Question 116.03

Question: Is Item 401(f) applicable to persons in the "significant employee" category of Item 401(c)?

Answer: Item 401(f) is not applicable to persons in the "significant employee" category of Item 401(c), unless such persons are de facto executive officers. [July 3, 2008]

Question 116.04

Question: Is Item 401(f)(1) disclosure required for legal proceedings in foreign countries?

Answer: Yes. Item 401(f)(1) requires disclosure regarding petitions filed under the "[f]ederal bankruptcy laws or any state insolvency law." This item should be interpreted to require disclosure regarding comparable events in foreign countries (except in the unusual situation where it is not material). For example, disclosure should be provided when a director of a U.S. public company is also the CEO of a non-U.S. company and a receiver is appointed for the non-U.S. company. [July 3, 2008]

Question 116.05

Question: For each director and nominee, Item 401(e)(1) requires disclosure of such person's "specific experience, qualifications, attributes or skills" that led the board to conclude that such person should serve as a director at the time that a filing containing the disclosure is made. May a company provide these disclosures on a group basis if the directors or nominees share similar characteristics, such as all of them are audit committee financial experts or all of them are current or former CEOs of major companies?

Answer: No. The disclosure of each director or nominee's experience, qualifications, attributes or skills must be provided on an individual basis. For each person, a company must disclose why the person's *particular* and *specific* experience, qualifications, attributes or skills led the board to conclude that such person should serve as a director of the company, in light of the company's business and structure, at the time that a filing containing the disclosure is made. For example, it would not be sufficient to disclose simply that a person should serve as a director because he or she is an audit committee financial expert. Instead, a company should describe the particular and specific experience, qualifications, attributes or skills that led the board to conclude that this particular person should serve as a director at the time that a filing containing the disclosure is made. [Jan. 20, 2010]

Question 116.06

Question: Under Item 401(e)(1), how should a company with a classified board disclose why a director's particular and specific experience, qualifications, attributes or skills led the board to conclude that the person should serve as a director at the time that a filing containing the disclosure is made, if the director is not up for re-election at the upcoming shareholders' meeting?

Answer: Because the composition of the entire board is important information for shareholder voting decisions, the purpose of this disclosure requirement is to elicit current information about all directors on

the board, including on classified boards. For each director who is not up for re-election, the evaluation of the director's particular and specific experience, qualifications, attributes or skills and the conclusion as to why the director should continue serving on the board, should be as of the time that a filing containing the disclosure is made. For some boards of directors, particularly those that do not conduct annual self-evaluations, this may require implementing additional disclosure controls and procedures to ensure that such information about directors who are not up for re-election at the upcoming shareholders' meeting is recorded, processed, summarized and reported within the time periods specified in the Commission's rules and forms. [Jan. 20, 2010]

Question 116.07

Question: Instruction 3 to Item 401(a) provides that if the information called for by paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates. Is Item 401(e) disclosure required with respect to any director to whom this Instruction applies?

Answer: No. Item 401(e) disclosure is not required for any director for whom the company is not required to provide Item 401(a) disclosure. [Feb. 16, 2010]

Question 116.08

Withdrawn July 8, 2011

Question 116.09

Question: Is a company required to include Item 401(e) information about a director's business experience if the director is appointed by holders of a class of preferred stock?

Answer: Yes. In this situation, the company may either provide the same information about this director as it would directors nominated by the board or disclose that the preferred shareholder has advised the company that the shareholder has appointed this director because of [the Item 401(e) information provided to the company by the shareholder that the company would then include in its filing]. [Mar. 4, 2011]

Question 116.10

Question: Pursuant to Instruction 3 of Item 401(a), an issuer omits from its proxy statement Item 401(a) and Item 401(e) information with respect to directors whose terms will not continue after the annual

shareholders' meeting. Is this information nevertheless required to be included in a Form 10-K that incorporates its Part III information by reference from the proxy statement?

Answer: No. If an issuer provides its Form 10-K, Part III information by incorporation by reference from the proxy statement and the issuer files its definitive proxy statement within 120 days of its fiscal year-end, then the issuer may rely on Instruction 3 to Item 401(a) to omit, from both the proxy statement and the Form 10-K, Item 401(a) and Item 401(e) information with respect to directors whose terms will not continue after the annual shareholders' meeting. If an issuer includes Item 401(a) and Item 401(e) information directly in Part III of Form 10-K, the issuer must provide such information about all current directors, including those directors whose terms will not continue after the annual shareholders' meeting. [July 8, 2011]

Question 116.11

Question: In connection with preparing Item 401 disclosure relating to director qualifications, certain board members or nominees have provided for inclusion in the company's disclosure certain self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background. What disclosure of self-identified diversity characteristics is required under Item 401 or, with respect to nominees, under Item 407?

Answer: Item 401(e) requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director. Item 407(c)(2)(vi) requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees. To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

Section 117. Item 402(a)—Executive Compensation; General

Question 117.01

Question: When a company that is in the process of restating its financial statements has not filed its Form 10-K for the fiscal year ended December 31, 2005, must the company comply with the 2006 Executive Compensation Rules when it ultimately files the Form 10-K for the fiscal year ended December 31, 2005?

Answer: The company is not required to comply with the 2006 Executive Compensation rules in the Form 10-K for the fiscal year ended December 31, 2005. [Jan. 24, 2007]

Question 117.02

Question: If a company files a preliminary proxy statement under Exchange Act Rule 14a-6 which omits the executive and director compensation disclosure required by Item 402 of Regulation S-K, would the staff request a revised preliminary proxy statement and deem that the 10-calendar day waiting period specified in Rule 14a-6 does not begin to run until the required information is filed?

Answer: Yes. However, given that the executive and director compensation rules were substantially revised in 2006, in a situation where a company that is complying with the 2006 rules for the first time files a preliminary proxy statement excluding the required executive and director compensation disclosure, the staff will not request a revised preliminary proxy statement nor deem the 10-calendar day waiting period specified in Rule 14a-6 to be tolled, so long as: (1) the omitted executive and director compensation disclosure is included in the definitive proxy statement; (2) the omitted disclosure does not relate to the matter or matters that caused the company to have to file preliminary proxy materials; and (3) the omitted disclosure is not otherwise made available to the public prior to the filing of the definitive proxy statement. [Feb. 12, 2007]

Question 117.03

Question: During 2009, a company recovers (or "claws-back") a portion of an executive officer's 2008 bonus. How does this affect the company's 2009 Item 402 disclosure for that executive officer?

Answer: The portion of the 2008 bonus recovered in 2009 should not be deducted from 2009 bonus or total compensation for purposes of determining, pursuant to Items 402(a)(3)(iii) and (iv), whether the executive is a named executive officer for 2009. If the executive is a named executive officer for 2009, the Summary

Compensation Table should report for the 2008 year, in the Bonus column (column (d)) and Total column (column (j)), amounts that are adjusted to reflect the "claw-back," with footnote disclosure of the amount recovered. As the instruction to Item 402(b) provides, if "necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers," the Compensation Discussion and Analysis should discuss the reasons for the "claw-back" and how the amount recovered was determined. [Aug. 14, 2009]

Question 117.04

Question: During 2009, a company grants an equity award to an executive officer. The same award is forfeited during 2009 because the executive officer leaves the company. Should the grant date fair value of this award be included for purposes of determining 2009 total compensation and identifying 2009 named executive officers?

Answer: Yes. [Jan. 20, 2010]

Question 117.05

Question: A registrant with a calendar fiscal year end has filed a Securities Act registration statement (or post-effective amendment) for which it seeks effectiveness after December 31, 2009 but before its 2009 Form 10-K is due. Must it include Item 402 disclosure for 2009 in the registration statement before it can be declared effective?

Answer: If the registration statement is on Form S-1, then it must include Item 402 disclosure for 2009 before it can be declared effective. This is because 2009 is the last completed fiscal year. Part I, Item 11(l) of Form S-1 specifically requires Item 402 information in the registration statement, which includes Summary Compensation Table disclosure for each of the registrant's last three completed fiscal years and other disclosures for the last completed fiscal year. General Instruction VII of Form S-1, which permits a registrant meeting certain requirements to incorporate by reference the Item 11 information, does not change this result because the registrant has not yet filed its Form 10-K for the most recently completed fiscal year. On the other hand, Form S-3's information requirements are satisfied by incorporating by reference filed and subsequently filed Exchange Act documents; for example, there is no specific line item requirement in Form S-3 for Item 402 information. Accordingly, a non-automatic shelf registration statement on Form S-3 can be declared effective before the Form 10-K is due. Securities Act Forms C&DI 123.01 addresses the situation in which a company requests effectiveness for a non-automatic shelf registration statement on Form S-3 during the period between the filing of the Form 10-K and the definitive proxy statement. [Feb. 16, 2010]

Question 117.06

Question: An individual who was the company's principal financial officer for part of the last completed fiscal year was serving the company as an executive officer in a different capacity at the end of that year, and was among the company's three most highly compensated executive officers. Does the company include this individual as a named executive officer pursuant to Item 402(a)(3)(iii), as one of its three most highly compensated executive officers other than the principal executive officer and principal financial officer who were serving as executive officers at the end of the last completed fiscal year?

Answer: No. The company includes this individual as a named executive officer pursuant to Item 402(a)(3)(ii), as an individual who served as principal financial officer during the fiscal year. The company identifies its three most highly compensated executive officers pursuant to Item 402(a)(3)(iii) from among individuals serving as executive officers at the end of the last completed fiscal year who did not serve as its principal executive officer or principal financial officer at any time during that year. [June 4, 2010]

Question 117.07

Question: Item 402(a)(6)(ii) provides that "registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees." Does this provision also apply to a disability plan that satisfies these nondiscrimination conditions?

Answer: Yes. To the extent that the disability plan provides benefits not related to termination of employment, a registrant may rely on Item 402(a)(6)(ii) to omit information regarding the disability plan. To the extent that the disability plan provides benefits related to termination of employment, a registrant may rely on Instruction 5 to Item 402(j) to omit information regarding the disability plan. [July 8, 2011]

Section 118. Item 402(b)—Executive Compensation; Compensation Discussion and Analysis

Question 118.01

Question: Is the guidance regarding Compensation Discussion and Analysis disclosure concerning option grants that is provided in Section II.A.2 of Securities Act Release No. 8732A applicable to other forms of equity compensation?

Answer: The same disclosure provisions governing required disclosure about option grants also govern disclosure about restricted stock and other non-option equity awards. This includes the example of potential material information identified in Item 402(b)(2)(iv) of Regulation S-K, which indicates that it may be appropriate to discuss how the determination is made as to when awards are granted, including awards of equity-based compensation such as options. [Jan. 24, 2007]

Question 118.02

Question: In presenting Compensation Discussion and Analysis disclosure about prior option grant programs, plans or practices, are companies required to provide disclosures about programs, plans or practices that occurred outside the scope of the information contained in the tables and otherwise disclosed pursuant to Item 402 (including periods before and after the information contained in the tables and otherwise disclosed pursuant to Item 402)?

Answer: Yes, in certain cases, depending on a company's particular circumstances, disclosure may be required as contemplated by Instruction 2 to Item 402(b) of Regulation S-K. [Jan. 24, 2007]

Question 118.03

Question: Are companies required to include disclosure about programs, plans or practices relating to option grants in the Compensation Discussion and Analysis disclosure for their first fiscal year ending on or after December 15, 2006, or is this disclosure only required for future fiscal periods?

Answer: Companies are required to include disclosure about programs, plans or practices relating to option grants in the Compensation Discussion and Analysis disclosure for fiscal years ending on or after December 15, 2006, as well as any other periods where necessary as contemplated by Instruction 2 to Item 402(b) of Regulation S-K. [Jan. 24, 2007]

Question 118.04

Question: How does a company determine if it may omit disclosure of performance target levels or other factors or criteria under Instruction 4 to Item 402(b)?

Answer: A company should begin its analysis of whether it is required to disclose performance targets by addressing the threshold question of materiality in the context of the company's executive compensation policies or decisions. If performance targets are not material in this context, the company is not required to disclose the performance targets. Whether performance targets are material is a facts and circumstances issue, which a company must evaluate in good faith.

A company may distinguish between *qualitative/subjective* individual performance goals (e.g., effective leadership and communication) and *quantitative/objective* performance goals (e.g., specific revenue or earnings targets). There is no requirement that a company provide quantitative targets for what are inherently subjective or qualitative assessments — for example, how effectively the CEO demonstrated leadership.

When performance targets are a material element of a company's executive compensation policies or decisions, a company may omit targets involving confidential trade secrets or confidential commercial or financial information *only if* their disclosure would result in competitive harm. A company should use the same standard for evaluating whether target levels (and other factors or criteria) may be omitted as it would use when making a confidential treatment request under Securities Act Rule 406 or Exchange Act Rule 24b-2; however, no confidential treatment request is required to be submitted in connection with the omission of a performance target level or other factors or criteria.

To reach a conclusion that disclosure would result in competitive harm, a company must undertake a competitive harm analysis taking into account its specific facts and circumstances and the nature of the performance targets. In the context of the company's industry and competitive environment, the company must analyze whether a competitor or contractual counterparty could extract from the targets information regarding the company's business or business strategy that the competitor or counterparty could use to the company's detriment. A company must have a reasoned basis for concluding, after consideration of its specific facts and circumstances, that the disclosure of the targets would cause it competitive harm. The company must make its determination based on the established standards for what constitutes confidential commercial or financial information, the disclosure of which would cause competitive harm. These standards have largely been addressed in case law, including *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *National Parks and Conservation Association v. Kleppe*,

547 F.2d 673 (D.C. Cir. 1976); and *Critical Mass Energy Project v. NRC*, 931 F.2d 939 (D.C. Cir. 1991), *vacated & reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991), *grant of summary judgment to agency aff'd en banc*, 975 F.2d 871 (D.C. Cir. 1992). To the extent that a performance target level or other factor or criteria otherwise has been disclosed publicly, a company cannot rely on Instruction 4 to withhold the information.

The competitive harm standard is the only basis for omitting performance targets if they are a material element of the registrant's executive compensation policies or decisions.

Because Compensation Discussion and Analysis will be subject to staff review, a company may be required to demonstrate that withholding target information meets the confidential treatment standard, and will be required to disclose the information if that standard is not met. Finally, a company that relies on Instruction 4 to omit performance targets is required by the instruction to discuss how difficult it will be for the executive or how likely it will be for the company to achieve the undisclosed target level or other factor or criteria. [July 3, 2008]

Question 118.05

Question: Item 402(b)(2)(xiv) provides, as an example of material information to be disclosed in the Compensation Discussion and Analysis, depending on the facts and circumstances, "[w]hether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies)." What does "benchmarking" mean in this context?

Answer: In this context, benchmarking generally entails using compensation data about other companies as a reference point on which — either wholly or in part — to base, justify or provide a framework for a compensation decision. It would not include a situation in which a company reviews or considers a broad-based third-party survey for a more general purpose, such as to obtain a general understanding of current compensation practices. [July 3, 2008]

Question 118.06 *[same as Question 133.08]*

Question: Regarding the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, on what basis should a company differentiate between the requirements of Item 407(e)(3)(iii) and Item 402(b)'s Compensation Discussion and Analysis disclosure?

Answer: The information regarding "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation" required by Item 407(e)(3)(iii)

is to be provided as part of the company's Item 407(e)(3) compensation committee disclosure. See Release 33-8732A at Section V.D, Corporate Governance Disclosure. If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should discuss that role in the Compensation Discussion and Analysis section. [July 3, 2008]

Question 118.07

Question: In Compensation Discussion and Analysis (CD&A), is a company required to discuss executive compensation, including performance target levels, to be paid in the current year or in future years?

Answer: No. The CD&A covers only compensation "awarded to, earned by, or paid to the named executive officers." Although Instruction 2 to Item 402(b) provides that the CD&A should also cover actions regarding executive compensation that were taken after the registrant's last fiscal year's end, such disclosure requirement is limited to those actions or steps that could "affect a fair understanding of the named executive officer's compensation for the last fiscal year." [Mar. 4, 2011]

Question 118.08

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to non-GAAP financial information that does not relate to the disclosure of target levels, but is nevertheless included in Compensation Discussion & Analysis ("CD&A") or other parts of the proxy statement—for example, to explain the relationship between pay and performance?

Answer: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K.

In these pay-related circumstances only, the staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as

part of its Part III information, the staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information. [July 8, 2011]

Question 118.09

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e) of Regulation S-K; however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to the disclosure of the actual results of the non-GAAP financial measure that is used as a target?

Answer: Yes, provided that this disclosure is made in the context of a discussion about target levels. [May 16, 2013]

Section 119. Item 402(c)—Executive Compensation; Summary Compensation Table

Question 119.01

Question: If a person that was not a named executive officer in fiscal years 1 and 2 became a named executive officer in fiscal year 3, must compensation information be disclosed in the Summary Compensation Table for that person for all three fiscal years?

Answer: No, the compensation information only for fiscal year 3 need be provided in the Summary Compensation Table. [Jan. 24, 2007]

Question 119.02

Question: Should a discretionary cash bonus that was not based on any performance criteria be reported in the Bonus column (column (d)) of the Summary Compensation Table pursuant to Item 402(c)(2)(iv) or in the Non-equity Incentive Plan Compensation column (column (g)) pursuant to Item 402(c)(2)(vii)?

Answer: The bonus should be reported in the Bonus column (column (d)). In order to be reported in the Non-equity Incentive Plan Compensation column (column (g)) pursuant to Item 402(c)(2)(vii), the bonus would have to be pursuant to a plan providing for compensation intended to serve as incentive for

performance to occur over a specified period that does not fall within the scope of Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), *Share-Based Payment* ("FAS 123R"). The outcome with respect to the relevant performance target must be substantially uncertain at the time the performance target is established and the target is communicated to the executives. The length of the performance period is not relevant to this analysis, so that a plan serving as an incentive for a period less than a year would be considered an incentive plan under Item 402(a)(6)(iii). Further, amounts earned under a plan that meets the definition of a non-equity incentive plan, but that permits the exercise of negative discretion in determining the amounts of bonuses, generally would still be reportable in the Non-equity Incentive Plan Compensation column (column (g)). The basis for the use of various targets and negative discretion may be material information to be disclosed in the Compensation Discussion and Analysis. If, in the exercise of discretion, an amount is paid over and above the amounts earned by meeting the performance measure in the non-equity incentive plan, that amount should be reported in the Bonus column (column (d)). [Jan. 24, 2007]

Question 119.03

Question: Instruction 2 to Item 402(c)(2)(iii) and (iv) provides that companies are to include in the Salary column (column (c)) or the Bonus column (column (d) any amount of salary or bonus forgone at the election of a named executive officer under which stock, equity-based, or other forms of non-cash compensation have been received instead by the named executive officer. In a situation where the value of the stock, equity-based or other form of non-cash compensation is the same as the amount of salary or bonus foregone at the election of the named executive officer, does this mean the amounts are only reported in the Salary or Bonus column and not in any other column of the Summary Compensation Table?

Answer: Yes, under Instruction 2 to Item 402(c)(2)(iii) and (iv) the amounts should be disclosed in the Salary or Bonus column, as applicable. The result would be different if the amount of salary or bonus foregone at the election of the named executive officer was less than the value of the equity-based compensation received instead of the salary or bonus, or if the agreement pursuant to which the named executive officer had the option to elect settlement in stock or equity-based compensation was within the scope of FAS123R (e.g., the right to stock settlement is embedded in the terms of the award). In the former case, the incremental value of an equity award would be reported in the Stock Awards or Option Awards columns, and in the latter case the award would be reported in the Stock Awards or Option Awards columns. In both of these special cases, the amounts reported in the Stock Awards and Option Awards columns would be the grant date fair value of the equity award, and footnote disclosure should be provided regarding the circumstances of the awards. Appropriate disclosure about equity-based compensation received instead of

salary or bonus must be provided in the Grants of Plan-Based Awards Table, the Outstanding Equity Awards at Fiscal Year End Table and the Option Exercises and Stock Vested Table. [May 17, 2013]

Question 119.04

Withdrawn Mar. 1, 2010

Question 119.05

Withdrawn Mar. 1, 2010

Question 119.06

Question: Instruction 3 to Item 402(c)(2)(viii) provides that where the amount of the change in the actuarial present value of the accumulated pension benefit computed pursuant to Item 402(c)(2)(viii)(A) is negative, the amount should be disclosed by footnote but should not be reflected in the sum reported in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column (column (h)). When a company aggregates all of the decreases and increases in the value of a named executive officer's individual pension plans, should the company subtract negative values from positive values or should any individual plan decreases be treated as a zero?

Answer: In applying this instruction, a company may subtract negative values when aggregating the changes in the actuarial present values of the accumulated benefits under the plans, and apply the "no negative number" position of the instruction for the final number after aggregating all plans. Under this approach, if one plan had a $500 increase and another plan had a $200 decrease, then the net change in the actuarial present value of the accumulated pension benefits would be $300. [Jan. 24, 2007]

Question 119.07

Question: Item 402(c)(2)(ix)(A) and Instruction 4 to that item require a company to report as "All Other Compensation" perquisites and personal benefits if the total amount exceeds $10,000, and to identify each such item by type, regardless of the amount. If the $10,000 threshold is otherwise exceeded, must a company list by type those perquisites and personal benefits as to which there was no aggregate incremental cost to the company, or as to which the executive officer fully reimbursed the company for such cost?

Answer: If a perquisite or other personal benefit has no aggregate incremental cost, it must still be separately identified by type. Any item for which an executive officer has actually fully reimbursed the

company should not be considered a perquisite or other personal benefit and therefore need not be separately identified by type. In this regard, for example, if a company pays for country club annual dues as well as for meals and incidentals and an executive officer reimburses the cost of meals and incidentals, then the company need not report meals and incidentals as perquisites, although it would continue to report the country club annual dues. If there was no such reimbursement, then the company would need to also report the meals and incidentals as perquisites. [July 3, 2008]

Question 119.08

Question: Item 402(c)(2)(ix)(C) indicates that stock purchased at a discount needs to be disclosed unless that discount is available generally to all security holders or to all salaried employees. The compensation cost, if any, is computed in accordance with FAS 123R. Footnote 221 to Securities Act Release No. 8732A seems to indicate that sometimes under FAS 123R there is no compensation cost. Does the footnote indicate that 423 plans must be disclosed?

Answer: No. Typically 423 plans need to be broad based and non-discriminatory to qualify for preferential tax treatment, which would be within the exception, even if they require some minimum of work hours — such as 10 hours a week — in order to be in the plan or the discount is larger than the 5% example in the footnote. The footnote explains that even if there is some discount, there may not be compensation cost under the accounting standard. [Jan. 24, 2007]

Question 119.09

Question: Item 402(c)(2)(ix)(G) requires disclosure of the dollar value of any dividends when those amounts were not factored into the grant date fair value required to be reported in the Grants of Plan-Based Awards Table. With regard to the treatment of dividends, dividend equivalents or other earnings on equity awards, is disclosure required in the All Other Compensation column (column (i)) if disclosure was not previously provided in the Grants of Plan-Based Awards Table for that named executive officer?

Answer: The company should analyze whether the dividends, dividend equivalents or other earnings would have been factored into the grant date fair value in accordance with FAS 123R. In this regard, the disclosure turns on how the rights to the dividends are structured and whether or not that brings them within the scope of FAS 123R for the purpose of the grant date fair value calculation. [Jan. 24, 2007]

Question 119.10

Question: Are deferred compensation payouts, lump sum distributions under Section 401(k) plans and earnings on 401(k) plans required to be disclosed in the Summary Compensation Table?

Answer: Non-qualified deferred compensation payouts are not disclosed in the Summary Compensation Table, but are rather disclosed in the Aggregate Withdrawals/ Distributions column (column (e)) of the Nonqualified Deferred Compensation Table. Lump sum distributions from 401(k) plans are not disclosed in the Summary Compensation Table, because the compensation that was deferred into the 401(k) plan was already disclosed in the Summary Compensation Table, as would be any company matching contributions. Earnings on 401(k) plans are not disclosed in the Summary Compensation Table because the disclosure requirement only extends to above-market or preferential earnings on non-qualified deferred compensation. [Jan. 24, 2007]

Question 119.11

Withdrawn Mar. 1, 2010

Question 119.12

Withdrawn Mar. 1, 2010

Question 119.13

Question: Item 402(c)(2)(ix)(D) requires disclosure in the "All Other Compensation" column of the amount paid or accrued to any named executive officer pursuant to any plan or arrangement in connection with any termination of such executive officer's employment with the company or its subsidiaries, or a change in control of the company. For this purpose, what standard applies for determining whether such an amount is reportable because it is accrued?

Answer: Instruction 5 to Item 402(c)(2)(ix) states that for purposes of Item 402(c)(2)(ix)(D) an accrued amount is an amount for which payment has become due. If the named executive officer's performance necessary to earn an amount is complete, it is an amount that should be disclosed. For example, if the named executive officer has completed all performance to earn an amount, but payment is subject to a six-month deferral in order to comply with Internal Revenue Code Section 409A, the amount would be an accrued amount subject to Item 402(c)(2)(ix)(D) disclosure. In contrast, if an amount will be payable two years after a termination event if the named executive officer cooperates with (or complies with a covenant

not to compete with) the company during that period, the amount is not reportable under Item 402(c)(2)(ix)(D) because the executive officer's performance is still necessary for the payment to become due. As noted in Footnote 217 to Securities Act Release No. 8732A, such amounts that are payable in the future, as well as amounts reportable under Item 402(c)(2)(ix)(D), are reportable under Item 402(j). [Aug. 8, 2007]

Question 119.14

Question: Where the instructions to the Summary Compensation Table requiring footnote disclosure do not specifically limit the footnote disclosure to compensation for the company's last fiscal year, as do Instructions 3 and 4 to Item 402(c)(2)(ix), must the footnote disclosure cover the other years reported in the Summary Compensation Table?

Answer: If the instruction does not specifically limit footnote disclosure to compensation for the company's last fiscal year, footnote disclosure for the other years reported in the Summary Compensation Table would be required only if it is material to an investor's understanding of the compensation reported in the Summary Compensation Table for the company's last fiscal year. [July 3, 2008]

Question 119.15

Withdrawn Mar. 1, 2010

Question 119.16

Question: May a company provide the assumption information required by Instruction 1 to Item 402(c)(2)(v) and (vi) for equity awards granted in the company's most recent fiscal year by reference to the Grants of Plan-Based Awards Table if the company chooses to report that assumption information in that table?

Answer: Yes. [Mar. 1, 2010]

Question 119.17

Question: In 2008, a company enters into a retention agreement in which it agrees to pay the CEO a cash retention bonus, conditioned on the CEO remaining employed by the company through December 31, 2010. The cash retention bonus is not a non-equity incentive plan award, as defined in Item 402(a)(6)(iii). When is

the cash retention bonus reportable in the company's Summary Compensation Table? When should it be discussed in Compensation Discussion and Analysis?

Answer: The cash retention bonus is reportable in the Summary Compensation Table for the year in which the performance condition has been satisfied. The same analysis applies to any interest the company is obligated to pay on the cash retention bonus, assuming the interest is not payable unless and until the performance condition has been satisfied. Before the performance condition has been satisfied, Instruction 4 to Item 402(c) would not require it to be reported in the Summary Compensation Table as a bonus that has been earned but deferred, and the bonus would not be reportable in the Nonqualified Deferred Compensation Table. However, the company should discuss the cash retention bonus in its Compensation Discussion and Analysis for 2008 and subsequent years through completion of the performance necessary to earn it. [July 3, 2008]

Question 119.18

Question: A person who was a named executive officer in year 1, but not in year 2, will again be a named executive officer in year 3. Must compensation information for this person be disclosed in the Summary Compensation Table for all three fiscal years?

Answer: Yes. [May 29, 2009]

Question 119.19

Question: A person who is a named executive officer for year 1 is entitled to a gross-up payment in respect of taxes on perquisites or other compensation provided during the year. The tax gross-up payment is not payable by the company until year 2. Is the tax gross-up payment reportable in the Summary Compensation Table in year 1?

Answer: Yes. To provide investors with a clearer view of all costs to the company associated with providing the perquisites or other compensation for which tax gross-up payments are being made, Item 402(c)(2)(ix)(B) disclosure of the tax gross-up payment should be included in the Summary Compensation Table for the same year as the related perquisites or other compensation. [May 29, 2009]

Question 119.20

Question: Instruction 3 to the Stock Awards and Option Awards columns specifies that the value reported for awards subject to performance conditions excludes the effect of estimated forfeitures. Does the grant date fair value reported for awards subject to time-based vesting also exclude the effect of estimated forfeitures?

Answer: Yes. The amount to be reported is the grant date fair value. FASB ASC Paragraph 718-10-30-27 provides, in relevant part, that "service conditions that affect vesting are not reflected in estimating the fair value of an award at the grant date because those conditions are restrictions that stem from the forfeitability of instruments to which employees have not yet earned the right." [Jan. 20, 2010]

Question 119.21

Question: In April 2010, a company grants an equity award to an executive officer, and the terms of the award do not provide for acceleration of vesting if the executive officer leaves the company. The grant date fair value of the award is $1,000. In November 2010, the executive officer will leave the company, and the company modifies the officer's same equity award to provide for acceleration of vesting upon departure. The fair value of the modified award, computed under FASB ASC Topic 718, is $800, reflecting a decline in the company's stock price. What dollar amount is included in 2010 total compensation for purposes of identifying 2010 named executive officers and reported in the executive officer's 2010 stock column with respect to this award if he will be a named executive officer? How would the company report the equity award if the award modification and executive's departure occur in 2011?

Answer: Consistent with Instruction 2 to Item 402(c)(2)(v) and (vi), the incremental fair value of the modified award, computed as of the modification date in accordance with FASB ASC Topic 718, as well as the grant date fair value of the original award must be reported in the 2010 stock column. Applying the guidance in paragraph 55-116 of FASB ASC Section 718-20-55, incremental fair value is computed as follows: the fair value of the modified award at the date of modification minus the fair value of the original award at the date of modification equals the incremental fair value of the modified award. In this fact pattern, the fair value of the original award at the date of modification is zero, because the executive officer left the company in November and the original award would not have vested. Therefore, the incremental fair value of the modified award is $800. As a result, the total amount reported is $1,800, which reflects the two compensation decisions the company made for this award in 2010. The same amount is included in 2010 total compensation for purposes of identifying the company's 2010 named executive officers pursuant to Items 402(a)(3)(iii) and (iv).

If the award modification and executive's departure occur in 2011, the company would report $1,000 in the 2010 stock column for the grant date fair value of the original award. In the 2011 stock column, the company would report $800 for the incremental fair value of the modified award. [Feb. 16, 2010]

Question 119.22

Question: During 2010, a company grants an annual incentive plan award to a named executive officer. Because no right to stock settlement is embedded in the terms of the award, the award is not within the scope of FASB ASC Topic 718. Therefore, it is a non-equity incentive plan award as defined in Rule 402(a)(6)(iii). The named executive officer elects to receive the award in stock. Instruction 2 to Item 402(c)(2)(iii) and (iv) does not apply because the award is an incentive plan award rather than a bonus. Should the company report the award in the stock awards column (column (e)) or in the non-equity incentive plan award column (column (g)) in its 2010 Summary Compensation Table? How should the award be reported in the Grants of Plan-Based Awards Table?

Answer: The company should report the award in the non-equity incentive plan award column (column (g)) of the Summary Compensation Table, reflecting the compensation the company awarded, with footnote disclosure of the stock settlement. Similarly, in the Grants of Plan-Based Awards Table, the company should report the award in the estimated future payouts under non-equity incentive plan awards columns (columns (c)-(e)). The stock received upon settlement should not also be reported in the Grants of Plan-Based Awards Table because that would double count the award. [Feb. 16, 2010]

Question 119.23

Question: During 2010, a company grants annual incentive plan awards to its named executive officers. The awards permit the named executive officers to elect payment of the award for 2010 performance in company stock rather than cash, with the election to be made during the first 90 days of 2010. Such company stock will have a grant date fair value equal to 110% of the award that would be paid in cash. One named executive officer elects stock payment, and the others do not. How is the award reported for the named executive officer who elects stock payment? How is the award reported for the named executive officers who receive cash payment?

Answer: For the named executive officer who elects stock payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as an equity incentive award. This is the case even if the amount of the award is not determined until early 2011 because all company decisions necessary to determine the value of the award are made in 2010. For the named executive officers who

receive cash payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as a non-equity incentive plan award. [Feb. 16, 2010]

Question 119.24

Question: In 2010, a company grants an executive officer an equity incentive plan award with a three-year performance period that begins in 2010. The equity incentive plan allows the compensation committee to exercise its discretion to reduce the amount earned pursuant to the award, consistent with Section 162(m) of the Internal Revenue Code. Under FASB ASC Topic 718, the fact that the compensation committee has the right to exercise "negative" discretion may cause, in certain circumstances, the grant date of the award to be deferred until the end of the three-year performance period, after the compensation committee has determined whether to exercise its negative discretion. If so, when and how should this award be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table? In what year should this award be included in total compensation for purposes of determining if the executive officer is a named executive officer?

Answer: Use of grant date fair value reporting in Item 402 generally assumes that, as stated in FASB ASC Topic 718, "[t]he service inception date usually is the grant date." The service inception date may precede the grant date, however, if the equity incentive plan award is authorized but service begins before a mutual understanding of the key terms and conditions is reached. In a situation in which the compensation committee's right to exercise "negative" discretion may preclude, in certain circumstances, a grant date for the award during the year in which the compensation committee communicated the terms of the award and performance targets to the executive officer and in which the service inception date begins, the award should be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table as compensation for the year in which the service inception date begins. Notwithstanding the accounting treatment for the award, reporting the award in this manner better reflects the compensation committee's decisions with respect to the award. The amount reported in both tables should be the fair value of the award at the service inception date, based upon the then-probable outcome of the performance conditions. This same amount should be included in total compensation for purposes of determining whether the executive officer is a named executive officer for the year in which the service inception date occurs. [Mar. 1, 2010]

Question 119.25

Question: A company grants annual non-equity incentive plan awards to its executive officers in January 2010. The awards' performance criteria are communicated to the executives at that time and are based on

the company's financial performance for the year. Executives will not know the total amount earned pursuant to the award until the end of the year, when the compensation committee can determine whether or to what extent the performance criteria have been satisfied.

After the end of the year, the amounts earned pursuant to the awards are determined and communicated to the executive officers. One executive decides not to receive any payment of earnings pursuant to the award. For that executive, should the award be included in total compensation for purposes of determining if the executive is a named executive officer for 2010? Should the award be reported in the Grants of Plan-Based Awards Table and the Summary Compensation Table for 2010?

Answer: Yes. The executive officer's decision not to accept payment of the award does not change the fact that award was granted in and earned for services performed during 2010. Accordingly, the grant of the award should be included in the Grants of Plan-Based Awards Table, which will reflect the compensation committee's decision to grant the award in 2010. The earnings pursuant to the award, even though declined, should be included in total compensation for purposes of determining if the executive is a named executive officer for 2010 and reported in the Summary Compensation Table. The company should disclose the executive's decision not to accept payment of the award, which it can do either by adding a column to the Summary Compensation Table next to column (g), "Nonequity Incentive Plan Compensation," reporting the amount of nonequity incentive plan compensation declined, or by providing footnote disclosure to the Summary Compensation Table. Moreover, in Compensation Discussion and Analysis, the company should consider discussing the effect, if any, of the executive's decision on how the company structures and implements compensation to reflect performance. [Mar. 12, 2010]

Question 119.26

Question: A company has a practice of granting discretionary bonuses to its executive officers. Before the board of directors takes action to grant such bonuses for 2010, an executive officer advises the board that she will not accept a bonus for 2010. Should the company report in column (d) of the Summary Compensation Table the bonus award it would have granted her and include that amount in total compensation for purposes of determining if she is a named executive officer for 2010?

Answer: No, because the executive declined the bonus before it was granted, and therefore, no bonus was granted. [Mar. 12, 2010]

Question 119.27

Question: In 2010, Company A acquires Company B and, as part of the merger consideration, agrees to assume all outstanding Company B options. The Company B options have not been modified other than to adjust the exercise price to reflect the merger exchange ratio. For Company B executives who are now Company A executives: Should the Company B options that were granted in 2010 be included in total compensation for purposes of determining if an executive is a named executive officer of Company A for 2010 and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table for 2010? Should Company A report the Company B options in its Outstanding Equity Awards at Fiscal Year-End Table and Options Exercised and Stock Vested Table, as applicable, for 2010 and in subsequent years?

Answer: Because the assumed Company B options are part of the merger consideration, they do not reflect any 2010 executive compensation decisions by Company A. Therefore, Company A should not include Company B options granted in 2010 in total compensation for purposes of determining its 2010 named executive officers, and should not report the Company B options in its 2010 Summary Compensation Table and Grants of Plan-Based Awards Table. Because the Company B options are now Company A options, Company A should report them in its Outstanding Equity Awards at Fiscal Year-End Table and Options Exercised and Stock Vested Table, as applicable, for 2010 and subsequent years, with footnote disclosure describing the assumption of Company B options. [June 4, 2010]

Question 119.28

Question: At the beginning of Year 1, the compensation committee sets the threshold, target and maximum levels for the number of shares that may be earned for Year 1 under the company's performance-based equity incentive plan. Incentive awards are paid in the form of restricted shares, which are issued early in Year 2 after the compensation committee has certified the company's Year 1 performance results. Can the amount reported in the Stock Awards column reflect the grant date fair value of the number of restricted shares actually issued for Year 1, rather than the amount that reflects the probable outcome of the performance conditions as of the grant date, as prescribed by Instruction 3 to Item 402(c)(2)(v) and (vi)?

Answer: No. The grant date fair value for stock and option awards subject to performance conditions must be reported based on the probable outcome of the performance conditions as of the grant date, even if the actual outcome of the performance conditions—and therefore, the number of restricted shares actually awarded for Year 1—is known by the time of the filing of the proxy statement. [July 8, 2011]

Section 120. Item 402(d)—Executive Compensation; Grants of Plan-Based Awards Table

Question 120.01

Question: If an equity incentive plan award is denominated in dollars, but payable in stock, how is it disclosed in the Grants of Plan-Based Awards Table since the headings for equity-based awards (columns (f), (g) and (h)) only refer to numbers and not dollars?

Answer: The award should be disclosed in the Grants of Plan-Based Awards Table by including the dollar value and a footnote to explain that it will be paid out in stock in the form of whatever number of shares that amount translates into at the time of the payout. In this limited circumstance, and if all the awards in this column are structured in this manner, it is acceptable to change the captions for columns (f) through (h) to show "($)" instead of "(#)." [Aug. 8, 2007]

Question 120.02

Question: If all of the non-equity incentive plan awards were made for annual plans, where the awards have already been earned, may the company change the heading over columns (c), (d) and (e) of the Grants of Plan-Based Awards Table that refers to "Estimated future payouts under non-equity incentive plan awards?"

Answer: Yes, if the awards were made in the same year they were earned and the earned amounts are therefore disclosed in the Summary Compensation Table, the heading over columns (c), (d) and (e) may be changed to "Estimated possible payouts under non-equity incentive plan awards." [Jan. 24, 2007]

Question 120.03

Renumbered as Question 122.04

Question 120.04

Renumbered as Question 122.05

Question 120.05

Withdrawn Mar. 1, 2010

Question 120.06

Question: Under a long-term incentive plan, a named executive officer receives an award for a target number of shares at the start of a three-year period, with one-third of this amount allocated to each of three single-year performance periods. How is grant date fair value determined for purposes of the disclosure required in column (l) of the table?

Answer: The grant date and grant date fair value are determined as provided in FAS 123R. Under paragraph A. 67 of FAS 123R, if all of the annual performance targets are set at the start of the three-year period, that is the grant date for the entire award. The grant date fair value for all three tranches of the award would be measured at that time, and would be reported in column (l). If each annual performance target is set at the start of each respective single-year performance period, however, paragraph A.68 of FAS 123R provides that each of those dates is a separate grant date for purposes of measuring the grant date fair value of the respective tranche. In this circumstance, only the grant date fair value for the first year's performance period would be measured and reported in column (l). [May 29, 2009]

Question 120.07

Question: During the fiscal year, an outstanding equity incentive plan award held by a named executive officer is amended or otherwise modified, resulting in incremental fair value under FAS 123R. Must the incremental fair value be reported in column (l) of the table?

Answer: Yes. This is required by Item 402(d)(2)(viii) and Instruction 7 to Item 402(d). [May 29, 2009]

Section 121. Item 402(e)—Executive Compensation; Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table

None

Section 122. Item 402(f)—Executive Compensation; Outstanding Equity Awards at Fiscal Year-End Table

Question 122.01

Question: A company has an equity incentive plan pursuant to which it grants awards that will vest, if at all, based on total shareholder return over a 3-year period. Awards were granted in 2005 ("2005 Awards") and will vest based on the company's total shareholder return from 1/1/05 through 12/31/07. 2006 was the second year of the 3-year performance period. Performance during 2005 was well above the maximum level. Performance during 2006 was below the threshold level. The combined performance for 2005 and 2006 would result in a payout at target if the performance period had ended on 12/31/06. Is it permissible to base disclosure on the actual multi-year performance to date (through the end of the last completed fiscal year)?

Answer: Yes. The number of shares or units reported in columns (d) or (i), and the payout value reported in column (j), should be based on achieving threshold performance goals, except that if performance during the last completed fiscal year (or, if the payout is based on performance to occur over more than one year, the last completed fiscal years over which performance is measured) has exceeded the threshold, the disclosure shall be based on the next higher performance measure (target or maximum) that exceeds the last completed fiscal year's performance (or, if the payout is based on performance to occur over more than one year, the last completed fiscal years over which performance is measured). [Aug. 8, 2007]

Question 122.02

Question: Instruction 2 to Item 402(f)(2) requires footnote disclosure of the vesting dates of the awards reported in the Outstanding Equity Awards at Fiscal Year-End Table. Can a company comply with this instruction by including a column in this table showing the grant date of each award reported and including a statement of the standard vesting schedule that applies to the reported awards?

Answer: Yes, provided, however, that if there is any different vesting schedule applicable to any of the awards, then the table would also need to include disclosure about any such vesting schedule. [July 3, 2008]

Question 122.03

Question: A company's performance-based restricted stock unit ("RSU") plan measures performance over a three-year period. After the end of the three-year performance period (2007-2009), the compensation committee will evaluate performance to determine the number of RSUs earned by the named executive officers. The named executive officers must remain employed by the company for a subsequent two-year service-based vesting period (2010-2011). Upon completion of service-based vesting, the company will pay the named executive officers the shares underlying the RSUs. In the Outstanding Equity Awards at Fiscal Year-End Table for fiscal year 2009, how should information about the shares underlying the RSUs be reported?

Answer: The number of shares reported should be based on the actual number of shares underlying the RSUs that were earned at the end of the three-year performance period. This is the case even if this number will be determined after the 2009 fiscal year end. The shares should not be reported in columns (i) and (j) because they are no longer subject to performance-based conditions. Instead, the shares should be reported in columns (g) and (h) because they are subject to service-based vesting. [May 29, 2009]

Question 122.04

Question: Should a company include in the Outstanding Equity Awards at Fiscal Year-End Table in-kind earnings on restricted stock awards that have earned share dividends or share dividend equivalents?

Answer: Yes. Outstanding in-kind earnings at the end of the fiscal year should be included in the table. However, in-kind earnings that vested during the fiscal year, or in-kind earnings that are already vested when the dividends are declared, instead should be reported in the Option Exercises and Stock Vested Table under Item 402(g) of Regulation S-K. [Jan. 24, 2007]

Question 122.05

Question: Instruction 3 to Item 402(f)(2) states that the issuer should report the market value of equity incentive plan awards using the closing market price at the end of the last completed fiscal year. The next sentence, however, states that the number of shares or units reported should be based on achieving threshold performance goals, "except that if the previous fiscal year's performance" has exceeded the threshold, disclosure is based on the next higher measure. Is the "previous fiscal year" the same year as the last completed fiscal year, or the year that preceded the last completed fiscal year?

Answer: For this purpose, the "previous fiscal year" means the same year as the "last completed fiscal year." [Aug. 8, 2007]

Section 123. Item 402(g)—Executive Compensation; Option Exercises and Stock Vested Table

Question 123.01

Question: When reporting on the exercise or settlement of a stock appreciation right in the Number of Shares Acquired on Exercise column (column (b)) of the Option Exercises and Stock Vested Table, should a company report the net number of shares received upon exercise, or the gross number of shares underlying the exercised stock appreciation right?

Answer: As would be the case with the cashless exercise of options, the total number of shares underlying the exercised stock appreciation right should be reported in column (b), rather than just the amount representing the increase of the stock price since the grant of the award. A footnote or narrative accompanying the table could explain and quantify the net number of shares received. [Jan. 24, 2007]

Section 124. Item 402(h)—Executive Compensation; Pension Benefits

Question 124.01

Question: Instruction 2 to Item 402(h)(2) indicates that the company must use the same assumptions used for financial reporting purposes under generally accepted accounting principles, except for the retirement age assumption, when computing the actuarial present value of a named executive officer's accumulated benefit under each pension plan. May the company deviate from the assumptions used for accounting purposes given the individual circumstances of the named executive officer or the plan?

Answer: No. [Jan. 24, 2007]

Question 124.02

Question: Instruction 2 to Item 402(h)(2) specifies that in calculating the actuarial present value of a named executive officer's accumulated pension benefits, the assumed retirement age is to be the normal retirement age as defined in the plan, or, if not defined, the earliest time at which the named executive officer may retire without any benefit reduction. While many plans have a specifically defined retirement age, some plans also have a provision that allows participants to retire at an earlier age without any benefit reduction. In this case, which age should the company use in making its calculation?

Answer: When a plan has a stated "normal" retirement age and also a younger age at which retirement benefits may be received without any reduction in benefits, the younger age should be used for determining pension benefits. The older age may be included as an additional column. [Jan. 24, 2007]

Question 124.03

Question: How do you measure the actuarial present value of the accumulated benefit of a pension plan in the situation where a particular benefit is earned at a specified age? For instance, if a named executive officer at age 40 is granted an award if he stays with his company until age 60, how should the company measure this benefit when the executive is age 50 and the normal retirement age under the plan is age 65?

Answer: The computation should be based on the accumulated benefit as of the pension measurement date, assuming that the named executive continues to live and will work at the company until retirement and thus will reach age 60 and receive the award. [Jan. 24, 2007]

Question 124.04

Question: Should assumptions regarding pre-retirement decrements be factored into the calculation of the actuarial present value of a named executive officer's accumulated benefit under a pension plan?

Answer: For purposes of calculating the actuarial present value for the Pension Benefits Table, the registrant should assume that each named executive officer will live to and retire at the plan's normal retirement age (or the earlier retirement age if the named executive officer may retire with unreduced benefits) and ignore for the purposes of the calculations what actuaries refer to as pre-retirement decrements. Therefore, the assumptions used for financial statement reporting purposes that should be used for calculating the actuarial present value are the discount rate, the lump sum interest rate (if applicable), post-retirement mortality, and payment distribution assumptions. Any contingent benefits arising upon death, early retirement or other termination of employment events should be disclosed in the post-employment narrative disclosure required under Item 402(j) of Regulation S-K. [Jan. 24, 2007]

Question 124.05

Question: A cash balance pension plan is a defined benefit plan in which the retiree's benefits may be determined by the amount represented in a hypothetical "account" for that participant. The "accrued benefit" is the amount credited to a participant's cash balance account as of any date, which the participant has the right to receive as a lump sum upon termination of employment. Can a company report, as the present value of the accumulated benefit for a cash balance plan, the "accrued benefit"?

Answer: No. The same as for other defined benefit plans, the amount disclosable in the Pension Benefits Table as the present value of accumulated benefit for a cash balance plan is the actuarial present value of

the named executive officer's accumulated benefit under the plan, computed as of the same plan measurement date used for purposes of the company's audited financial statements for the last completed fiscal year. [Aug. 8, 2007]

Section 125. Item 402(i)—Executive Compensation; Nonqualified Defined Contribution and Other Nonqualified Deferred Compensation Plans

Question 125.01

Question: The instruction to Item 402(i)(2) of Regulation S-K requires footnote disclosure quantifying the extent to which amounts reported in the table were reported as compensation in the Summary Compensation Table in the last completed fiscal year and in previous fiscal years. What should be noted by footnote when amounts were not previously reported (either because of the transition guidance in Securities Act Release No. 8732A or when a named executive officer appears in the table for the first time)?

Answer: The purpose of the instruction is to facilitate an understanding that non-qualified deferred compensation is reported elsewhere within the executive compensation disclosure over time. Amounts only need to be disclosed by footnote if they were actually previously reported in the Summary Compensation Table. [Jan. 24, 2007]

Question 125.02

Question: Item 402(i)(2)(iv) requires disclosure of the dollar amount of aggregate interest or other earnings accrued during the registrant's last fiscal year. What items, other than interest, are "earnings" for this purpose?

Answer: "Earnings" include dividends, stock price appreciation (or depreciation), and other similar items. The purpose of the table is to show changes in the aggregate account balance at fiscal year end for each named executive officer. Thus, "earnings" should encompass any increase or decrease in the account balance during the last completed fiscal year that is not attributable to contributions, withdrawals or distributions during the year. [Aug. 8, 2007]

Question 125.03

Question: Item 402(i)(1) calls for the Nonqualified Deferred Compensation Plan Table to provide the specified information "with respect to each defined contribution or other plan that provides for the

deferral of compensation on a basis that is not tax-qualified." Does this item mean that this information should be provided on a plan-by-plan basis?

Answer: Yes. [July 3, 2008]

Question 125.04

Question: Item 402(i)(2)(iii) calls for disclosure of aggregate company contributions to each nonqualified deferred compensation plan during the company's last fiscal year. For an excess plan related to a qualified plan, the contributions earned in 2008, which are reportable in the All Other Compensation column of the 2008 Summary Compensation Table, are not credited to the executive's account until January 2009. Are those contributions considered company contributions "during" 2008?

Answer: Yes. [July 3, 2008]

Question 125.05

Question: An equity award has vested, and the plan under which it was granted provides for the deferral of its receipt. Item 402(i)(1) calls for the Nonqualified Deferred Compensation Plan Table to provide the specified information "with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified." Does this item require the deferred receipt of the vested equity award to be included in the Nonqualified Deferred Compensation Plan Table?

Answer: Yes. This is the case whether the deferral is at the election of the named executive officer or pursuant to the terms of the equity award or plan. [Aug. 14, 2009]

Section 126. Item 402(j)—Executive Compensation; Potential Payments Upon Termination or Change-in-Control

Question 126.01

Question: In the event that options are accelerated upon a termination or change-in- control, for purposes of Item 402(j) disclosure should the value of the accelerated options be calculated using the "spread" between exercise and market price (as of fiscal year end) or the FAS 123R value recognized in connection with the acceleration?

Answer: For purposes of Item 402(j), the company should use the "spread" to calculate the value of the award. Since Item 402(j) requires quantification of what a named executive officer would have received

assuming the event took place on the last business day of the registrant's last completed fiscal year, disclosure of the "spread" at that date is consistent with Instruction 1 to 402(j), which prescribes using the closing market price per share of the registrant's securities on last business day of the registrant's last completed fiscal year. [Aug. 8, 2007]

Question 126.02

Question: A company's employee stock option plan provides for full and immediate vesting of all outstanding unvested awards upon a change-in-control of the company and this provision is included in each option recipient's award agreement (whether the recipient is an executive officer or an employee). Instruction 5 to Item 402(j) provides that a company need not provide information with respect to contracts, agreements, plans, or arrangements to the extent they are available generally to all salaried employees and do not discriminate in scope, terms, or operation, in favor of executive officers of the company. Can the company rely on Instruction 5 to omit disclosure of these awards when quantifying the estimated payments and benefits that would be provided to named executive officers upon a change-in-control?

Answer: No. The Instruction 5 standard that the "scope" of arrangements not discriminate in favor of executive officers would not be satisfied where the option awards to executives are in amounts greater than those provided to all salaried employees. [Aug. 8, 2007]

Section 127. Item 402(k)—Executive Compensation; Compensation of Directors

Question 127.01

Question: Is director compensation disclosure required under Item 402(k) of Regulation S-K for a person who served as a director for part of the last completed fiscal year, even if the person was no longer a director at the end of the last completed fiscal year?

Answer: Yes. If a person served as a director during any part of the last completed fiscal year the person must be included in the Director Compensation Table. [Jan. 24, 2007]

Question 127.02

Question: Is director compensation disclosure required under Item 402(k) of Regulation S-K for a person who served as a director during the last completed fiscal year but will not stand for re-election the next year?

Answer: Yes. If a person served as a director during any part of the last completed fiscal year the person must be included in the Director Compensation Table. [Jan. 24, 2007]

Question 127.03

Question: Does the Instruction to Item 402(k)(2)(iii) and (iv) require footnote disclosure, for each director, of the grant date fair value of each equity award outstanding or only of the awards granted during the company's last completed fiscal year?

Answer: Like the corresponding disclosure for named executive officers in the Grants of Plan-Based Awards Table, this Director Compensation Table requirement applies only to stock and option awards granted during the company's last completed fiscal year. [Aug. 8, 2007]

Question 127.04

Question: Does the Instruction to Item 402(k)(2)(iii) and (iv) requirement to provide footnote disclosure, for each director, of the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end include exercised options or vested stock awards?

Answer: No. Like the corresponding disclosure for named executive officers in the Outstanding Equity Awards at Fiscal Year-End Table, this Director Compensation Table requirement applies only to unexercised option awards (whether or not exercisable) and unvested stock awards (including unvested stock units). [Aug. 8, 2007]

Question 127.05

Question: Can a charitable matching program that is available to all employees be excluded from the disclosure required of "director legacy or charitable awards programs" under Item 402(k)(2)(vii)(G) based on the exclusion for "information regarding group life, health, hospitalization, or medical reimbursement plans

that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees" in the Item 402(a)(6)(ii) definition of "plan"?

Answer: No. A charitable matching program available to all employees must be included in the Director Compensation Table. The Director Compensation Table disclosure applies to "the annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs." Any company-sponsored charitable award program in which a director can participate would be a "similar charitable award program." [Aug. 8, 2007]

Section 128. Items 402(l) to (r)—Executive Compensation; Smaller Reporting Companies

None

Section 128A—Item 402(s) Narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management

Question 128A.01

Question: The requirement to provide narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management is in Item 402(s), rather than included as part of Compensation Discussion and Analysis in Item 402(b). Where should a registrant present Item 402(s) disclosure in its filings?

Answer: The new rules do not specify where the disclosure should be presented. However, to ease investor understanding, the staff recommends that Item 402(s) disclosure be presented together with the registrant's other Item 402 disclosure. The staff would have concerns if the Item 402(s) disclosure is difficult to locate or is presented in a fashion that obscures it. [Jan. 20, 2010]

Section 128B—Item 402(t) Golden Parachute Compensation

Question 128B.01

Question: Instruction 1 to Item 402(t)(2) provides that Item 402(t) disclosure will be required for those executive officers who were included in the most recently filed Summary Compensation Table. If a

company files its annual meeting proxy statement in March 2011 (including the 2010 Summary Compensation Table), hires a new principal executive officer in May 2011 and prepares a merger proxy in September 2011, may the company rely on this instruction to exclude the new principal executive officer from the merger proxy's say on golden parachute vote and Item 402(t) disclosure?

Answer: No. Instruction 1 to Item 402(t) specifies that Item 402(t) information must be provided for the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of Regulation S-K. Instruction 1 to Item 402(t)(2) applies only to those executive officers who are included in the Summary Compensation Table under Item 402(a)(3)(iii), because they are the three most highly compensated executive officers other than the principal executive officer and the principal financial officer. Under Items 402(a)(3)(i) and (ii), the principal executive officer and the principal financial officer are, per se, named executive officers, regardless of compensation level. Consequently, Instruction 1 to Item 402(t)(2) is not instructive as to whether the principal executive officer or principal financial officer is a named executive officer. This position also applies to Instruction 2 to Item 1011(b), which is the corresponding instruction in Regulation M-A. [Feb. 11, 2011]

Section 128C—Item 402(u) Pay Ratio Disclosure

Question 128C.01

Question: If a registrant does not use annual total compensation calculated using Item 402(c)(2)(x) of Regulation S-K ("annual total compensation") to identify the median employee, how should a registrant select another consistently applied compensation measure ("CACM") to identify the median employee?

Answer: Item 402(u) requires registrants to identify the median employee using annual total compensation or another CACM, such as information derived from the registrant's tax and/or payroll records. Because of concerns about the expected compliance costs if registrants had been required to calculate annual total compensation for all employees, the Commission permitted registrants to use a CACM other than annual total compensation as a reasonable alternative to identifying the median employee. Any measure that reasonably reflects the annual compensation of employees could serve as a CACM. The appropriateness of any measure will depend on the registrant's particular facts and circumstances. As the Commission stated in the interpretive release, "a registrant may use internal records that reasonably reflect annual compensation to identify the median employee, even if those records do not include every element of compensation, such as equity awards widely distributed to employees." [October 18, 2016; updated September 21, 2017]

Question 128C.02

Question: May a registrant exclusively use hourly or annual ***rates*** of pay as its CACM?

Answer: No. Although an hourly or annual pay rate may be a component used to determine an employee's overall compensation, the use of the pay rate alone generally is not an appropriate CACM to identify the median employee. Using an hourly rate without taking into account the number of hours actually worked would be similar to making a full-time equivalent adjustment for part-time employees, which is not permitted. Similarly, using an annual ***rate*** only, without regard to whether the employees worked the entire year and were actually paid that amount during the year, would be similar to annualizing pay, which the rule only permits in limited circumstances. [October 18, 2016]

Question 128C.03

Question: When a registrant uses a CACM to identify the median employee, what time period may it use? Must the period include the date on which the employee population is determined? Must it always be for an annual period? May it use the prior fiscal year?

Answer: To calculate the required pay ratio, a registrant must first select a date, which must be within three months of the end of its fiscal year, to determine the population of its employees from which to identify the median. Once the employee population is determined, the registrant must then identify the median employee from that population using either annual total compensation or another CACM. In applying the CACM to identify the median employee, a registrant is not required to use a period that includes the date on which the employee population is determined nor is it required to use a full annual period. A CACM may also consist of annual total compensation from the registrant's prior fiscal year so long as there has not been a change in the registrant's employee population or employee compensation arrangements that would result in a significant change of its pay distribution to its workforce. [October 18, 2016]

Question 128C.04

Question: When someone is furloughed on the date that the registrant uses to determine the population of its employees from which it is required to identify the median, must the registrant include the furloughed person in the employee population used to identify the median employee, and, if included in the population, how should the furloughed employee's compensation be calculated?

Answer: Item 402(u) does not define or even address furloughed employees. Because a furlough could have different meanings for different employers, registrants will need to determine whether furloughed

workers should be included as employees based on the facts and circumstances. If the furloughed worker is determined to be an employee of the registrant on the date the employee population is determined, his or her compensation should be determined by the same method as for a non-furloughed employee. Item 402(u)(3) of Regulation S-K identifies four classes of employees: full-time, part-time, temporary and seasonal. The registrant must determine in which class the employee belongs on that date and determine that individual's compensation using annual total compensation or another CACM in accordance with Instruction 5 of Item 402(u). That instruction states that a registrant may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the registrant for less than the full fiscal year or who were on an unpaid leave of absence during the period. In contrast, a registrant may not annualize the total compensation for employees in temporary or seasonal positions. A registrant may not make a full-time equivalent adjustment for any employee. [October 18, 2016]

Question 128C.05

[Withdrawn, September 21, 2017]

Question 128C.06

Question: Given the significant flexibility provided to registrants in Item 402(u) to identify the median employee, would the staff object if a registrant describes the pay ratio as an estimate?

Answer: No. As the Commission stated in the interpretive release, due to the use of estimates, assumptions, adjustments, and statistical sampling permitted by the rule, pay ratio disclosures may involve a degree of imprecision. Therefore, the staff would not object if a registrant states in any required disclosure that the pay ratio is a reasonable estimate calculated in a manner consistent with Item 402(u). [September 21, 2017]

Section 128D. Item 402(v)—Pay Versus Performance

Question 128D.01

Question: Is the information required pursuant to Item 402(v) of Regulation S-K required to be included in Form 10-K, given that Item 11 of Form 10-K indicates that the registrant is required to furnish the information required under Item 402 of Regulation S-K?

Answer: No. Item 402(v) of Regulation S-K provides that the information required thereunder must be provided in connection with any proxy or information statement for which the rules of the Commission

require executive compensation disclosure pursuant to Item 402 of Regulation S-K, and Instruction 3 to Item 402(v) specifies that the information provided under Item 402(v) of Regulation S-K will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference. [February 10, 2023]

Question 128D.02

Question: In calculating the equity award adjustments required by Item 402(v)(2)(iii)(C)(1), are equity awards granted to a first-time named executive officer ("NEO") in a year prior to (and not otherwise related to) their appointment as a NEO required to be included? For example, if a non-NEO employee is granted a stock option in year 1, and subsequently appointed as a NEO in year 2, must that NEOs "compensation actually paid" in year 2 reflect the adjustments required by subparagraphs (ii), (iv) or (v) (relating to prior fiscal year awards) of Item 402(v)(2)(iii)(C)(1) with respect to the stock option granted in year 1?

Answer: Yes. Although such awards may not be reported in the Summary Compensation Table required by Item 402(c) (see Question 119.01), the change in value of such awards during the executive's tenure as a NEO should be included in the calculation of compensation actually paid. [February 10, 2023]

Question 128D.03

Question: Item 402(v)(3) of Regulation S-K requires, for each amount disclosed in columns (c) and (e) of the Pay Versus Performance table, footnote disclosure of each of the amounts deducted and added pursuant to Item 402(v)(2)(iii). Is footnote disclosure required for each of the fiscal years presented in the table?

Answer: Item 402(v) footnote disclosure for years other than the most recent fiscal year included in the Pay Versus Performance table would be required only if it is material to an investor's understanding of the information reported in the Pay Versus Performance table for the most recent fiscal year, or of the relationship disclosure provided under Item 402(v)(5). However, in the registrant's first Pay Versus Performance table under the new rules, the registrant should provide footnote disclosure for each of the periods presented in the table. [February 10, 2023]

Question 128D.04

Question: Item 402(v)(3) of Regulation S-K requires, for each amount disclosed in columns (c) and (e) of the Pay Versus Performance table, footnote disclosure of each of the amounts deducted and added pursuant to Item 402(v)(2)(iii). May a registrant satisfy this requirement by providing the aggregate amount calculated

for pension value adjustments under Item 402(v)(2)(iii)(B)(1) and equity award adjustments under Item 402(v)(2)(iii)(C)(1)?

Answer: No. The registrant should provide footnote disclosure of each of the amounts deducted and added pursuant to Items 402(v)(2)(iii)(B)(1)(i) – (ii) and Items 402(v)(2)(iii)(C)(1)(i) – (vi). [February 10, 2023]

Question 128D.05

Question: For purposes of calculating peer group total shareholder return under Item 402(v)(2)(iv) of Regulation S-K, may a registrant use any compensation peer group that is disclosed in its Compensation Discussion & Analysis ("CD&A"), or is the registrant limited only to a peer group used in the CD&A for purposes of disclosing the registrant's compensation benchmarking practices under Item 402(b)(2)(xiv) of Regulation S-K?

Answer: The registrant may use a peer group that is disclosed in its CD&A as a peer group actually used by the registrant to help determine executive pay, even if such peer group is not used for "benchmarking" under Item 402(v)(2)(xiv) of Regulation S-K, as that term is explained in CDI 118.05. [February 10, 2023]

Question 128D.06

Question: What time period is a registrant required to present under Item 402(v) of Regulation S-K for its cumulative total shareholder return ("TSR") and peer group TSR when the registrant went public during the earliest year included in the "Pay Versus Performance" table?

Answer: Consistent with the calculation of TSR under Item 201(e) of Regulation S-K, if the class of securities was registered under Section 12 of the Exchange Act during the earliest year included in the "Pay Versus Performance" table, the "measurement point" for purposes of calculating TSR and peer group TSR should begin on such registration date. [February 10, 2023]

Question 128D.07

Question: In each of 2020 and 2021, a registrant provided the same list of companies as a peer group in its Compensation Discussion & Analysis ("CD&A") under Item 402(b) but provided a different list of companies in its CD&A for 2022. With respect to a registrant providing initial Pay versus Performance disclosure in its 2023 proxy statement for three years (as permitted by Instruction 1 to Item 402(v) of Regulation S-K), may

the registrant present the peer group total shareholder return for each of the three years using the 2022 peer group?

Answer: No. In this situation, the registrant should present the peer group total shareholder return for each year in the table using the peer group disclosed in its CD&A for such year. [February 10, 2023]

Question 128D.08

Question: Item 402(v)(2)(v) requires "net income" to be included in column (h) of the Pay Versus Performance table required by Item 402(v)(1). May a registrant use other net income amounts presented in the audited financial statements? For example, may a registrant that consolidates subsidiaries that are not wholly-owned use net income attributable to the controlling interest or registrant to satisfy this requirement? May a registrant with material discontinued operations during the fiscal year use income or loss from continuing operations to satisfy this requirement?

Answer: No. The registrant is required to provide in column (h) its net income or loss as required by Regulation S-X to be disclosed in the registrant's audited GAAP financial statements. [February 10, 2023]

Question 128D.09

Question: Under Item 402(v)(2)(vi), a registrant's Company-Selected Measure must be a financial performance measure that is not otherwise required to be disclosed in the Pay Versus Performance table required by Item 402(v)(1). The required financial performance measures include net income and the cumulative total shareholder return of the registrant. May a registrant provide a Company-Selected Measure that is derived from, a component of, or similar to these required measures, such as earnings per share, gross profit, income or loss from continuing operations, or relative total shareholder return?

Answer: Yes, the Company-Selected Measure can be any financial performance measure that differs from the financial performance measures otherwise required to be disclosed in the table that meets the definition of Company-Selected Measure in Item 402(v)(2)(vi) including a measure that is derived from, a component of, or similar to those required measures. Any such measures could also be included as financial performance measures in the Tabular List required by Item 402(v)(6) of Regulation S-K. [February 10, 2023]

Question 128D.10

Question: Would it be appropriate for a registrant to disclose its stock price as its Company-Selected Measure under Item 402(v)(2)(vi) if the registrant does not use any financial measures to otherwise link pay and financial performance, but the "compensation actually paid" reported in the Pay Versus Performance table required by Item 402(v)(1) includes the fair value of time-vested share-based awards, which value is largely tied to stock price?

Answer: No. While stock price is considered a "financial performance measure" for purposes of Item 402(v)(2)(vi), it should not be disclosed as the registrant's Company-Selected Measure if the registrant does not use it to link compensation actually paid to its named executive officers to company performance, even if it has a significant impact on the amounts reported in the Pay Versus Performance table. That is, if the only impact of stock price on a named executive officer's compensation is through changes in the value of share-based awards (which would be evident from the registrant's Summary Compensation Table disclosure), the registrant could not include its stock price as the Company-Selected measure. However, if, for example, the registrant's stock price is a market condition applicable to an incentive plan award, or is used to determine the size of a bonus pool, it may be included as a registrant's Company-Selected Measure. [February 10, 2023]

Question 128D.11

Question: Can the Company-Selected Measure included in the Pay Versus Performance table required by Item 402(v)(1) be measured over a multi-year period that includes the applicable fiscal year as the final year, similar to the use of multi-year measurement periods for calculating total shareholder return under Item 402(v)(2)(iv), as long as such performance period is used consistently for all years in the table?

Answer: No. Under Item 402(v)(2)(vi), the Company-Selected Measure is the measure which in the registrant's assessment represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance. [February 10, 2023]

Question 128D.12

Question: A registrant uses a "pool plan" to determine its annual bonus awards. Under the plan, a bonus pool is available for payout only upon achievement of a financial performance measure or the size of the

pool is determined based upon the extent such measure is achieved. Once that financial performance measure is achieved, the compensation committee may allocate bonus payouts to participants in its discretion, based on criteria independent of the achievement of any financial performance measure(s). If the registrant's executive compensation does not use any other financial performance measures, may the registrant omit the Tabular List required under Item 402(v)(6) of Regulation S-K and the Company-Selected Measure required under Item 402(v)(2)(vi) of Regulation S-K and the related relationship disclosure required under Item 402(v)(5)(iii) of Regulation S-K from its disclosure under Item 402(v)?

Answer: No. Because the size of the bonuses paid from the "bonus pool" is determined based wholly or in part on satisfying the financial performance measure, the registrant is using the financial performance measure to link the executive compensation actually paid to company performance within the meaning of Item 402(v)(2)(vi) and Item 402(v)(6). [February 10, 2023]

Question 128D.13

Question: If a registrant has multiple principal executive officers ("PEOs") in a fiscal year, Item 402(v) requires the registrant to provide separate columns for each PEO in the Pay Versus Performance table required by Item 402(v)(1). May the registrant aggregate (i.e., use the total sum of) the compensation of such PEOs in a given year for purposes of the narrative, graphical, or combined comparison between compensation actually paid and total shareholder return ("TSR"), net income, and the Company-Selected Measure provided under Item 402(v)(5)?

Answer: To the extent the presentation will not be misleading to investors, the staff will not object if a registrant aggregates the PEOs' compensation for purposes of the narrative, graphical, or combined comparison between compensation actually paid and TSR, net income, and the Company-Selected Measure. [February 10, 2023]

Section 129. Item 403—Security Ownership of Certain Beneficial Owners and Management

Question 129.01

Question: If a director's term will not continue beyond the annual meeting, must that director's equity security holdings be disclosed pursuant to Item 403(b)?

Answer: Item 403(b), by its terms, requires the disclosure of shareholdings of all directors named in the registrant's proxy statement, including directors' qualifying shares, even if the terms of some directors will not continue beyond the annual meeting. [Mar. 13, 2007]

Question 129.02

Question: Are phantom stock units held in a nonqualified deferred compensation plan reportable in the table required by Item 403(b)?

Answer: If the units could be settled in stock at the holder's election, so that if the holder were terminated currently he or she would get the underlying stock without the need to satisfy any additional vesting requirements, the registrant should report the total number of shares and percent of class beneficially owned, including the shares and percent of class beneficially owned due to the potential exercise of rights acquired under the phantom stock units. This is because the holder would have the right to acquire the underlying stock within 60 days (see Exchange Act Rule 13d-3). In addition to including the shares underlying the units in the total number of shares and percent of class beneficially owned, the phantom stock units also should be presented in a manner that distinguishes them from stock owned outright - e.g., pursuant to a clear and succinct footnote explanation. In contrast, if the phantom stock units can be settled in stock only at the company's discretion, they should not be reported in the total number of shares and percent of class beneficially owned, because the holder does not have a right to acquire the underlying stock within 60 days. Similarly, if the phantom stock units can be settled solely in cash, they should not be reported because the holder has no right to acquire the underlying stock. [Mar. 13, 2007]

Question 129.03

Question: If a named executive officer died since the beginning of the registrant's last fiscal year, must the deceased named executive officer be included in the Item 403(b) ownership table?

Answer: No. Although Item 403(b) requires disclosure for each of the named executive officers, as defined in Item 402(a)(3), a named executive officer who died since the beginning of the registrant's last fiscal year would not need to be included in the Item 403(b) ownership table. [Mar. 13, 2007]

Question 129.04

Question: Does the Item 403(b) requirement to indicate, by footnote or otherwise, the amount of shares that are pledged as security apply to a "negative pledge" of the company's stock by a director, nominee or named executive officer? (A "negative pledge" is a covenant granted by a borrower to a lender in which a promise is made not to convey the shares to a third party or to otherwise encumber them. Assuming a default by the borrower, the "negative pledge" would not transfer title by operation of law, but would instead require a foreclosure.)

Answer: Yes, because shares subject to a "negative pledge" may be subject to material risk or contingencies that do not apply to other shares beneficially owned by these persons, and such shares are pledged as security by operation of the negative pledge covenant. [Mar. 13, 2007]

Question 129.05

Question: Does the requirement in Item 403(c) to disclose "any arrangement . . . including any pledge . . . which may at a subsequent date result in a change in control of the registrant" apply to a "negative pledge" of the company's stock by a principal shareholder, as described in Question 129.04 above?

Answer: In the ordinary course, such an arrangement would not be disclosable under Item 403(c). However, the registrant should consider whether any circumstances, such as insolvency of the borrower or takeover activity with respect to the registrant, would render a change in control arising from such an arrangement foreseeable and, hence, disclosable under Item 403(c). [Mar. 13, 2007]

Section 130. Item 404—Transactions with Related Persons, Promoters and Certain Control Persons

Question 130.01

Question: If a company with a class of securities registered under the Exchange Act that is current in its Exchange Act reports files a Form S-1 that does not incorporate information by reference, must Item 404(a) disclosure be provided for fiscal years ending before December 15, 2006 if the company already provided Item 404 disclosure for these years under the pre-2006 Item 404 requirements in a Commission filing?

Answer: No. Companies do not have to "restate" Item 404(a) disclosure under the 2006 Item 404 requirements if it was previously reported under the pre-2006 requirements. [Mar. 13, 2007]

Question 130.02

Question: If a company files a registration statement for an initial public offering on Form S-1, or files a Form 10 to register a class of securities under the Exchange Act, must the company provide Item 404(a) disclosure pursuant to the 2006 Item 404 requirements for fiscal years ending before December 15, 2006?

Answer: Yes. Disclosure must be provided in these filings pursuant to the 2006 Item 404 requirements for the period specified in Instruction 1 to Item 404. [Mar. 13, 2007]

Question 130.03

Question: Item 404(a) requires, in pertinent part, disclosure of any transaction since the beginning of the registrant's last fiscal year between the registrant and any 5 percent shareholder where the amount involved exceeds $120,000 and the 5 percent shareholder has a direct or indirect material interest in the transaction. Is disclosure required of such a transaction that occurred since the beginning of the registrant's last fiscal year, but prior to the date the person became a 5 percent shareholder?

Answer: Disclosure is required if the transaction: (a) was continuing (such as through the ongoing receipt of payments) after the date the person became a 5 percent shareholder; or (b) resulted in the person becoming a 5 percent shareholder. If the transaction concluded before the person became a 5 percent shareholder, disclosure would not be required. [Mar. 13, 2007]

Question 130.04

Question: How does a company value unexercised, in-the-money stock options for purposes of determining whether the $120,000 threshold of Item 404(a) has been met?

Answer: The value of unexercised, in-the-money options should be determined for Item 404(a) purposes by determining the difference between the fair market value of the securities underlying the options and the exercise or base price of the options. Use of the Black-Scholes or binomial option pricing method also would be appropriate, provided that such use and the underlying assumptions are clearly disclosed and the value thus calculated is greater than zero and is otherwise reasonably related to the unrealized gain. [Mar. 13, 2007]

Question 130.05

Question: Is the condition that loans be made on substantially the same terms as for "comparable loans with persons not related to the lender" in Instruction 4.c.ii. to Item 404(a) satisfied if a bank makes loans available on the same terms to all of its employees, the vast majority of whom are not "related persons" as defined in Item 404, but the same terms are not offered to non-employees?

Answer: No. The term "persons not related to the lender" means persons with no relationship at all with the lender other than the lending relationship, such as regular customers. Employees are considered related to the lender by virtue of their employment relationship. [Mar. 13, 2007]

Question 130.06

Question: Must a company include disclosure regarding policies for the review, approval or ratification of related person transactions under Item 404(b)(1) even when the company does not have to report any transactions under Item 404(a)?

Answer: Yes. Item 404(b)(1) requires disclosure regarding policies for the review, approval or ratification of the types of related person transactions that would be disclosed under Item 404(a). [Mar. 13, 2007]

Question 130.07

Question: Is a smaller reporting company required to describe its policies and procedures for review, approval or ratification of transactions with related persons as specified by Item 404(b) of Regulation S-K if a schedule or form being used for a filing requires the company to furnish the information required by Item 404(b)?

Answer: No. Smaller reporting companies are not required to furnish Item 404(b) disclosure in these circumstances. Smaller reporting companies comply with the requirements of Item 404 by furnishing the information called for by Item 404(d) of Regulation S-K, the paragraph of Item 404 labeled "Smaller reporting companies," which does not require Item 404(b) disclosure. [July 3, 2008]

Section 131. Item 405—Compliance with Section 16(a) of the Exchange Act

None

Section 132. Item 406—Code of Ethics

None

Section 133. Item 407—Corporate Governance

Question 133.01

Question: If a non-listed issuer has independence definitions that are more stringent than those of a national securities exchange, may that issuer provide disclosure based on its own independence

definitions in accordance with Item 407(a)(1)(i), rather than provide the disclosure required by Item 407(a)(1)(ii)?

Answer: The non-listed issuer must provide the disclosure required by Item 407(a)(1)(ii). If the non-listed issuer believes that its own independence definitions are more stringent than those of the exchange identified in the required Item 407(a)(1)(ii) disclosure, it may, in addition, disclose that belief and provide the disclosures called for by Item 407(a)(1)(i) based on its own definitions, provided that it also complies with Item 407(a)(2) regarding disclosure of its own definitions of independence. [Mar. 13, 2007]

Question 133.02

Question: May a company indicate that the nominating committee's processes, policies, or minimum director nominee qualifications are included in the company's governance policies posted on the company's website, rather than including descriptions of the nominating committee's processes, policies, or minimum nominee qualifications in the proxy statement?

Answer: No. Item 407(c)(2) requires that the descriptions of the processes, policies, and nominee qualifications be included in the proxy statement, and no mechanism for reference to website posting of this information is provided for with respect to the Item 407(c)(2) disclosure. [Mar. 13, 2007]

Question 133.03

Question: Item 407(c)(2)(vii) requires the identification of the category of persons or entities that recommended each nominee for director, other than executive officers or nominees that are directors who are standing for re-election. If a director who did not stand for election by shareholders last year (but rather had been named as a director by the board during the year) is to be nominated for election by shareholders for the first time, is disclosure under Item 407(c)(2)(vii) required for that nominee?

Answer: Yes. The nominee for director would not be considered as standing for "re-election"; therefore, disclosure of the category of persons or entities that recommended the nominee is required by Item 407(c)(2)(vii). [Mar. 13, 2007]

Question 133.04

Question: Does Item 407(d)(3)(i)(D) require the audit committee to state whether it recommended inclusion of the audited financial statements in the Form 10-K for periods prior to the last completed fiscal year?

Answer: No. Item 407(d)(3)(i)(D) requires the audit committee to state whether it recommended inclusion of the audited financial statements in the Form 10-K. This statement need not cover financial statements for periods prior to the last completed fiscal year. [Mar. 13, 2007]

Question 133.05

Question: Should all compensation consultants engaged by the company that played a role in determining or recommending the amount or form of executive or director compensation be disclosed, or only those that consulted with the board of directors or the compensation committee?

Answer: All compensation consultants with any role in determining or recommending the amount or form of executive or director compensation must be disclosed under Item 407(e)(3)(iii). [Mar. 13, 2007]

Question 133.06

Question: Is the consent of a compensation consultant required under Securities Act Rule 436 if a compensation consultant is identified in accordance with Item 407(e)(3)(iii) in a filing that is incorporated by reference into a Securities Act registration statement?

Answer: No. Item 407(e)(3) requires a "narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation including … (iii) [a]ny role of compensation consultants in determining or recommending the amount or form of executive and director compensation." Identifying a compensation consultant and the role that the compensation consultant had in determining or recommending the amount or form of executive and director compensation does not result in the compensation consultant being deemed an "expert" for the purposes of the Securities Act, or mean that the compensation consultant has expertized any portion of the disclosure regarding executive and director compensation or compensation committee processes. Therefore, a consent would not be required. [Mar. 13, 2007]

Question 133.07

Question: Which names of directors must be included below the disclosure required in the Compensation Committee Report by Item 407(e)(5)?

Answer: Item 407(e)(5)(ii) requires that the name of each member of the compensation committee (or other board committee performing equivalent functions, or in the absence of any such committee, the entire board of directors) must appear below the required disclosure in the Compensation Committee Report. The members of the compensation committee (or the full board) who participated in the review, discussions and recommendation with respect to the Compensation Discussion and Analysis must be identified. New members who did not participate in such activities and departed members who are no longer directors need not be included. Members who resigned from the compensation committee during the course of the year, but remain directors of the issuer, may need to be named under the disclosure in the Compensation Committee Report pursuant to Item 407(e)(5)(ii). [Mar. 13, 2007]

Question 133.08 *[same as Question 118.06]*

Question: Regarding the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, on what basis should a company differentiate between the requirements of Item 407(e)(3)(iii) and Item 402(b)'s Compensation Discussion and Analysis disclosure?

Answer: The information regarding "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation" required by Item 407(e)(3)(iii) is to be provided as part of the company's Item 407(e)(3) compensation committee disclosure. See Release 33-8732A at Section V.D, Corporate Governance Disclosure. If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should discuss that role in the Compensation Discussion and Analysis section. [July 3, 2008]

Question 133.09

[Withdrawn, November 7, 2018]

Question 133.10

Question: Are the "additional services" provided by executive compensation consultants that are subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B) limited to services for non-executives?

Answer: No. [Jan. 20, 2010]

Question 133.11

Question: If a compensation consultant's role is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors and to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the consultant does not provide advice, then such services do not need to be disclosed under Item 407(e)(3)(iii), so long as these are the *only* services provided by the consultant. If the consultant's role extends beyond these two types of services, then disclosure of all of the consultant's services, including consulting on broad-based plans and providing non-customized information, will be required under Item 407(e)(3)(iii), subject to the disclosure threshold in this item. Are the fees for these two types of services considered to be for "determining or recommending the amount or form of executive and director compensation" or are such fees considered to be for "additional services"?

Answer: The answer depends on the facts and circumstances of each service. Fees for consulting on broad-based, non-discriminatory plans in which executive officers or directors participate and for providing information relating to executive and director compensation, such as survey data (in each case, that would otherwise qualify for the exclusion from disclosure if they are the only services provided), are considered to be fees for "determining or recommending the amount or form of executive and director compensation" for purposes of reporting fees under the rule. However, "consulting" on broad-based non-discriminatory plans does not also include any related services, such as benefits administration, human resources services, actuarial services and merger integration services, all of which are "additional services" subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B). In addition, if the non-customized information relates to matters other than executive and director compensation, then the fees for such information would be for "additional services." [Jan. 20, 2010]

Question 133.12

Question: Under Item 407(e)(3)(iii)(A)-(B), compensation consultant fees are required to be disclosed if the consultant provides advice on executive and director compensation and also provides "additional services" in an amount in excess of $120,000 during the last completed fiscal year. Is there any limitation on the types of services that are included as "additional services"? If, in addition to services, the consultant also sells products to the company, do the revenues generated from such sales also have to be disclosed?

Answer: There is no limitation on the types of services that are included in "additional services." If the consultant also sells products to the company, then the revenues generated from such sales should be included in "aggregate fees for any additional services provided by the compensation consultant or its affiliates." [Mar. 12, 2010]

Question 133.13

Question: In connection with preparing Item 401 disclosure relating to director qualifications, certain board members or nominees have provided for inclusion in the company's disclosure certain self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background. What disclosure of self-identified diversity characteristics is required under Item 401 or, with respect to nominees, under Item 407?

Answer: Item 401(e) requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director. Item 407(c)(2)(vi) requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees. To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

Section 134. Item 501—Forepart of Registration Statement and Outside Front Cover Page of Prospectus

Question 134.01

Question: Is Item 501(b)(8)(iii)'s requirement to disclose the presence or absence of arrangements to place funds in escrow applicable only when the best-efforts offering is conditioned on a minimum number of securities being sold?

Answer: Yes. [July 3, 2008]

Question 134.02

Question: When should the legend specified in Item 501(b)(10) be included on a prospectus?

Answer: The legend specified in Item 501(b)(10) should be printed on all preliminary prospectuses used before the effective date of the registration statement and, in accordance with Item 501(b)(11), in any prospectus contained in an effective registration statement omitting Rule 430A information that is used after effectiveness and prior to the pricing. [July 3, 2008]

Question 134.03

Question: How should the prospectus date and "Subject to Completion" legend required by Items 501(b)(9) and (10) of Regulation S-K be placed on the cover page of the prospectus?

Answer: The placement of the prospectus date and "Subject to Completion" legend on the prospectus cover page should be such that the information is presented in a clear, concise, and understandable manner. [July 3, 2008]

Question 134.04

Question: Instruction 1 to Item 501(b)(3) requires a preliminary prospectus for an initial public offering of securities, other than debt securities, to include a bona fide estimate of the range of the maximum offering price. Are there constraints on how wide the disclosed price range may be?

Answer: Yes. For initial public offerings, a price range in excess of $2, for offerings up to $10 per share, or in excess of 20% of the high end of the range, for offerings over $10 per share, will not be considered bona fide. For example, if the high end of the range is $20, then the price range may be as wide as $16 to $20. If an auction clearing price will be used as the primary factor in establishing the final offering price, a price range in excess of $4, for offerings up to $20 per share, or in excess of 20% of the high end of the range, for offerings over $20 per share, will not be considered bona fide. [May 16, 2013]

Section 135. Item 502—Inside Front and Outside Back Cover Pages of Prospectus

None

Section 136. Item 503—Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges

Question 136.01

Question: When is the ratio of earnings to fixed charges required in registration statements?

Answer: The ratio of earnings to fixed charges required by Item 503(d) is required for registration statements relating to both short and long term debt. However, if the ratio already is contained in a Form 10-K filed by the issuer, it can be incorporated by reference into the registration statement, provided the registration form permits such incorporation and the issuer is eligible to incorporate the information by reference. [July 3, 2008]

Section 137. Item 504—Use of Proceeds

None

Section 138. Item 505—Determination of Offering Price

None

Section 139. Item 506—Dilution

None

Section 140. Item 507—Selling Security Holders

Question 140.01

Question: Does the term "security holders" in Item 507 refer to beneficial holders?

Answer: Yes. The term "security holders," as used in Item 507, means beneficial holders, not nominee holders or other such holders of record. [July 3, 2008]

Question 140.02

Question: If a selling security holder is not a natural person, how does a registrant satisfy the obligation in Item 507 of Regulation S-K to disclose the nature of any position, office, or other material relationship that the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates?

Answer: In addition to disclosing any material relationships between the registrant and the selling security holder entity, the registrant must disclose the Item 507 information about any persons (entities or natural persons) who have control over the selling entity and who have had a material relationship with the registrant or any of its predecessors or affiliates within the past three years. In such case, the registrant must identify each such person and describe the nature of any relationships. [July 26, 2016]

Question 140.03

Question: How should registration statements for secondary offerings reflect the addition of selling shareholders or the substitution of new selling shareholders for already named selling shareholders?

Answer: If the company is eligible to rely on Rule 430B when the registration statement was originally filed, the company may add or substitute selling shareholders to a registration statement related to a specific transaction by prospectus supplement. The supplement is filed under Rule 424(b)(7).

If the company is not eligible to rely on Rule 430B when the registration statement is initially filed, it must file a post-effective amendment to add selling shareholders to a registration statement related to a specific transaction that was completed prior to the filing of the resale registration statement. A Rule 424(b) prospectus supplement may be used to post-effectively update the selling shareholder table to reflect a transfer from a previously identified selling shareholder. The new investor's shares must have been acquired or received from a selling shareholder previously named in the resale registration statement and the aggregate number of securities or dollar amount registered cannot change. [Apr. 24, 2009]

Section 141. Item 508—Plan of Distribution

Question 141.01

Question: Does Item 508(a) of Regulation S-K, which calls for disclosure of the identity of "principal underwriters" and their material relationships with the registrant, require disclosure as to each member of the selling group?

Answer: No. The disclosure is limited to those underwriters who are in privity of contract with the issuer with respect to the offering. [July 3, 2008]

Section 142. Item 509—Interests of Named Experts and Counsel

None

Section 143. Item 510—Disclosure of Commission Position on Indemnification for Securities Act Liabilities

None

Section 144. Item 511—Other Expenses of Issuance and Distribution

None

Section 145. Item 512—Undertakings

Question 145.01

Question: Must a registration statement on Form S-8, covered by Rule 415, include all applicable undertakings in Item 512 of Regulation S-K, including specifically those in Items 512(a), (b) and (h)?

Answer: Yes. However, the Form S-8 does not have to include the undertakings contained in Items 512(a)(5)(i), 512(a)(5)(ii), and 512(a)(6). [July 3, 2008]

Question 145.02

Question: Should a Form S-3 for an automatic shelf registration statement include the Item 512(h) undertaking or the indemnification disclosure required by Item 510 of Regulation S-K?

Answer: A Form S-3 for an automatic shelf registration statement, other than for a dividend reinvestment plan, should include the Item 512(h) undertaking rather than the indemnification disclosure required by Item 510, even though the registrant will not request acceleration of effectiveness. For automatic shelf registration statements relating to dividend reinvestment plans, the Item 510 disclosure should be included in lieu of the Item 512(h) undertaking. [July 3, 2008]

Question 145.03

Question: Item 512(a) of Regulation S-K, which is applicable to Rule 415 offerings, sets forth three circumstances requiring a post-effective amendment: Section 10(a)(3) updating, fundamental changes and material changes to the plan of distribution. Can a Rule 424(b) supplement be used for these purposes if the offering is registered on Form S-3 or Form F-3?

Answer: Yes. In a Form S-3 or Form F-3, issuers may satisfy the Item 512(a) undertaking by incorporating by reference from Exchange Act reports containing the required information or by filing a Rule 424(b) prospectus. [July 3, 2008]

Section 146. Item 601—Exhibits

Question 146.01

Question: Instruction 1 to Item 601(a) of Regulation S-K provides that when filing amendments to registration statements, a registrant need not include copies of exhibits which have been modified only to correct minor typographical errors or to put in pricing terms. May the incomplete exhibits already on file that do not reflect the pricing or typographical modifications noted above be incorporated by reference in any subsequent filing?

Answer: No. Instruction 1 also states that incomplete exhibits already on file that do not reflect these modifications may not be incorporated by reference in any subsequent filing. [July 3, 2008]

Question 146.02

Question: Under Item 601(a)(2), must the exhibit index for each year's Form 10-K list each of the exhibits required in the Form 10-K, even if some of the exhibits have previously been filed?

Answer: Yes. Of course, the previously filed exhibits may be incorporated by reference from the prior year's Form 10-K or another appropriate document. [July 3, 2008]

Question 146.03

Question: Must a Form 10-Q include the full exhibit index specified by Item 601(a)(2)?

Answer: No. The exhibit index in a Form 10-Q can be limited to those exhibits actually filed as part of, or incorporated by reference into, the Form 10-Q. [July 3, 2008]

Question 146.04

Question: If 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, should the registrant provide a written description of the contract similar to that required for oral contracts or arrangements pursuant to Item 601(b)(10)(iii)?

Answer: Yes. [July 3, 2008]

Question 146.05

Question: If a company enters into a new material contract, when should the contract be filed as an exhibit to a Form 10-Q or Form 10-K?

Answer: Instruction 2 to Item 601(b)(10) indicates that Exhibit 10 material contracts need to be filed with the periodic report covering the period during which the contract is executed or becomes effective. [July 3, 2008]

Question 146.06

Question: A company entered into a material agreement. However, the agreement was no longer material to the company by the end of the reporting period during which the contract was entered into. Must the agreement be filed as an exhibit to the periodic report?

Answer: Yes. Item 601(a)(4) provides that if a material contract "is executed or becomes effective during the reporting period," then it shall be filed as an exhibit. [July 3, 2008]

Question 146.07

Question: When may consents that are filed with an Exchange Act document be incorporated by reference into a Securities Act registration statement?

Answer: Item 601(b)(23)(ii) of Regulation S-K and Securities Act Rule 439(a) permit the incorporation by reference of consents filed with Exchange Act reports only into an already effective Securities Act registration statement. Consents may not be incorporated by reference into a registration statement that becomes effective after the filing of the consent with an Exchange Act document. [July 3, 2008]

Question 146.08

Question: An issuer is filing a special financial report on Form 10-K. Must the issuer file with the report the certification required by Item 601(b)(31)?

Answer: Yes. However, the issuer may omit paragraphs 4 and 5 of the certification because the report will contain only audited financial statements and not Item 307 or Item 308 of Regulation S-K disclosures. [July 3, 2008]

Question 146.09

Question: How should a smaller reporting company that relies on Item 402(m)(2) of Regulation S-K rather than Item 402(a)(3) to determine its "named executive officers" comply with Item 601(b)(10)(iii)(A) of Regulation S-K, which describes management contracts and compensatory plans, contracts and arrangements in which named executive officers participate that must be filed as exhibits to registration statements and reports?

Answer: Although Item 601(b)(10)(iii)(A) refers only to the Item 402(a)(2) definition of "named executive officer," if a smaller reporting company applied Item 402(m)(2) to determine the named executive officers in its registration statement or report and provides the disclosure permitted under Items 402(m) through 402(r) instead of the disclosure required under Items 402(a) through 402(k), the smaller reporting company need only file as exhibits those plans, contracts and arrangements in which named executive officers as determined under Item 402(m)(2) participate. [July 3, 2008]

Question 146.10

Question: Should a copy of the employee benefit plan under which the registered securities will be issued be filed as an exhibit to the registration statement on Form S-8?

Answer: Yes. [July 3, 2008]

Question 146.11

Question: Does a written arrangement whereby officers are provided company cars and other perquisites have to be filed as a "material contract"?

Answer: If the perquisite is separately identified and quantified in the proxy statement, then the written arrangement pursuant to which the officer receives the perquisite need not be filed as a "material contract." [July 3, 2008]

Question 146.12

Question: Even though interactive data exhibits are not required for initial public offerings, can a filer voluntarily submit an interactive data exhibit for an IPO on Form S-1?

Answer: Yes. If the filer chooses to submit an interactive data exhibit with an IPO on Form S-1, however, it must include the exhibit as soon as the registration statement contains a price or price range and subsequent amendments also must include the interactive data exhibit if the financial statements are changed. [May 29, 2009]

Question 146.13

Question: If a Form 8-K contains audited annual financial statements that are a revised version of financial statements previously filed with the Commission and have been revised to reflect the effects of certain subsequent events, such as discontinued operations, a change in reportable segments or a change in accounting principle, then under Item 601(b)(101)(i) of Regulation S-K, the filer must submit an interactive data file with the Form 8-K for those revised audited annual financial statements. Paragraph 6(a) of General Instruction C of Form 6-K contains a similar requirement. Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K permit a filer to voluntarily submit an interactive data file with a Form 8-K or 6 K, respectively, under specified conditions. Is a filer permitted to voluntarily submit an interactive data file with a Form 8-K or 6-K for other financial statements that may be included in the Form 8-K or 6-K, but for which an interactive data file is not required to be submitted? For example, if the Form 6-K contains interim financial statements other than pursuant to the nine-month updating requirement of Item 8.A.5 of Form 20-F?

Answer: Yes, if the filer otherwise complies with Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K, as applicable. [Sep. 14, 2009]

Question 146.14

Question: How does a filer determine when it is required to submit interactive data and to "detail tag" the financial statement footnotes and schedules in its interactive data?

Answer: A filer first assesses its filing status at the end of each fiscal year (by looking to its public float as of the end of the most recently completed second quarter) and then follows the phase-in provisions for that status in the filings it makes during the immediately following fiscal year.

For example, as of December 31, 2009, a calendar-year domestic filer is a large accelerated filer with a public float under $5 billion on the last business day of its second quarter ended June 30, 2009. For purposes of its 2010 filings, the filer will follow the submission requirements of Item 601(b)(101)(i)(B) of Regulation S-K and the detail tagging requirements of Rule 405(f)(2) of Regulation S-T. Accordingly, the filer is required to submit interactive data with its Forms 10-Q for the quarters ended June 30 and September 30, 2010 but need not detail tag the financial statement footnotes and schedules until its Form 10-Q for the quarter ended June 30, 2011, assuming that, as of December 31, 2010, it is a large accelerated filer with a public float under $5 billion on the last business day of its second quarter ended June 30, 2010.

If the filer, as of December 31, 2010, is no longer a large accelerated filer, for purposes of its 2011 filings, it will follow the submission requirements of Item 601(b)(101)(i)(C) of Regulation S-K and the detail tagging requirements of Rule 405(f)(3) of Regulation S-T. Accordingly, the filer would not be required to submit interactive data with its Form 10-K for the year ended December 31, 2010 or Form 10-Q for the quarter ended March 31, 2011, but it would be required to submit interactive data with its Forms 10-Q for the quarters ended June 30 and September 30, 2011. The filer would not be required to detail tag the financial statement footnotes and schedules until its Form 10-Q for the quarter ended June 30, 2012.

Conversely, if the filer, as of December 31, 2010, is a large accelerated filer with a public float *over* $5 billion on the last business day of its second quarter ended June 30, 2010, it will follow the submission requirements of Item 601(b)(101)(i)(A) of Regulation S-K and the detail tagging requirements of Rule 405(f)(1) of Regulation S-T. Accordingly, the filer would be required to submit interactive data with its Form 10-K for the year ended December 31, 2010 and Forms 10-Q for the quarters ended March 31, June 30 and September 30, 2011 and to detail tag the financial statement footnotes and schedules in the interactive data it submits with all of these forms, even though the filer is in its first year of interactive data reporting. A filer that is required to begin detail tagging within its first year of interactive data reporting may apply for a continuing hardship exemption pursuant to Rule 202 of Regulation S-T if it cannot detail tag without undue burden or expense. Such applications will be considered on a case-by-case basis. [Sept. 17, 2010]

Question 146.15

Question: In detail tagging financial statement footnotes and schedules in its interactive data file, a filer must, among other things, "block-text" tag "[e]ach significant accounting policy within the significant accounting policies footnote" under Rule 405(d)(2) of Regulation S-T. Must the filer also block-text tag significant accounting policies that are described in footnotes outside of a significant accounting policies footnote, either because the significant accounting policies footnote is not the only footnote that describes significant accounting policies or because there is no significant accounting policies footnote?

Answer: Yes. [Sept. 17, 2010]

Question 146.16

Question: In detail tagging financial statement footnotes and schedules in its interactive data file, a filer must also, among other things, tag separately "[e]ach amount (i.e., monetary value, percentage, and number)" within each footnote and financial statement schedule under Rules 405(d)(4)(i) and 405(e)(2)(i), respectively, of Regulation S-T. Are there any monetary values, percentages or numbers in footnotes and financial statement schedules that do not need to be tagged separately?

Answer: Yes. Examples of the types of monetary values, percentages and numbers that the staff has agreed are not within the purpose of the current interactive data requirements and, as a result, need not be tagged separately to comply with Rules 405(d)(4)(i) and 405(e)(2)(i) include:

- attributed increased sales to the $1.99 pancake special (the increased sales figure itself would need to be tagged);
- sales of 1% fat milk (the sales figure itself would need to be tagged);
- docket number 34-4589;
- 22nd district court;
- FASB Accounting Standards Codification Section 605-40-15;
- altitude of 27,000 feet;
- drilling 700 feet;
- open new stores no less than 2 miles from existing stores;
- founded a new subsidiary in 2009;
- each restaurant now offers at least 20 entrees under 500 calories; and
- number of the footnote itself. [Sept. 17, 2010]

Question 146.17

Question: A reporting issuer plans to rely on Securities Act Rule 430A to omit pricing information from its prospectus until after effectiveness of the registration statement. Unlike a non-reporting issuer, it is not required to disclose, pursuant to Item 501(b)(3) of Regulation S-K, a bona fide estimate of the range of the maximum offering price. As Item 601(b)(101)(i) provides that an interactive data file is "required for a registration statement under the Securities Act only if the registration statement contains a price or price range," must the issuer provide an interactive data file as an exhibit to the registration statement?

Answer: Yes. Item 601(b)(101)(i) does not provide an exemption from the interactive data requirements for reporting issuers that plan to rely on Rule 430A. In general, disclosure that satisfies the requirements in Item 501(b)(3) of Regulation S-K to state the "offering price" will be considered a "price or price range" for purposes of the interactive data rules, and thus trigger the requirement to submit interactive data. Accordingly, registration statements for shelf offerings, at-the-market offerings, exchange offers and secondary offerings must comply with the interactive data filing requirement even though they generally do not include a specific offering price at the time of effectiveness, unless the financial statements are incorporated by reference into the registration statement. [May 16, 2013]

Section 147. Item 701—Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

Question 147.01

Question: Does Item 701(f) require a registrant to report how it anticipates using the proceeds of an offering?

Answer: No. The reporting of use of proceeds requires the reporting of actual expenditures of the funds. Merely earmarking funds for future use should not be reported. [July 3, 2008]

Section 148. Item 702—Indemnification of Directors and Officers

None

Section 149. Item 703—Purchases of Equity Securities by the Issuer and Affiliated Purchasers

Question 149.01

Question: Item 703 requires tabular disclosure regarding any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer's equity securities that are registered by the issuer under Exchange Act Section 12. In connection with an employee benefit plan, an employee exercises an option using a process known as "net" option exercise. Is this transaction a repurchase by the issuer that the issuer must disclose under Item 703?

Answer: No. If, however, any shares are withheld in addition to the shares necessary to pay taxes or satisfy the exercise price, the company must disclose the repurchase of the additional shares under Item 703. Similarly, if the option exercise price is paid with company stock that the option holder otherwise owns, the company must report the repurchase of the stock under Item 703. [July 3, 2008]

Question 149.02

Question: Is disclosure required by Item 703 of Regulation S-K if a holder of restricted stock subject to vesting conditions forfeits the stock upon failure to satisfy vesting condition if he or she was granted them for no consideration?

Answer: No. [July 3, 2008]

Section 150. Items 801 and 802—Industry Guides

None

Section 151. Items 901 through 915—Roll-up Transactions

Question 151.01

Question: Are the roll-up rules in the Item 900 Series of Regulation S-K applicable to transactions exempt from registration under the Securities Act?

Answer: Pursuant to Item 901(c)(2)(ii), a "roll-up transaction" does not include transactions in which the securities to be issued or exchanged are not required to be, and are not, registered under the Securities Act. The roll-up rules are not applicable except from an anti-fraud perspective. See Release No. 33-6922 (Oct. 30, 1991). [July 3, 2008]

Section 152. Items 1000-1016—Regulation M-A

None

Section 153. Items 1100-1123—Regulation AB

None

Section 154. Items 1201-1208—Disclosure by Registrants Engaged in Oil and Gas Producing Activities

Question 154.01

Question: For a recently drilled well, where there is only a limited amount of production data and the production rate is expected to decline in a hyperbolic manner but the evidence to date indicates only an exponential decline, can you assume that the production rate will eventually begin to decline in a hyperbolic manner and claim that as proved reserves?

Answer: Yes, but only at such time when additional production data, such as from offset wells, exists demonstrating that there will be a change in the manner of decline from exponential to hyperbolic. [Oct. 26, 2009]

Question 154.02

Question: Should reserve quantities attributable to equity method investees be combined with reserve quantities attributable to consolidated entities for purposes of identifying countries containing 15% or more of the registrant's reserves under Item 1202 of Regulation S-K.

Answer: Yes. [Oct. 26, 2009]

Question 154.03

Question: If an issuer engages a third party to prepare or audit its reserve estimates, or to conduct a process review, of a limited amount of its reserves, does it need to file the third party's report under Item 1202(a)(8) of Regulation S-K?

Answer: If the issuer discloses in its filing that it engaged a third party to prepare or audit its reserve estimates, or to conduct a process review, of a limited amount of its reserves, then the issuer must file the third party's report. [Oct. 26, 2009]

Section 155. Subpart 1300 (Items 1300-1305)—Disclosure by Registrants Engaged in Mining Operations

Question 155.01

Question: For purposes of filing an Exchange Act annual report, when must a registrant engaged in mining operations comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K?

Answer: A registrant engaged in mining operations must comply with Subpart 1300's disclosure rules beginning with its Exchange Act annual report for the first fiscal year beginning on or after January 1, 2021. Until then, staff will not object if the company relies on the guidance provided in Guide 7 and by the Division of Corporation Finance staff for the purpose of filing an Exchange Act annual report. [April 29, 2020]

Question 155.02

Question: For purposes of filing a Securities Act registration statement, may the registrant satisfy its obligation to include mining property disclosure pursuant to Subpart 1300 of Regulation S-K by incorporating such disclosure by reference to its Exchange Act annual report for the appropriate period, even if such annual report was not required to comply with the new mining property disclosure rules in Subpart 1300 of Regulation S-K?

Answer: Yes. Until annual financial statements for the first fiscal year beginning on or after January 1, 2021 are required to be included in the registration statement, the staff will not object if a Securities Act registration statement incorporates by reference disclosure prepared in accordance with Guide 7 from an Exchange Act annual report for the appropriate period filed by a registrant engaged in mining operations if otherwise permitted to do so by the Commission's rules on incorporation by reference. *See, e.g.,* Securities Act Rule 411 (17 CFR 230.411), which provides that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. [April 29, 2020]

Question 155.03

Question: For purposes of filing an Exchange Act or Securities Act registration statement that does not incorporate by reference mining property disclosure from a registrant's Exchange Act annual report, when

must a registrant engaged in mining operations comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K?

Answer: An Exchange Act or Securities Act registration statement that does not incorporate by reference mining property disclosure from an Exchange Act annual report filed by a registrant engaged in mining operations must comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K on or after the first day of the first fiscal year beginning on or after January 1, 2021. For example, a calendar year-end company would be required to comply with the new mining property disclosure rules when filing an Exchange Act registration statement or a Securities Act registration statement that does not incorporate by reference disclosure from a registrant's Exchange Act annual report on or after January 1, 2021, while a registrant with a June 30th fiscal year-end would be required to comply with the new mining property disclosure rules when filing an Exchange Act registration statement or a Securities Act registration statement that does not incorporate by reference disclosure from a registrant's Exchange Act annual report on or after July 1, 2021. [April 29, 2020]

Interpretive Responses Regarding Particular Situations

Section 201. Regulation S-K — General Guidance

None

Section 202. Item 10 — General

202.01 In calculating an issuer's annual revenues to determine whether the issuer qualifies as a "smaller reporting company" as defined in Item 10(f)(1)(ii) of Regulation S-K, the issuer should include all annual revenues on a consolidated basis. As such, a holding company with no public float as of the last business day of its second fiscal quarter would qualify as a smaller reporting company only if it had less than $100 million in consolidated annual revenues in the most recently completed fiscal year for which audited financial statements are available (i.e., as of the fiscal year end preceding that second fiscal quarter). [November 7, 2018]

Section 203. Item 101 — Description of Business

203.01 In the narrative description of business, a registrant is required to specify "the number of persons employed by the registrant." In industries where registrants' general practice is to hire independent

contractors (sometimes called “contract employees” or “freelancers”) rather than “employees” to perform the work of the company, this disclosure should indicate the number of persons retained as independent contractors, as well as the number of regular employees. [July 3, 2008]

Section 204. Item 102—Description of Property

None

Section 205. Item 103—Legal Proceedings

205.01 The bank subsidiary of a one bank holding company initiates a lawsuit to collect a debt that exceeds 10% of the current assets of the bank and its holding company parent. Due to the unusual size of the debt, Item 103 requires disclosure of the lawsuit, even though the collection of debts is a normal incident of the bank’s business. [July 3, 2008]

205.02 Contrary to Release No. 33-5170 (July 19, 1971), it is no longer the practice of the Division to require registrants automatically to furnish, as supplemental information, either a description of civil rights litigation omitted from a newly-filed disclosure document or the reasons for the omission. [July 3, 2008]

Section 206. Item 201—Market Price of and Dividends on the Registrant’s Common Equity and Related Stockholder Matters

206.01 An equity compensation plan has received Bankruptcy Court approval, but not shareholder approval. Such a plan should be reported in the “not approved by security holders” category for the purposes of the Equity Compensation Plan Information table. A footnote may be added to disclose the Bankruptcy Court approval. [Mar. 13, 2007]

206.02 A compensation plan that permits awards to be settled in either cash or stock must be disclosed under Item 201(d). A plan that permits awards to be settled only in cash need not be disclosed under Item 201(d), because the purpose of Item 201(d) is to show dilution and cash-only plans are not dilutive. However, pursuant to Item 10 of Schedule 14A, if a company is seeking shareholder approval of any plan pursuant to which cash (or non-cash) compensation may be paid or distributed, the company is required to include in its proxy statement Item 201(d) disclosure with respect to its plans under which company equity securities are authorized for issuance. [Mar. 13, 2007]

206.03 Instruction 1 to Item 201(d) provides that no disclosure is required with respect to any employee benefit plan that is intended to meet the qualification requirements of Internal Revenue Code

Section 401(a). The same treatment would apply to a foreign employee benefit plan that is similar in substance to a Section 401(a) qualified plan in terms of being broad-based, compensatory and non-discriminatory. The same analysis applies for purposes of determining whether a plan must be filed as an exhibit pursuant to Item 601(b)(10)(iii)(B) of Regulation S-K, based on the exclusion provided by Item 601(b)(10)(iii)(C)(4) of Regulation S-K. [Mar. 13, 2007] *[same as C&DI 246.11]*

206.04 A company has stock appreciation rights that are exercisable for an amount of its common stock with a value equal to the increase in the fair market value of the common stock from the date the stock appreciation rights were granted. For these instruments, the company may use the fair market value of its common stock at fiscal year end for the purposes of reporting the number of shares to be issued upon exercise of the stock appreciation rights pursuant to Item 201(d)(2)(i). The company should also describe this assumption in a footnote to the Equity Compensation Plan Information table. [Mar. 13, 2007]

206.05 As a general rule, when a registrant changes the entities comprising a self-constructed index from the index used in the prior year, the reasons for the change must be explained and the total return must be compared with that of both the newly constructed index and the prior index. See Item 201(e)(4) and Release No. 34-32723 (Aug. 6, 1993) at IV.B.1. Two limited exceptions are set forth in Release No. 34-32723. Presentation on the old basis is not required: (i) if an entity is omitted solely because it is no longer in the line of business or industry; or (ii) the changes in the composition of the index are the result of application of pre-established objective criteria. In these two cases, a specific description of, and the bases for, the change must be disclosed, including the names of the companies deleted from the new index. [Mar. 13, 2007]

206.06 If a company becomes listed on an exchange that is different from the exchange it was listed on in the prior year, the change needs to be reflected in the performance graph if the company also changes its broad market indices as a result. For example, if a company that had been listed on the American Stock Exchange becomes listed on a different exchange and now plans to use the S&P 500 as its broad market index rather than the American Stock Exchange Composite Index, the company must provide a narrative explanation of the change in indices and compare returns based upon the old and new index on the graph. [Mar. 13, 2007]

206.07 In lieu of data for the last trading day prior to the end of a given fiscal year, a registrant may use data for the last day in that year made available by a third-party index provider. [Mar. 13, 2007]

206.08 A registrant created by a spin-off may begin its Performance Graph presentation on the effective date of the registration of its common stock under Section 12 of the Exchange Act. [Mar. 13, 2007]

206.09 A registrant that spins off a portion of its business should treat that transaction as a special dividend, make the appropriate adjustments to its shareholder return data, and disclose the occurrence of the transaction and resultant adjustments in its performance graph. [Mar. 13, 2007]

206.10 A merger or other acquisition involving the registrant, where the registrant remains in existence and its common stock remains outstanding, does not change the presentation of the registrant's performance graph. [Mar. 13, 2007]

206.11 A registrant with several distinct lines of business may construct a composite peer group index composed of entities from different industry groups, representing each of the registrant's lines of business (with the lines of business weighted by revenues or assets). The basis and amount of the weighting should be disclosed. Alternatively, the registrant may plot a separate peer index line for each of its lines of business. [Mar. 13, 2007]

206.12 If a company selects its own peer group and subsequently changes the group, an additional line showing the newly selected index should be added to the performance graph. [Mar. 13, 2007]

206.13 Companies that have a short fiscal year (for example, following an initial public offering, as the result of a spin-off, or after emerging from bankruptcy) must do a stock performance graph for the short year unless the short year is 30 days or less. [Mar. 13, 2007]

206.14 A company is preparing its first proxy statement following its emergence from bankruptcy. The new class of stock that was issued under the bankruptcy plan started trading in Mar. 2006. The measurement period for the graph is from Mar. 2006 through December 2006. However, the company may plot the graph on a monthly basis and can continue the graph beyond December 2006 as long as the December 2006 plotting point is clearly shown. The same principle applies to initial public offerings and spin-off situations with a short fiscal year. [Mar. 13, 2007]

206.15 A "published industry or line-of-business index" is one that is "accessible to the registrant's security holders" and, if prepared by the registrant or an affiliate, is also "widely recognized and used." Certain guidance concerning the use of trade group indices and of composite indices composed of more than one published index is given in Release No. 34-32723 (Aug. 6, 1993) at Section IV.B.2. Self-constructed indices (which term includes those prepared by a third party for the registrant and which are not "published") are not prohibited or discouraged by Item 201(e), they just must be weighted by market capitalization (as are most published indices) and include identification of the component issuers. See Instruction 5 to Item 201(e). [Mar. 13, 2007]

Section 207. Item 202—Description of Registrant's Securities

None

Section 208. Item 301—Selected Financial Data

None

Section 209. Item 302—Supplementary Financial Information

None

Section 210. Item 303—Management's Discussion and Analysis of Financial Condition and Results of Operations

None

Section 211. Item 304—Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

211.01 Item 304(a)(1)(iv) uses the phrase "the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal," whereas Item 304(a)(1) uses the phrase, "the registrant's two most recent fiscal years or any subsequent interim period." The Division staff has been asked whether the period referenced in Item 304(a)(1)(iv) is coterminous with the period referenced in Item 304(a)(1), or instead refers to a period of such duration preceding the accountant's resignation or dismissal, as the language would literally suggest. The Division staff takes the position that Item 304(a)(1)(iv) refers to the time period preceding the resignation or dismissal. [July 3, 2008]

Section 212. Item 305—Quantitative and Qualitative Disclosures About Market Risk

None

Section 213. Item 306 [***Reserved***]

None

Section 214. Item 307—Disclosure Controls and Procedures

214.01 As discussed in Question and Answer 3 (FAQ 3) of "Management's Report on Internal Control over Financial Reporting and Certification of Disclosure Controls in Exchange Act Periodic Reports — Frequently Asked Questions (revised Sept. 24, 2007)," issued by the Office of the Chief Accountant and the Division of Corporation Finance, under limited and specified circumstances, the staff will not object to management excluding an acquired business from management's assessment of the registrant's internal control over financial reporting. FAQ 3 relates only to omitting an assessment of an acquired business's internal control over financial reporting from the assessment of the registrant's internal control over financial reporting. By its terms, it does not address management's evaluation of disclosure controls and procedures. In light of the overlap between a company's disclosure controls and procedures and its internal control over financial reporting, in those situations in which a registrant may properly rely on FAQ 3, management's evaluation of disclosure controls and procedures may exclude an assessment of those disclosure controls and procedures of the acquired entity that are subsumed by internal control over financial reporting. In addition, consistent with FAQ 3, we would expect the registrant to indicate the significance of the acquired business to the registrant's consolidated financial statements. [July 3, 2008]

214.02 A royalty trust attempted to limit its conclusion regarding the effectiveness of its disclosure controls and procedures by stating that it relied on the working interest owners for disclosure in the document. Although a royalty trust can explain its reliance on working interest owners, it cannot thereby limit the scope of its conclusion. [July 3, 2008]

Section 215. Items 308 and 308T—Internal Control over Financial Reporting

215.01 Notwithstanding the introductory note to Item 308T, which states that it applies only to annual reports, any Form 10-Q that is required to include Item 308T disclosure pursuant to Item 4T of Form 10-Q must include the disclosure required by Item 308T(b). Quarterly reports need not include Item 308T(a) disclosure. [July 3, 2008]

215.02 The guidance provided in Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Frequently Asked Questions No. 3 does not relate to reverse acquisitions between an issuer and a private operating company, and the surviving issuer in a reverse acquisition is not a "newly public company" as that term is used in Exchange Act Release No. 54942 (Dec. 15, 2006). However, the staff acknowledges that it might not always be possible to conduct an assessment of the private operating company or accounting acquirer's internal control over financial reporting in the period between the consummation date of a reverse acquisition and the date of

management's assessment of internal control over financial reporting required by Item 308(a) of Regulation S-K. We also recognize that in many of these transactions, such as those in which the legal acquirer is a non-operating public shell company, the internal controls of the legal acquirer may no longer exist as of the assessment date or the assets, liabilities, and operations may be insignificant when compared to the consolidated entity. In the instances described above, the staff would not object if the surviving issuer were to exclude management's assessment of internal control over financial reporting in the Form 10-K covering the fiscal year in which the transaction was consummated. However, when the transaction is consummated shortly after year-end and surviving issuer is required to file an amended Form 8-K to update its financial statements for its most recent year-end, that filing is equivalent to the first annual report subsequent to the consummation of the transaction and future annual reports should not exclude management's report on internal control over financial reporting. Similar conclusions may also be reached in transactions involving special-purpose acquisition companies.

In lieu of management's report, the issuer should disclose why management's assessment has not been included in the report, specifically addressing the effect of the transaction on management's ability to conduct an assessment and the scope of the assessment if one were to be conducted.

In addition, the staff notes that a reverse acquisition between two operating companies may often present facts that would preclude an issuer from concluding that management's assessment may be excluded from the issuer's Form 10-K. Consequently, issuers in this situation are encouraged to discuss with the staff whether it is appropriate to exclude management's report on internal control over financial reporting.

Notwithstanding management's exclusion of its report, the issuer must include the internal control over financial reporting language in the introductory portion of paragraph 4 of the Section 302 certification, as well as paragraph 4(b), because the issuer is subject to Section 404(a) of the Sarbanes-Oxley Act. [Apr. 24, 2009]

Section 216. Item 401—Directors, Executive Officers, Promoters and Control Persons

216.01 Item 401(d) requires disclosure where a director's wife is the first cousin of an executive officer of the same company since the director and executive officer are related by marriage "not more remote than first cousin." [July 3, 2008]

216.02 A director of a public company is the general partner (and 50% owner) of limited partnership A which, in turn, is the general partner of limited partnership B, now in bankruptcy. Disclosure of the

bankruptcy is required in the public company's filings under Item 401(f)(l), because the director's general partnership in, and percentage ownership of, A are evidence of control of A, the general partner of B. [July 3, 2008]

216.03 The president of a company about to go public is convicted within the past year of misdemeanor criminal offenses, involving two small checks of $30 and $50, respectively. Counsel argues that disclosure is not required under Item 401(f) because of the exclusion of Item 401(f)(2) for "traffic violations and other minor offenses." The Division staff disagrees, taking the position that such disclosure is "material to an evaluation of the ability or integrity of any . . . executive officer of the registrant" (emphasis added). [July 3, 2008]

216.04 Item 401(f) would require the disclosure by an issuer of an order temporarily restraining another corporation from pursuing a tender offer where a director of the issuer, who is the president of the other corporation, has been specifically named in the order. [July 3, 2008]

Section 217. Item 402(a)—Executive Compensation; General

217.01 Whether a spin-off is treated like the IPO of a new "spun-off" registrant for purposes of Item 402 disclosure depends on the particular facts and circumstances. When determining whether disclosure of compensation before the spin-off is necessary, the "spun-off" registrant should consider whether it was a reporting company or a separate division before the spin-off, as well as its continuity of management. For example, if a parent company spun off a subsidiary which conducted one line of the parent company's business, and before and after the spin-off the executive officers of the subsidiary: (1) were the same; (2) provided the same type of services to the subsidiary; and (3) provided no services to the parent, historical compensation disclosure likely would be required. In contrast, if a parent company spun off a newly formed subsidiary consisting of portions of several different parts of the parent's business and having new management, it is more likely that the spin-off could be treated as the IPO of a new "spun-off" registrant. [Jan. 24, 2007]

217.02 Following a merger among operating companies, there is no concept of "successor" compensation. Therefore, the surviving company in the merger need not report on compensation paid by predecessor corporations that disappeared in the merger. Similarly, a parent corporation would not pick up compensation paid to an employee of its subsidiary prior to the time the subsidiary became a subsidiary (i.e., when it was a target). Moreover, income paid by such predecessor companies need not be counted in computing whether an individual is a named executive officer of the surviving corporation. A different result may apply, however, in situations involving an amalgamation or combination of companies. A

different result also applies where an operating company combines with a shell company, as defined in Securities Act Rule 405, as provided in Interpretive Response 217.12, below. [Aug. 8, 2007]

217.03 A subsidiary of a public company is going public. The officers of the subsidiary previously were officers of the parent, and in some cases all of the work that they did for the parent related to the subsidiary. The registration statement of the subsidiary would not be required to include compensation previously awarded by the parent corporation. The subsidiary would start reporting as of the IPO date. [Jan. 24, 2007]

217.04 Instruction 1 to Item 402(a)(3) states that the generally required compensation disclosure regarding highly compensated executive officers need not be set forth for an executive officer (other than the principal executive officer or principal financial officer) whose total compensation for the last fiscal year, reduced by the amount required to be disclosed by Item 402(c)(2)(viii), did not exceed $100,000. A reporting company that recently changed its fiscal year end from December 31st to June 30th is preparing its transition report for the 6-month period ended June 30th, having filed its Form 10-K for the fiscal year ended 6 months earlier on December 31st. The reporting company generally has a group of executive officers that earn in excess of $100,000 each year. In addition, during the 6-month period, the company made an acquisition that resulted in new executive officers that, on an annual basis, will earn more than $100,000. During the 6-month period, however, none of these existing or new officers earned more than $100,000 in total compensation. The company asked whether disclosure under Item 402 regarding these officers therefore would not be required in the report being prepared for the 6-month period. The Division staff advised that no disclosure need be provided with respect to executive officers that started employment with the company during the 6-month period and did not, during that period of employment, earn more than $100,000. With respect to executive officers that were employed by the company both during and before the 6-month period, however, Item 402 disclosure would have to be provided for those who earned in excess of $100,000 during the one-year period ending June 30th (the same ending date as the six-month period, but extending back over 6 months of the preceding fiscal year). [Jan. 24, 2007]

217.05 If a company changes its fiscal year, report compensation for the "stub period," and do not annualize or restate compensation. In addition, report compensation for the last three full fiscal years, in accordance with Item 402 of Regulation S-K. For example, in late 1997 a company changed its fiscal year end from June 30 to December 31. In the Summary Compensation Table, provide disclosure for each of the following four periods: July 1, 1997 to December 31, 1997; July 1, 1996 to June 30, 1997; July 1, 1995 to June 30, 1996; and July 1, 1994 to June 30, 1995. Continue providing such disclosure for four periods (three full fiscal years and the stub period) until there is disclosure for three full fiscal years after the stub period (December 31, 2000 in the example). If the company was not a reporting company and was to do an IPO in

February 1998, it would furnish disclosure for both of the following periods in the Summary Compensation Table: July 1, 1997 to December 31, 1997; and July 1, 1996 to June 30, 1997. [Jan. 24, 2007]

217.06 Compensation of both incoming and departing executives should not be annualized. [Jan. 24, 2007]

217.07 A caller asked whether an executive officer, other than the principal executive officer or principal financial officer, could be considered a "named executive officer" if the executive officer became a non-executive employee during the last completed fiscal year and did not depart from the registrant. If an executive officer becomes a non-executive employee of a registrant during the preceding fiscal year, consider the compensation the person received during the entire fiscal year for purposes of determining whether the person is a named executive officer for that fiscal year. If the person thus would qualify as a named executive officer, disclose all of the person's compensation for the full fiscal year, i.e. compensation for when the person was an executive officer and for when the person was a non-executive employee. [Jan. 24, 2007]

217.08 A parent and its subsidiary are both Exchange Act reporting companies. Some of the executive officers of the parent may receive a portion of their compensation from the subsidiary corporation. The Division staff advised that if an executive spends 100% (or near 100%) of the executive's time for the subsidiary but is paid by the parent, then the compensation paid by the parent has to be reported in the executive compensation table of the subsidiary. However, if an allocation of the monies paid by the parent would be necessary because the executive officer splits time between the parent and the subsidiary, the payments allocable to services to the parent need not be included in the subsidiary's executive compensation table. In addition, in the event that the subsidiary pays a management fee to the parent for use of the executives, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. Compensation paid by the subsidiary to executives of the parent company must be included in the parent's executive compensation table if such payments are paid directly by the subsidiary. If the payments are part of a management contract, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. [July 3, 2008] *[same as C&DI 230.11]*

217.09 Parent and its consolidated subsidiary are public companies. X was CEO of parent for all of 2007, and was CEO of subsidiary for part of 2007. Y was an executive officer of the parent for 2007, and was CFO of the subsidiary for 2007. Even though parent made all salary and bonus payments to X and to Y, pursuant to intercompany accounting: 60% of X's 2007 salary and bonus was allocated to the subsidiary; and 85% of Y's 2007 salary and bonus was allocated to the subsidiary. If 100% of Y's salary and bonus are included, Y

would be one of parent's three most highly compensated executive officers for 2007, but if the 85% allocable to subsidiary is excluded, Y would not be a parent NEO.

On these facts, the staff takes the view that 100% of the salary and bonus of each of X and Y should be counted in determining the parent's three most highly compensated executive officers and disclosed in the parent's Summary Compensation Table. Parent's NEO determinations and compensation disclosures should not be affected by whether its subsidiary is public or private. The staff also takes the view that subsidiary's Summary Compensation Table should report the respective percentages (60% for X and 85% for Y) of salary and bonus allocated to the subsidiary's books. Each Summary Compensation Table should include footnote disclosure noting the extent to which the same compensation is reported in both tables. [July 3, 2008]

217.10 A company's reimbursement to an officer of legal expenses with respect to a lawsuit in which the officer was named as a defendant, in her capacity as an officer, is not disclosable pursuant to Item 402 of Regulation S-K. [Jan. 24, 2007]

217.11 A caller inquired whether a filing that is made on January 2 must include compensation for the previous year ended December 31 when compensation information may not be incorporated by reference into the filing. The Division staff's position is that compensation must be included for such year because registrants should have those numbers available. However, if bonus or other amounts for the prior year have not yet been determined, this should be noted in a footnote together with disclosure regarding the date the bonus will be determined, any formula or criteria that will be used and any other pertinent information. When determined, the bonus or other amount must be disclosed in a filing under Item 5.02(f) of Form 8-K. Further, where the compensation disclosure depends upon assumptions used in the financial statements and those financial statements have not yet been audited, it is permissible for the company to note this fact in the compensation disclosure. [Jan. 24, 2007]

217.12 Shareholders of a shell company, as defined in Securities Act Rule 405, will vote on combining the shell company with an operating company. The combination will have the effect of making the operating company subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act. The disclosure document soliciting shareholder approval of the combination (whether a proxy statement, Form S-4, or Form F-4) needs to disclose: (1) Item 402 disclosure for the shell company before the combination; (2) Item 402 disclosure regarding the operating company that the operating company would be required to make if filing a 1934 Act registration statement, including Compensation Discussion and Analysis disclosure; and (3) Item 402 disclosure regarding each person who will serve as a director or an executive officer of the surviving company required by Item 18(a)(7)(ii) or 19(a)(7)(ii) of Form S-4, including Compensation

Discussion and Analysis disclosure that may emphasize new plans or policies (as provided in the Release 33-8732A text at n. 97). The Form 10-K of the combined entity for the fiscal year in which the combination occurs would provide Item 402 disclosure for the named executive officers and directors of the combined entity, complying with Item 402(a)(4) of Regulation S-K and Instruction 1 to Item 402(c) of Regulation S-K. [Aug. 8, 2007]

217.13 Options or other rights to purchase securities of the parent or a subsidiary of the registrant should be reported in the same manner as compensatory options to purchase registrant securities. [Jan. 24, 2007]

217.14 Item 402(c)(2)(ix)(G) requires Summary Compensation Table disclosure of the dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer. Item 402(j) requires description and quantification of the estimated payments and benefits that would be provided in each covered termination circumstance, including the proceeds of such life insurance payable upon a named executive officer's death. However, if an executive officer dies during the last completed fiscal year, the proceeds of a life insurance policy funded by the registrant and paid to the deceased executive officer's estate need not be taken into consideration in determining the compensation to be reported in the Summary Compensation Table, or in determining whether the executive is among the registrant's up to two additional individuals for whom disclosure would be required under Item 402(a)(3)(iv). [May 29, 2009]

Section 218. Item 402(b)—Executive Compensation; Compensation Discussion and Analysis

None

Section 219. Item 402(c)—Executive Compensation; Summary Compensation Table

219.01 A registrant need not report earnings on compensation that is deferred on a basis that is not tax qualified as above-market or preferential earnings within the meaning of Item 402(c)(2)(viii)(B) where the return on such earnings is calculated in the same manner and at the same rate as earnings on externally managed investments to employees participating in a tax-qualified plan providing for broad-based employee participation. See n. 43 to Release No. 34-31327 (Oct. 16, 1992); American Society of Corporate Secretaries (Jan. 6, 1993). For example, many issuers provide for deferral of salary or bonus amounts not covered by tax-qualified plans where the return on such amounts is the same as the return paid on amounts invested in an externally managed investment fund, such as an equity mutual fund, available to

all employees participating in a non-discriminatory, tax-qualified plan (e.g., 401(k) plan). Although this position generally will be available for so-called "excess benefit plans" (as defined for Rule 16b-3(b)(2) purposes), it may not be appropriately applied in the case of a pure "top-hat" plan or SERP (Supplemental Employee Retirement Plan) that bears no relationship to a tax-qualified plan of the issuer. When in doubt, consult the staff. For a deferred compensation plan with a cash-based, interest-only return, earnings would not be reportable as "above-market" unless the rate of interest exceeded 120% of the applicable federal long-term rate, as stated in Instruction 2 to Item 402(c)(2)(viii). Non-qualified deferred compensation plan earnings that are "above-market or preferential" are reportable even if the deferred compensation plan is unfunded and thus subject to risk of loss of principal. [Jan. 24, 2007]

219.02 Item 402(c)(2)(ix)(G) requires disclosure in the "All Other Compensation" column of the dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award. If a company credits stock dividends on unvested restricted stock units, but does not actually pay them out until the restricted stock units vest, those dividends should be reported in the year credited, rather than the year vested (and actually paid). [Aug. 8, 2007]

219.03 Item 402(c)(2)(viii) of Regulation S-K and Item 402(h)(2)(iii) and (iv) of Regulation S-K require amounts that are computed as of the same pension plan measurement date used for financial reporting purposes with respect to the company's audited financial statements for the last completed fiscal year. The rules reference the same pension plan measurement date as is used for financial statement reporting purposes so that the company would not have to use different assumptions when computing the present value for executive compensation disclosure and financial reporting purposes. The pension plan measurement date for most pension plans is September 30, which, in the case of calendar-year companies, does not correspond with the company's fiscal year. This means that the pension benefit information will be presented for a period that differs from the fiscal year period covered by the disclosure. Under recent changes in pension accounting standards, the pension measurement date will be changed to be the same as the end of the company's fiscal year. In the year in which companies change their pension measurement date, they may use an annualized approach for the disclosure of the change in the value of the accumulated pension benefits in the Summary Compensation Table (thereby adjusting the 15 month period to a 12 month period) when the transition in pension plan measurement date occurs, so long as the company includes disclosure explaining it has followed this approach. The actuarial present value computed on the new measurement date should be reported in the Pension Benefits Table. [Jan. 24, 2007]

219.04 If the actuarial present value of the accumulated pension benefit for a named executive officer on the pension measurement date of the prior fiscal year was $1,000,000, and the present value of the

accumulated pension benefit on the pension measurement date of the most recently completed fiscal year is $1,000,000, but during the most recently completed fiscal year the named executive officer earned and received an in-service distribution of $200,000, then $200,000 should be reported as the increase in pension value in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column (column (h)) of the Summary Compensation Table. [Jan. 24, 2007]

219.05 In reporting compensation for periods affected by COVID-19, questions may arise whether benefits provided to executive officers because of the COVID-19 pandemic constitute perquisites or personal benefits for purposes of the disclosure required by Item 402(c)(2)(ix)(A) and determining which executive officers are "named executive officers" under Item 402(a)(3)(iii) and (iv). The two-step analysis articulated by the Commission in Release 33-8732A continues to apply when determining whether an item provided because of the COVID-19 pandemic constitutes a perquisite or personal benefit.

- An item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties.
- Otherwise, an item that confers a direct or indirect benefit and 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 a perquisite or personal benefit unless it is generally available on a non-discriminatory basis to all employees.

Whether an item is "integrally and directly related to the performance of the executive's duties" depends on the particular facts. In some cases, an item considered a perquisite or personal benefit when provided in the past may not be considered as such when provided as a result of COVID-19. For example, enhanced technology needed to make the NEO's home his or her primary workplace upon imposition of local stay-at-home orders would generally not be a perquisite or personal benefit because of the integral and direct relationship to the performance of the executive's duties. On the other hand, items such as new health-related or personal transportation benefits provided to address new risks arising because of COVID-19, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits even if the company would not have provided the benefit but for the COVID-19 pandemic, unless they are generally available to all employees. [Sep. 21, 2020]

Section 220. Item 402(d)—Executive Compensation; Grants of Plan-Based Awards Table

220.01 Where a named executive officer exercises "reload" options and receives additional options upon such exercise, the registrant is required to report the additional options as an option grant in the Grants of

Plan-Based Awards Table. In the Summary Compensation Table, the registrant would include the grant date fair value of the additional options in the aggregate amount reported. [Mar. 1, 2010]

220.02 If plans do not include thresholds or maximums (or equivalent items), the registrant need not include arbitrary sample threshold and maximum amounts. For example, for a non-equity incentive plan that does not specify threshold or maximum payout amounts (for example, a plan in which each unit entitles the executive to $1.00 of payment for each $.01 increase in earnings per share during the performance period), threshold and maximum levels need not be shown as "0" and "N/A" because the payouts theoretically may range from nothing to infinity. Rather, an appropriate footnote should state that there are no thresholds or maximums (or equivalent items). [Jan. 24, 2007]

Section 221. Item 402(e)—Executive Compensation; Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table

None

Section 222. Item 402(f)—Executive Compensation; Outstanding Equity Awards at Fiscal Year-End Table

222.01 A company grants stock options that provide for immediate exercise in full as of the grant date, subject to the company's right to repurchase (at the exercise price) if the executive terminates employment with the company before a specified date. If the executive officer exercises the option before the repurchase restriction lapses, he or she effectively receives restricted stock subject to forfeiture until the repurchase restriction lapses. In this circumstance, the Outstanding Equity Awards table should show the shares received as stock awards that have not vested (columns (g) and (h)) until the repurchase restriction lapses, and the exercise should not be reported in the Option Exercises and Stock Vested Table. Instead, as the shares acquired by the executive officer cease to be subject to the repurchase provision, those shares should be reported as stock awards (columns (d) and (e)) in the Option Exercises and Stock Vested Table. If the executive officer exercises the option after the repurchase restriction lapses, it is reported in the same manner as a regular stock option. [Aug. 8, 2007]

Section 223. Item 402(g)—Executive Compensation; Option Exercises and Stock Vested Table

None

Section 224. Item 402(h)—Executive Compensation; Pension Benefits

None

Section 225. Item 402(i)—Executive Compensation; Nonqualified Defined Contribution and Other Nonqualified Deferred Compensation Plans

None

Section 226. Item 402(j)—Executive Compensation; Potential Payments Upon Termination or Change-in-Control

226.01 Item 402(j) requires quantitative disclosure of estimated payments and benefits, applying the assumptions that the triggering event took place on the last business day of the company's last completed fiscal year and the price per share of the company's securities is the closing market price as of that date. The date used for Item 402(j) quantification disclosure can affect the quantification of tax gross-ups with respect to the Internal Revenue Code Section 280G excise tax on excess parachute payments, such as by suggesting that benefits would be accelerated or by changing the five-year "base period" for computing the average annual taxable amount to which the parachute payment is compared. Where the last business day of the last completed fiscal year for a calendar year company is not December 31, the company may calculate the excise tax and related gross-up on the assumption that the change-in-control occurred on December 31, rather than the last business day of its last completed fiscal year, using the company stock price as of the last business day of its last completed fiscal year. The company may not substitute January 1 of the current year for the last business day of the company's last completed fiscal year, which would change the five-year "base period" to include the company's last completed fiscal year. [Aug. 8, 2007]

226.02 Following the end of the last completed fiscal year (2006), but before the proxy statement is filed, a named executive officer leaves the company (in early 2007). A Form 8-K disclosing this termination is filed, as required by Item 5.02(b) of Form 8-K. This named executive officer is not the principal executive officer or the principal financial officer and will not be a named executive officer for the current fiscal year (2007) based on Item 402(a)(3)(iv). The severance package that applied to the named executive officer's termination is not newly negotiated but instead has the same terms that otherwise would apply. In these limited circumstances, it is permissible to provide Item 402(j) disclosure for the named executive officer only for the triggering event that actually occurred (even though beyond the scope of Instruction 4 to Item 402(j) because it took place after the end of the last completed fiscal year), rather than providing the disclosure for several additional scenarios that no longer can occur. [Aug. 8, 2007]

226.03 A company will file a proxy statement for its regular annual meeting that also will solicit shareholder approval of a transaction in which the company would be acquired. The company has post-termination compensation arrangements that apply generally. Assuming that the acquisition is approved, however, all the named executive officers will be covered by termination agreements that that will be specific to the acquisition. The company cannot satisfy Item 402(j) by disclosing *only* the termination agreements that are specific to the pending acquisition for the following reasons: If the company's shareholders and/or any applicable regulatory authority do not approve the acquisition, the company's generally applicable post-termination arrangements will continue to apply. In addition, comparison of the acquisition-specific agreements with the generally applicable post-termination arrangements may be material. [Aug. 8, 2007]

Section 227. Item 402(k)—Executive Compensation; Compensation of Directors

227.01 Consulting arrangements between the registrant and a director are disclosable as director compensation under Item 402(k)(2)(vii), even where such arrangements cover services provided by the director to the issuer other than as director (e.g., as an economist). [Jan. 24, 2007]

227.02 A company has an executive officer (who is not a named executive officer) who is also a director. This executive officer does not receive any additional compensation for services provided as a director, and the conditions in Instruction 5.a.ii to Item 404(a) of Regulation S-K are satisfied. The compensation that this director receives for services as an executive officer does not need to be reported in the Director Compensation Table under Item 402(k) of Regulation S-K. The director may be omitted from the table, provided that footnote or narrative disclosure explains that the director is an executive officer, other than a named executive officer, who does not receive any additional compensation for services provided as a director. [Aug. 8, 2007]

227.03 A company has a director who also is an employee (but not an executive officer). Item 404(a) requires disclosure of the transaction pursuant to which the director is compensated for services provided as an employee. (Instruction 5 to Item 404(a) does not apply because the person is not an executive officer or does not have compensation reported for services as a director in the Director Compensation Table required by Item 402(k).) However, disclosure of this employee compensation transaction in the Director Compensation Table typically would result in a clearer, more concise presentation of the information. In this situation, if the employee compensation transaction is reported in the Director Compensation Table, it need not be repeated with the other Item 404(a) disclosure. Footnote or narrative disclosure to the Director Compensation Table should explain the allocation to services provided as an employee. [Aug. 8, 2007]

227.04 A current director previously was an employee of the company and receives a pension that was earned for services rendered as a company employee. If payment of the pension is not conditioned on his or her service as a director, the pension benefits do not need to be disclosed in the Director Compensation Table, whether or not the director receives compensation for services provided as a director. If service as a director generates new accruals to the pension, disclosure would be required in column (f) of the Director Compensation Table. [Aug. 8, 2007]

Section 228. Items 402(l) to (r)—Executive Compensation; Smaller Reporting Companies

None

Section 228A Item 402(s)—Narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management

None

Section 228B Item 402(t) — Golden Parachute Compensation

None

Section 228C Item 402(u)—Pay Ratio Disclosure

None

Section 228D Item 402(v)—Pay Versus Performance

228D.01 If a company changes its fiscal year during the time period covered by the Item 402(v) Pay Versus Performance table, provide the disclosure required by Item 402(v) for the "stub period," and do not annualize or restate compensation. For example, in late 2022, a company that is not a Smaller Reporting Company changed its fiscal year end from June 30 to December 31. In the registrant's first Pay Versus Performance table, provide disclosure for each of the following four periods: July 1, 2022 to December 31, 2022; July 1, 2021 to June 30, 2022; July 1, 2020 to June 30, 2021; and July 1, 2019 to June 30, 2020. Continue providing such disclosure including the stub period until there is disclosure for five full fiscal years after the stub period. This is consistent with the approach applicable to Summary Compensation Table disclosure for changes in fiscal year end. See Question 217.05. [February 10, 2023]

228D.02 A registrant emerged from bankruptcy, and a new class of stock that was issued under the bankruptcy plan started trading in September 2020. Registrant is preparing its first Pay Versus Performance disclosure for inclusion in its 2023 proxy statement. Consistent with Question 206.14, registrant will be presenting less than five full years of data in its stock performance graph under Item 201(e) using a measurement period for the graph from September 2020 through December 2022. For purposes of the requirement in Item 402(v)(2)(iv), the registrant may provide its cumulative total shareholder return and peer group cumulative total shareholder return in the same manner. The registrant should provide footnote disclosure to explain the approach and its effect on the Pay Versus Performance table. [February 10, 2023]

Section 229. Item 403—Security Ownership of Certain Beneficial Owners and Management

229.01 A limited partnership holds restricted voting securities in a company that plans to make a public offering of its securities. The limited partnership agreement requires the limited partnership to distribute the restricted securities to its general and limited partners within 60 days following such public offering. In light of the beneficial ownership provisions of Section 13(d), the beneficial ownership of shares to be held by the general and limited partners whose holdings will be in excess of 5 percent (or if such persons are directors or named executive officers) following such distribution should be included in the beneficial ownership table contained in the company's prospectus. [Mar. 13, 2007]

229.02 When asked whether an issuer would be required to consider Form 13-F reports of "investment discretion" in determining the identity of 5 percent beneficial owners under Item 403(a), the Division staff advised that the concept of "investment discretion" was not the same as "beneficial ownership," noting that investment managers subject to Form 13-F reporting would also have to file Schedule 13D or Schedule 13G if their interest in the securities constituted beneficial ownership. The Division staff emphasized the statement in Item 403 that the issuer could rely on Schedules 13D and 13G, but that such reliance could not be exclusive if it had knowledge (or has reason to believe that such information is not complete or accurate or that a statement or amendment that should have been filed was not) of any 5 percent beneficial owners who had not filed such reports. [Mar. 13, 2007]

229.03 The tax consequences under Section 409A of the Internal Revenue Code that apply if a "key employee" receives a stock distribution within six months after leaving the company do not affect the analysis as to whether the person has a right to acquire the stock within 60 days under Rule 13d-3(d)(1). This is because Section 409A results in a negative economic consequence rather than a prohibition upon receipt of the shares. [Mar. 13, 2007]

Section 230. Item 404—Transactions with Related Persons, Promoters and Certain Control Persons

230.01 The term "any immediate family member," as used in Item 404, is defined to include, among others, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and stepchildren and stepparents. For purposes of this item, such relatives are deemed to be: (1) only those persons who are currently related to the primary reporting person (e.g., a person who is divorced from a director's daughter would no longer be a son-in-law whose transactions must be reported); and (2) only those persons who are related by blood or step relationship to the primary reporting person or his spouse (e.g., the sister of a director's spouse is considered a sister-in-law for purposes of this item; the sister's husband, however, is not considered a brother-in-law for purposes of this item). [Mar. 13, 2007]

230.02 A is an officer and director of Y corporation, a wholly-owned subsidiary of registrant X. A is not an officer or director of X and holds only a nominal amount of X's shares. Y does business in an amount in excess of $120,000 with B, A's brother. That relationship need not be disclosed in X's reports under Item 404(a), since A is not a person described in Instruction 1 to Item 404(a). [Mar. 13, 2007]

230.03 A corporation enters into a lease in an amount substantially in excess of $120,000 with a lessor completely unaffiliated with the corporation. The lease, however, is negotiated through a related person specified in Instruction 1 to Item 404(a), who is paid a commission that is less than $120,000 by the lessor for those services. Since the amount of that person's commission is dependent upon the value of the lease, that person is considered to have an interest in the lease transaction, and the transaction, together with the commission, should be reported if the interest is determined to be a direct or indirect material interest. [Mar. 13, 2007]

230.04 Y, the President and a director of Z Corporation, a supplier of the registrant, is a member of the registrant's board of directors. The registrant solicited bids from Z and various other companies on a supply contract involving an amount in excess of the $120,000 threshold of Item 404(a). The registrant plans to award the contract to Z, even though this supplier did not submit the lowest bid in what purportedly was a competitive bidding contest. Under these circumstances, the registrant cannot avail itself of the exclusion in Instruction 7.a. to Item 404(a) for transactions where the rates or charges involved are determined by competitive bids. [Mar. 13, 2007]

230.05 Instruction 7.a. to Item 404(a) of Regulation S-K does not permit non-disclosure of an equipment lease transaction between a company owned by a director of a reporting company and the reporting company, simply because the reporting company solicited proposals from other unrelated persons and

selected the director's company only after an internal analysis of the available terms. The procedure used was not deemed to be a competitive bid because it did not involve the formal procedures normally associated with competitive bidding situations. There were no specifications established for the lease being bid upon and there was no indication of the basis upon which a bid was accepted. [Mar. 13, 2007]

230.06 A contract between a reporting company and the fund manager of the company's pension plan, who is also a more than 5 percent beneficial owner under Rule 13d-3, should be disclosed under Item 404(a) where the amount involved in the contract exceeds $120,000. [Mar. 13, 2007]

230.07 X is a director of the registrant. X's child is employed by the registrant and receives yearly compensation exceeding $120,000. The child's compensation is not reported under Item 402 since the child is not one of the registrant's named executive officers, nor is the child an officer or director. The child's compensation is required to be disclosed under Item 404(a) because the child is a related person and has a material interest in his or her yearly compensation. [Aug. 14, 2009]

230.08 An agreement by a company with a related person to repurchase company shares from the related person's estate upon death with the proceeds of a life insurance policy paid for by the company should be disclosed pursuant to Item 404(a). [Mar. 13, 2007]

230.09 In connection with a move of company headquarters, a company purchased and resold the homes owned by all affected employees. The price paid was determined by an independent appraiser. The company was advised that the Division staff will raise no objection if the company discloses under Item 404(a) only the general features of the program (including how the price was determined) and the total amount spent by the company on the program. [Mar. 13, 2007]

230.10 Item 404(a) requires disclosure of nonaccrual, past due, restructured and potential problem loans from banks, savings and loan associations or broker-dealers extending credit under Federal Reserve Regulation T. Instruction 4.c. of Item 404(a) refers to Industry Guide 3, Statistical Disclosure by Bank Holding Companies, for determining if loans are nonaccrual, past due, restructured or potential problem loans. Guide 3 requires disclosure of loans in these categories the end of each "reported period." In a proxy statement, therefore, where the reported period is the last fiscal year, only those loans which were in these categories at the end of the last fiscal year are required to be reported. [Mar. 13, 2007]

230.11 A parent and its subsidiary are both Exchange Act reporting companies. Some of the executive officers of the parent may receive a portion of their compensation from the subsidiary corporation. The Division staff advised that if an executive spends 100% (or near 100%) of the executive's time for the

subsidiary but is paid by the parent, then the compensation paid by the parent has to be reported in the executive compensation table of the subsidiary. However, if an allocation of the monies paid by the parent would be necessary because the executive officer splits time between the parent and the subsidiary, the payments allocable to services to the parent need not be included in the subsidiary's executive compensation table. In addition, in the event that the subsidiary pays a management fee to the parent for use of the executives, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. Compensation paid by the subsidiary to executives of the parent company must be included in the parent's executive compensation table if such payments are paid directly by the subsidiary. If the payments are part of a management contract, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. [July 3, 2008] *[same as C&DI 217.08]*

230.12 When the transaction under consideration is an employment arrangement, "the amount involved in the transaction" includes all compensation, not just the salary of the employee. [Aug. 8, 2007]

230.13 The compensation of an executive officer who is not a named executive officer is approved by the Board's compensation committee, and the executive officer's compensation is not disclosed under Item 404(a) pursuant to Instruction 5.a to Item 404(a). An immediate family member of this executive officer also is employed by the company. The immediate family member's compensation is disclosed under Item 404(a). In this regard, Instruction 5.a to Item 404(a) does not apply to the immediate family member because she was not an executive officer. [Aug. 8, 2007]

Section 231. Item 405—Compliance with Section 16(a) of the Exchange Act

231.01 Item 405 requires the company to disclose delinquent filings required by Section 16(a) of the Exchange Act during the most recent fiscal year or prior years. An insider's Form 5 with respect to 2007, due in February 2008, was filed late. If this late Form 5 is disclosed in the company's Form 10-K for the year ended December 31, 2007 and the proxy statement for the 2008 annual meeting, this Item 405 disclosure need not be repeated in the company's Form 10-K for the year ended December 31, 2008 and the proxy statement for the 2009 annual meeting. [July 3, 2008]

Section 232. Item 406—Code of Ethics

None

Section 233. Item 407—Corporate Governance

233.01 The "total number of meetings of the board of directors" specified as the basis for calculation of director's attendance in Item 407(b)(1) does not include board action by written consent. [Mar. 13, 2007]

233.02 If the only disclosure that a registrant is required to provide pursuant to Item 407(e)(4) is the identity of the members of the compensation committee, because the registrant has no transactions or relationships that trigger a disclosure obligation, the registrant may omit the Item 407(e)(4) caption ("Compensation Committee Interlocks and Insider Participation"). [Mar. 13, 2007]

233.03 The Compensation Committee Report must be separately captioned to identify it clearly as specified in Item 407(e)(5). Where there are multiple committees on the board with responsibility for different components of compensation (e.g., a stock option committee) and those committees review and discuss the Compensation Discussion and Analysis with management and, based on that review and discussion, recommend the inclusion of the Compensation Discussion and Analysis in the registrant's filings, each of these committees has a disclosure obligation under Item 407(e)(5). [Mar. 13, 2007]

Section 234. Item 501—Forepart of Registration Statement and Outside Front Cover Page of Prospectus

234.01 Counsel for a company named Geo-Search was informed that if the company registered under the Exchange Act, the Division staff would not suggest a name change solely because there is an existing registrant named Geosearch. [July 3, 2008]

234.02 The cover page of a prospectus relating to a secondary equity offering, registered for the shelf pursuant to Rule 415, need not contain the tabular or other presentation required by Item 501(b)(3) where the offering will not be underwritten, the securities will be offered at the market, and brokerage commissions will be negotiated at the time of the offering. The reason is that no meaningful figures as to "price to the public" and "underwriter's discounts" would be available. [July 3, 2008]

Section 235. Item 502—Inside Front and Outside Back Cover Pages of Prospectus

None

Section 236. Item 503—Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges

None

Section 237. Item 504—Use of Proceeds

None

Section 238. Item 505—Determination of Offering Price

None

Section 239. Item 506—Dilution

None

Section 240. Item 507—Selling Security Holders

240.01 Item 507 of Regulation S-K requires certain disclosure concerning each selling shareholder for whose account the securities being registered are to be offered. The Division staff has permitted this disclosure to be made on a group basis, as opposed to an individual basis, where the aggregate holding of the group is less than 1% of the class prior to the offering. Where the aggregate holding of the group is less than 1% of the class but for a few major shareholders, the disclosure for the members of the group other than the major shareholders also may be made on a group basis. [July 3, 2008]

240.02 Revised and moved to Question 140.03 [Aug. 14, 2009]

240.03 An investment advisor manages security holder accounts in the advisor's exclusive discretion. Although the account agreements give the advisor complete discretionary authority to vote and sell securities held in the managed accounts, the account holders may revoke this authority within 60 days. Both the investment advisor and the individual account holders must be identified under Item 507 of Regulation S-K because both are viewed as security holders given their shared power to vote and sell the securities held in the managed accounts. [July 3, 2008]

240.04

[Withdrawn, July 26, 2016]

Section 241. Item 508—Plan of Distribution

241.01 Stabilizing transactions begun on the day a registration statement became effective, but prior to the time of effectiveness (e.g., stabilizing began at 10:00 A.M. and the registration statement was declared effective at 2:00 P.M.), are not deemed to be "before the effective date of the registration statement" for purposes of Item 508(l)(2). Accordingly, the disclosure set forth in Item 508(l)(2) need not be made for such transactions. [July 3, 2008]

Section 242. Item 509—Interests of Named Experts and Counsel

242.01 A legal fee incurred in the preparation of a registration statement, even if in excess of $50,000, is not the kind of "substantial interest" in the registrant requiring disclosure under Item 509. Such fees, of course, are normally disclosed in Part II of the registration statement. [July 3, 2008]

242.02 Where a registrant's attorney has a 10% limited partnership interest in a limited partnership in which the registrant has a 50% limited partnership interest, the registrant's relationship to the partnership is sufficiently analogous to a parent-subsidiary relationship to warrant furnishing the disclosure required by Item 509 of Regulation S-K. [July 3, 2008]

242.03 A law firm is charging a flat fee to a registrant for services performed in connection with preparation of the registrant's Securities Act registration statement. However, as the company will declare bankruptcy if the offering is unsuccessful, the law firm is not certain it will be paid unless the offering is successful. The Division staff has taken the position that this is not a form of "contingent interest" the disclosure of which was contemplated by Item 509. [July 3, 2008]

Section 243. Item 510—Disclosure of Commission Position on Indemnification for Securities Act Liabilities

None

Section 244. Item 511—Other Expenses of Issuance and Distribution

None

Section 245. Item 512—Undertakings

245.01 A Rule 415 offering provides that purchasers within the first 60 days will receive a security with a higher yield than that to be received by subsequent purchasers. The registrant wished to extend the

preferential purchase period for an additional 30 days. The Division staff has taken the position that such an extension is a material change in the plan of distribution, which according to the Item 512(a)(iii) undertaking would require a post-effective amendment (or, for registration statements on Form S-3 or F-3, compliance with one of the methods in Item 512(a)(1)(B)). [July 3, 2008]

245.02 In an offering of limited partnership interests registered under the Securities Act, the undertaking required by Item 512(f) that the issuer provide certificates to the underwriter need not be included in the registration statement where no certificates will be used. [July 3, 2008]

Section 246. Item 601—Exhibits

246.01 Item 601(b)(3) requires that the entire amended text of the articles or by-laws be filed, along with the text of the new amendments. This could be accomplished by filing the entire amended text, redlined to show the new amendments. [July 3, 2008]

246.02 The exhibits to be filed with a Form 10-Q need only include instruments defining the rights of security holders with respect to long-term debt that was issued during the quarter covered by the form. Thus, documents defining the rights of commercial paper holders are not required to be filed as exhibits since commercial paper is not long-term indebtedness. [July 3, 2008]

246.03 Item 601 of Regulation S-K provides that a Form 10-Q must include, among other things, the exhibits required by Item 601(b)(4) (viz., instruments defining the rights of security holders, including indentures). However, an indenture need be filed with a Form 10-Q only in those situations where the Form 10-Q discloses a new debt issue in the quarter for which the report is filed. See Item 601(b)(4)(v). If the indenture has already been filed as part of a Securities Act registration statement, it can be incorporated by reference into the Form 10-Q pursuant to Exchange Act Rules 12b-23 and 12b-32. [July 3, 2008]

246.04 A registrant adopts a resolution providing confidential proxy voting rights for shareholders and asks whether the resolution should be filed as an "instrument defining the rights of security holders" pursuant to Regulation S-K Item 601(b)(4). The Division staff has advised that it should be so filed. [July 3, 2008]

246.05 Subparagraph (ii) of Item 601(b)(4) requires filing as an exhibit instruments defining the rights of holders of long-term debt. Subparagraph (iii)(A) excludes from this requirement such instruments where the amount of indebtedness authorized thereunder does not exceed 10% of the total assets of the company and there is filed an agreement to furnish a copy of the instrument to the Commission upon request. The confidential treatment procedures set forth in Rule 83(c) would apply to such documents furnished upon request. [July 3, 2008]

246.06 A company issues a series of notes, amounting to 5% of its total assets, in a private placement and pursuant to an indenture. Since the amount involved is less than 10 percent of its total assets, the indenture is not required to be filed pursuant to Item 601(b)(4) as an exhibit to the Form 10-K and, although not made in the ordinary course of business, the indenture would not be required to be filed as a material contract pursuant to Item 601(b)(10). [July 3, 2008]

246.07 In connection with a rights offering, a foreign company registering: (1) warrants evidencing the rights to purchase American depositary shares representing ordinary shares; (2) provisional allotment letters ("PALs") evidencing rights to purchase ordinary shares; and (3) ordinary shares underlying the warrants and PALs, must provide an opinion of counsel as to the legal issuance of the warrants and PALs and the fact that they are valid and binding obligations of the company, in addition to the opinion regarding the valid issuance and fully-paid and non-assessable nature of the ordinary shares. [July 3, 2008]

246.08 Two companies propose a joint Form S-4 registration statement for a stock-for-assets acquisition. Although the company to be acquired is not the registrant, it should file as exhibits any contracts or other documents that would be material to the new entity. [July 3, 2008]

246.09 Item 601(b)(10) requires the filing of material contracts. Pursuant to Item 601(b)(10)(ii)(C), a contract for the acquisition of real estate must be filed if consideration in excess of 15% of the fixed assets of the company is paid for the real estate. When computing the consideration paid for the real estate, an issuer should include the cash purchase price plus the amount of any indebtedness assumed as a result of the purchase. [July 3, 2008]

246.10 For purposes of Form 10-K, Item 601(b)(10)(iii) of Regulation S-K requiring disclosure of remunerative contracts would apply to a deferred compensation plan entered into during the fiscal year, even though the officer/director retired during that fiscal year and no longer was an officer/director. [July 3, 2008]

246.11 Instruction 1 to Item 201(d) provides that no disclosure is required with respect to any employee benefit plan that is intended to meet the qualification requirements of Internal Revenue Code Section 401(a). The same treatment would apply to a foreign employee benefit plan that is similar in substance to a Section 401(a) qualified plan in terms of being broad-based, compensatory and non-discriminatory. The same analysis applies for purposes of determining whether a plan must be filed as an exhibit pursuant to Item 601(b)(10)(iii)(B) of Regulation S-K, based on the exclusion provided by Item 601(b)(10)(iii)(C)(4) of Regulation S-K. [Mar. 13, 2007] *[same as C&DI 206.03]*

246.12 A remuneration plan applicable to 300 key executives in a company with 18,000 employees would not be considered a plan available to employees generally. Therefore, it would not fall within the

exemption provided by Item 601(b)(10)(iii)(C)(4) and would have to be filed as an exhibit. In this regard, if a compensatory plan, contract or arrangement is available generally to all officers and directors but is not available to all employees of the company, the plan, contract or arrangement does not fall within this exemption. [July 3, 2008]

246.13 A company files its first Form 10-K containing management's report on internal control over financial reporting. The company inadvertently omits the internal control over financial reporting language from the introductory portion of paragraph 4 of the Section 302 certification, as well as paragraph 4(b). Because companies were permitted to omit these portions of the certification during the transition period to Section 404(a) compliance, if this error occurs in the company's first Form 10-K containing management's report, the staff will permit the company to file a Form 10-K/A that contains only the cover page, explanatory note, signature page and paragraphs 1, 2, 4 and 5 of the Section 302 certification. However, if the same company were to make this mistake in the following year, it would be required to file a Form 10-K/A containing full Item 9A disclosure as well as the company's financial statements. [July 3, 2008]

246.14 The following errors in a certification required by Item 601(b)(31) are examples of errors that will require the company to file a corrected certification that is accompanied by the entire periodic report: (1) the company identifies the wrong periodic report in paragraph 1 of the certification; (2) the certification omits a conformed signature above the signature line at the end of the certification; (3) the certification fails to include a date; and (4) the individuals who sign the certification are neither the company's principal executive officer nor the principal financial officer, or persons performing equivalent functions. [July 3, 2008]

246.15 Consistent with the requirements of Item 601(b)(10)(iii), a company files its nonqualified deferred compensation plan as an exhibit. The company subsequently establishes a rabbi trust under the nonqualified deferred compensation plan. Establishment of the rabbi trust would trigger filing under Item 601(b)(10)(iii) only if it materially modifies participants' rights under the previously filed nonqualified deferred compensation plan. [May 29, 2009]

Section 247. Item 701—Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

247.01 If the only warrants in an offering were issued to underwriters as compensation, and if the proceeds from the exercise of the warrants will be de minimis with respect to the overall proceeds, the Division staff may deem the obligation to report use of proceeds from an initial offering to be completed. Ordinarily, however, when purchase warrants remain outstanding, an offering is ongoing for purposes of reporting use of proceeds. [July 3, 2008]

247.02 Use of proceeds disclosure is required in the issuer's first periodic report filed following the effective date of its first registration statement filed under the Securities Act, even if the registration statement covered a best-efforts offering that has not closed on the due date of that periodic report. [July 3, 2008]

247.03 If a registrant's first filing under the Securities Act is a secondary offering, no disclosure need be provided in response to Item 701(f) since there is no use of proceeds. However, such a secondary offering would not constitute "the first registration statement filed under the Act by an issuer" for purposes of Rule 463. Accordingly, the first primary Securities Act offering by that registrant would necessitate disclosure under Item 701(f). [July 3, 2008]

247.04 On the same registration statement, in its initial public offering, a company registered X shares for sale to the public and Y shares for issuance pursuant to employee benefit plans. The Division staff agreed with the company's analysis that it need report the use of proceeds as required by Rule 463 and Item 701(f) of Regulation S-K only for the shares sold to the public, and could omit the information relating to the employee benefit plan shares in reliance on Rule 463(d)(3). The Division staff's response is premised on the representation that the employee benefit plan shares were originally registered for that purpose; had it been a matter of converting shares originally registered for sale to the public that remained unsold to the employee benefit purpose, this position would not apply. [July 3, 2008]

Section 248. Item 702—Indemnification of Directors and Officers

None

Section 249. Item 703—Purchases of Equity Securities by the Issuer and Affiliated Purchasers

249.01 If a company receives its shares back from a vendor in settlement of litigation, these shares must be disclosed under Item 703 of Regulation S-K. [July 3, 2008]

249.02 An investor purchased stock from an issuer in a private placement. The investor paid the consideration with a promissory note, which was secured by the stock. When it became apparent that the investor could not repay the note, the parties agreed that the investor would forfeit the stock in exchange for cancellation of the note. The forfeiture of the pledged stock to the issuer is an issuer repurchase that requires Item 703 of Regulation S-K disclosure. [July 3, 2008]

Section 250. Items 801 and 802—Industry Guides

None

Section 251. Items 901 through 915—Roll-up Transactions

None

Exchange Act Form 8-K

Last Update: March 22, 2022

These interpretations replace the Form 8-K interpretations in the July 1997 Manual of Publicly Available Telephone Interpretations, the June 13, 2003 Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures and the November 22, 2004 Form 8-K Frequently Asked Questions. Some of the interpretations included here were originally published in the sources noted above, and have been revised in some cases. The bracketed date following each interpretation is the latest date of publication or revision.

Questions and Answers of General Applicability

Section 101. Form 8-K—General Guidance

Question 101.01

Question: If a triggering event specified in one of the items of Form 8-K occurs within four business days before a registrant's filing of a periodic report, may the registrant disclose the event in its periodic report rather than a separate Form 8-K? If so, under what item of the periodic report should the event be disclosed? Item 5 of Part II of Form 10-Q and Item 9B of Form 10-K appear to be limited to events that were required to be disclosed during the period covered by those reports.

Answer: Yes, a triggering event occurring within four business days before the registrant's filing of a periodic report may be disclosed in that periodic report, except for filings required to be made under Item 4.01 of Form 8-K, Changes in Registrant's Certifying Accountant and Item 4.02 of Form 8-K, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review. The registrant may disclose triggering events, other than Items 4.01 and 4.02 events, on the periodic report under Item 5 of Part II of Form 10-Q or Item 9B of Form 10-K, as applicable. All Item 4.01 and Item 4.02 events must be reported on Form 8-K. Of course, amendments to previously filed Forms 8-K must be filed on a Form 8-K/A. See also Exchange Act Form 8-K Question 106.04 regarding the ability to rely on Item 2.02 of Form 8-K. [April 2, 2008]

Question 101.02

Question: Some items of Form 8-K are triggered by the specified event occurring in relation to the "registrant" (such as Items 1.01, 1.02, 2.03, 2.04). Other items of Form 8-K refer also to majority-owned subsidiaries (such as Item 2.01). Should registrants interpret all Form 8-K Items as applying the triggering event to the registrant and subsidiaries, other than items that obviously apply only at the registrant level, such as changes in directors and principal officers?

Answer: Yes. Triggering events apply to registrants and subsidiaries. For example, entry by a subsidiary into a non-ordinary course definitive agreement that is material to the registrant is reportable under Item 1.01 and termination of such an agreement is reportable under Item 1.02. Similarly, Item 2.03 disclosure is triggered by definitive obligations or off-balance sheet arrangements of the registrant and/or its subsidiaries that are material to the registrant. [April 2, 2008]

Question 101.03

Question: General Instruction E to Form 8-K requires that a copy of the report be filed with each exchange where the registrant's securities are listed. Does the term "exchange" as used in the instruction refer only to domestic exchanges?

Answer: Yes. The term "exchange" as used in the instruction refers only to domestic exchanges and, accordingly, Form 8-K reports need be furnished only to domestic exchanges. [April 2, 2008]

Question 101.04

Question: If a Form 8-K contains audited annual financial statements that are a revised version of financial statements previously filed with the Commission and have been revised to reflect the effects of certain subsequent events, such as discontinued operations, a change in reportable segments or a change in accounting principle, then under Item 601(b)(101)(i) of Regulation S-K, the filer must submit an interactive data file with the Form 8-K for those revised audited annual financial statements. Paragraph 6(a) of General Instruction C of Form 6-K contains a similar requirement. Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K permit a filer to voluntarily submit an interactive data file with a Form 8-K or 6 K, respectively, under specified conditions. Is a filer permitted to voluntarily submit an interactive data file with a Form 8-K or 6-K for other financial statements that may be included in the Form 8-K or 6-K, but for which an interactive data file is not required to be submitted? For example,

if the Form 6-K contains interim financial statements other than pursuant to the nine-month updating requirement of Item 8.A.5 of Form 20-F?

Answer: Yes, if the filer otherwise complies with Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K, as applicable. [Sep. 14, 2009]

Question 101.05

Question: If a filer is required to submit an interactive data file with a form other than a Form 8-K or 6-K, may the filer satisfy this requirement by submitting the interactive data file with a Form 8-K or 6-K?

Answer: No. If a filer does not submit an interactive data file with a form as required, the filer must amend the form to include the interactive data file. [Sep. 14, 2009]

Section 102. Item 1.01 Entry into a Material Definitive Agreement

Question 102.01

Question: If an agreement that was not material at the time the registrant entered into it becomes material at a later date, must the registrant file an Item 1.01 Form 8-K at the time the agreement becomes material?

Answer: No. If an agreement becomes material to the registrant but was not material to the registrant when it entered into, or amended, the agreement, the registrant need not file a Form 8-K under Item 1.01. In any event, the registrant must file the agreement as an exhibit to the periodic report relating to the reporting period in which the agreement became material if, at any time during that period, the agreement was material to the registrant. In this regard, the registrant would apply the requirements of Item 601 of Regulation S-K to determine if the agreement must be filed with the periodic report. [April 2, 2008]

Question 102.02

Question: Is a placement agency or underwriting agreement a material definitive agreement for purposes of Item 1.01? If so, does the requirement to disclose the parties to the agreement require disclosure of the name of the placement agent or underwriter? Would such disclosure render the safe harbor from the definition of an "offer" included in Securities Act Rule 135c not available for the Form 8-K filing?

Answer: The registrant must determine whether specific agreements are material using established standards of materiality and with reference to Instruction 1 to Item 1.01. If the registrant determines that such an agreement requires filing under Item 1.01, it may, as under Item 3.02, omit the identity of the underwriters from the disclosure in the Form 8-K to remain within the safe harbor of Rule 135c. [April 2, 2008]

Question 102.03

Question: Must a material definitive agreement be summarized in the body of the Form 8-K if it is filed as an exhibit to the Form 8-K?

Answer: Yes. Item 1.01 requires "a brief description of the material terms and conditions of the agreement or amendment that are material to the registrant." Therefore, incorporation by reference of the actual agreement would not satisfy this disclosure requirement. In some cases, the agreement may be so brief that it may make sense to disclose all the terms of the agreement into the body of the Form 8-K. [April 2, 2008]

Question 102.04

Question: A registrant enters into a business combination agreement, such as a merger agreement, that is reportable under Item 1.01 of Form 8-K as a material definitive agreement. What material terms and conditions of the agreement should the registrant disclose in the Form 8-K?

Answer: Item 1.01 of Form 8-K requires a brief description of the terms and conditions of the agreement that are material to the registrant. Although the materiality of a term or condition of the business combination agreement will ultimately depend on the particular facts and circumstances, the following terms should generally be viewed as material and disclosed in the Form 8-K:

- the amount and nature of consideration offered for the business combination (or the method, exchange ratio, or formula for determining the consideration);

- any committed financing arrangements (e.g., PIPE investments), or the need for financing to close the business combination transaction, along with the material terms of such arrangements;
- any material terms regarding the securities ownership or management structure of the combined or surviving company after the closing of the business combination transaction;
- any material conditions to the closing of the transaction; and
- the anticipated timeframes for filing any Securities Act registration statement, proxy or information statement, or tender offer materials, as well as for the closing of the business combination transaction.

The Form 8-K also must include all other material information that is necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading. See Exchange Act Rule 12b-20 and Exchange Act Section 10(b). For example, the registrant should consider disclosing the following information in the Form 8-K so that investors can evaluate the business combination agreement with the proper context:

- if a material term of the agreement has not yet been determined by the parties, the Form 8-K should affirmatively state so; and
- in the case where the registrant is the acquiror, the Form 8-K should briefly describe the nature of the target company's business, including, at a minimum, whether it has existing operations or has generated revenues, as well as any information disclosed by the target company in announcing the business combination transaction. [March 22, 2022]

Question 102.05

Question: Under the factual circumstances described in Question 102.04 above, should the registrant file the material definitive agreement as an exhibit to the Item 1.01 Form 8-K?

Answer: Registrants are encouraged, as a best practice, to file the agreement as an exhibit to the Item 1.01 Form 8-K. The Commission did not require the material definitive agreement to be filed as an exhibit to the Item 1.01 Form 8-K due to the registrant's need for time to (1) request confidential treatment of sensitive terms of the agreement and (2) prepare the agreement in the proper EDGAR format. See Release No. 33-8400 (March 16, 2004).

The Commission, however, recently amended Form 8-K to permit registrants to redact sensitive terms of a material definitive agreement without submitting a confidential treatment request. See Instructions 5 and 6

to Item 1.01 of Form 8-K; see also Release No. 33-10618 (March 20, 2019). The need for confidential treatment generally can no longer be the basis for declining to file the material definitive agreement as an exhibit to the Item 1.01 Form 8-K. This is consistent with the Commission's previous views. See Release No. 33-8400 ("[W]e encourage companies to file the exhibit with the Form 8-K when feasible, particularly when no confidential treatment is requested.").

Further, absent unusual circumstances, it should generally be feasible to prepare the agreement in the proper EDGAR format within the four business day timeframe for filing an Item 1.01 Form 8-K, given technological advances since 2004 and widespread availability of EDGAR filing services. Registrants that are unable to prepare the agreement in the proper EDGAR format and file the agreement as an exhibit should, as a best practice, provide an explanation in the Form 8-K. [March 22, 2022]

Section 103. Item 1.02 Termination of a Material Definitive Agreement

Question 103.01

Question: A material definitive agreement has an advance notice provision that requires 180 days advance notice to terminate. The counterparty delivers to the registrant written advance notice of termination. Even though the registrant intends to negotiate with the counterparty and believes in good faith that the agreement will ultimately not be terminated, is an Item 1.02 Form 8-K required when the registrant receives the appropriate advance notice of termination?

Answer: Yes. Although Instruction 1 to Item 1.02 notes that no disclosure is required solely by reason of that item during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated, and Instruction 2 indicates that no disclosure is required if the registrant believes in good faith that the material definitive agreement has not been terminated, Instruction 2 clarifies that, once notice of termination pursuant to the terms of the agreement has been received, the Form 8-K is required, notwithstanding the registrant's continued efforts to negotiate a continuation of the contract. [April 2, 2008]

Question 103.02

Question: A material definitive agreement expires automatically on June 30, 200X, but is continued for successive one-year terms until the next June 30th unless one party sends a non-renewal notice during a 30- day window period six months before the automatic renewal – in other words, January. Does non-renewal of this type of agreement by sending the notice in January trigger Item 1.02 disclosure?

Answer: Yes. The triggering event is the sending of the notice in January, not the termination of the agreement on June 30th. However, automatic renewal in accordance with the terms of the agreement (in other words, when no non-renewal notice is sent) does not trigger the filing of an Item 1.01 Form 8-K. [April 2, 2008]

Question 103.03

Question: A material definitive agreement expires on June 30, 200X. It provides that either party may renew the agreement for another one-year term ending on June 30th if it sends a renewal notice to the other party during January, and the other party does not affirmatively reject that notice in February. If neither party sends a renewal notice during January, which means that the agreement terminates on June 30th, is an Item 1.02 Form 8-K filing required?

Answer: No. This would be a termination on the agreement's stated termination date that does not trigger an Item 1.02 filing. If one party sends a renewal notice that is not rejected, an Item 1.01 Form 8-K is required. Such a filing would be triggered by the passage of the rejection deadline on February 28th, and not the sending of the renewal notice in January. [April 2, 2008]

Section 104. Item 1.03 Bankruptcy or Receivership

None

Section 105. Item 2.01 Completion of Acquisition or Disposition of Assets

None

Section 106. Item 2.02 Results of Operations and Financial Condition

Question 106.01

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any financial and other statistical information contained in the presentation, together with any information that would be required by Regulation G. Would an audio file of the initial webcast satisfy this condition to the exemption?

Answer: Yes, provided that: (1) the audio file contains all material financial and other statistical information included in the presentation that was not previously disclosed, and (2) investors can access it and replay it through the company's web site. Alternatively, slides or a similar presentation posted on the web site at the time of the presentation containing the required, previously undisclosed, material financial and other statistical information would satisfy the condition. In each case, the company must provide all previously undisclosed material financial and other statistical information, including information provided in connection with any questions and answers. Regulation FD also may impose disclosure requirements in these circumstances. [Jan. 11, 2010]

Question 106.02

Question: A company issues its earnings release after the close of the market and holds a properly noticed conference call to discuss its earnings two hours later. That conference call contains material, previously undisclosed, information of the type described under Item 2.02 of Form 8-K. Because of this timing, the company is unable to furnish its earnings release on a Form 8-K before its conference call. Accordingly, the company cannot rely on the exemption from the requirement to furnish the information in the conference call on a Form 8-K. What must the company file with regard to its conference call?

Answer: The company must furnish the material, previously non-public, financial and other statistical information required to be furnished on Item 2.02 of Form 8-K as an exhibit to a Form 8-K and satisfy the other requirements of Item 2.02 of Form 8-K. A transcript of the portion of the conference call or slides or a similar presentation including such information will satisfy this requirement. In each case, all material, previously undisclosed, financial and other statistical information, including that provided in connection with any questions and answers, must be provided. [Jan. 11, 2010]

Question 106.03

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any material financial and other statistical information not previously disclosed and contained in the presentation, together with any information that would be required by Regulation G. When must all of this information appear on the company's web site?

Answer: The required information must appear on the company's web site at the time the oral presentation is made. In the case of information that is not provided in a presentation itself but, rather, is disclosed unexpectedly in connection with the question and answer session that was part of that oral presentation, the information must be posted on the company's web site promptly after it is disclosed. Any requirements of Regulation FD also must be satisfied. A webcast of the oral presentation would be sufficient to meet this requirement. [Jan. 11, 2010]

Question 106.04

Question: Company X files its quarterly earnings release as an exhibit to its Form 10-Q on Wednesday morning, prior to holding its earnings conference call Wednesday afternoon. Assuming that all of the other conditions of Item 2.02(b) are met, may the company rely on the exemption for its conference call even if it does not also furnish the earnings release in an Item 2.02 Form 8-K?

Answer: Yes. Company X's filing of the earnings release as an exhibit to its Form 10-Q, rather than in an Item 2.02 Form 8-K, before the conference call takes place, would not preclude reliance on the exemption for the conference call. [Jan. 11, 2010]

Question 106.05

Question: Does a company's failure to furnish to the Commission the Form 8-K required by Item 2.02 in a timely manner affect the company's eligibility to use Form S-3?

Answer: No. Form S-3 requires the company to have filed in "a timely manner all reports required to be filed in twelve calendar months and any portion of a month immediately preceding the filing of the registration statement." Because an Item 2.02 Form 8-K is furnished to the Commission, rather than filed with the Commission, failure to furnish such a Form 8-K in a timely manner would not affect a company's

eligibility to use Form S-3. While not affecting a company's Form S-3 eligibility, failure to comply with Item 2.02 of Form 8-K would, of course, be a violation of Section 13(a) of the Exchange Act and the rules thereunder. [Jan. 11, 2010]

Question 106.06

Question: Company A issues a press release announcing its results of operations for a just-completed fiscal quarter, including its expected adjusted earnings (a non-GAAP financial measure) for the fiscal period. Would this press release be subject to Item 2.02 of Form 8-K?

Answer: Yes, because it contains material, non-public information regarding its results of operations for a completed fiscal period. The adjusted earnings range presented would be subject to the requirements of Item 2.02 applicable to non-GAAP financial measures. [Jan. 11, 2010]

Question 106.07

Question: A registrant reports "preliminary" earnings and results of operations for a completed quarterly period, and some of these amounts may even be estimates. In issuing this preliminary earnings release, must the registrant comply with all of the requirements of, and instructions to, Item 2.02 of Form 8-K?

Answer: Yes. [April 24, 2009]

Section 107. Item 2.03 Creation of a Direct Financial Obligation under an Off-Balance Sheet Arrangement of a Registrant

Question 107.01

Question: Instruction 2 to Item 2.03 states that if the registrant is not a party to the transaction creating the contingent obligation arising under the off-balance sheet arrangement, the four business day period begins on the "earlier of" (1) the fourth business day after the contingent obligation is created or arises, and (2) the day on which an executive officer becomes aware. How can a registrant disclose something of which it is not aware?

Answer: A registrant must maintain disclosure and internal controls and procedures designed to ensure that information required to be disclosed by the issuer in the reports that it files under the Exchange Act, including Current Reports on Form 8-K, is recorded, processed, summarized and reported within the required time frames. Instruction 2 to Item 2.03 provides for an additional four business days as a "grace" period given the nature of the requirement. [April 2, 2008]

Question 107.02

Question: If a registrant has a long-term debt issuance in a private placement that is coming due, and replaces it or refunds it with another long term debt issuance of the same principal amount and with similar terms in another private placement, is a Form 8-K required to be filed under Item 2.03?

Answer: Item 2.03 requires disclosure of a direct financial obligation that is material to the registrant. Materiality is a facts and circumstances determination. Whether the financial obligation is a refinancing on similar terms is one such fact; the amount of the obligation is another. Depending on other facts and circumstances (including but not limited to factors such as current impact on covenants, liquidity and debt capacity and other debt requirements), a registrant may be able to conclude that a financial obligation in this situation is not material. [April 2, 2008]

Section 108. Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement

Question 108.01

Question: Is an Item 2.04 Form 8-K required if all conditions necessary to an event triggering acceleration or an increase in a direct financial obligation under an agreement have occurred but the counterparty has not declared, or provided notice of, a default?

Answer: It depends on how the agreement is written. If, as is often the case, such declaration or notice is necessary prior to the increase or the acceleration of the obligation, then Item 2.04 is not triggered. If no such declaration or notice is necessary and the increase or acceleration is triggered automatically on the occurrence of an event without declaration or notice and the consequences of the event are material to the registrant, then disclosure is required under Item 2.04. [April 2, 2008]

Section 109. Item 2.05 Costs Associated with Exit or Disposal Activities

Question 109.01

Question: Are costs associated with an exit activity limited to those addressed in FASB Statement of Financial Accounting Standards No. 146, Accounting for Costs Associated with Exit or Disposal Activities (SFAS 146)?

Answer: No. SFAS 146 addresses certain costs associated with an exit activity. Paragraph 2 of SFAS 146 states that such costs include, but are not limited to, those costs addressed by the SFAS. Other costs that

may need to be disclosed pursuant to Item 2.05 of Form 8-K are addressed by FASB Statements of Financial Accounting Standards Nos. 87, 88, 106 and 112. [April 2, 2008]

Question 109.02

Question: If a registrant, in connection with an exit activity, is terminating employees, must it file the Form 8-K when the registrant commits to the plan, or can it wait until it has informed its employees?

Answer: Item 2.05 was intended to be generally consistent with SFAS 146. SFAS 146 states that, if a registrant is terminating employees as part of a plan to exit an activity, it need not disclose the commitment to the plan until it has informed affected employees. Similarly, a Form 8-K need not be filed until those employees have been informed. See paragraphs 8, 20 and 21 of SFAS 146. [April 2, 2008]

Section 110. Item 2.06 Material Impairments

Question 110.01

Question: The Instruction to Item 2.06 of Form 8-K indicates that a filing is not required if an impairment conclusion is made "in connection with" the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, the periodic report is filed on a timely basis and such conclusion is disclosed in the report. If an impairment conclusion is made at a time that coincides with, but is not in connection with, the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, is an Item 2.06 Form 8-K required?

Answer: No. If the impairment conclusion coincides with the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act and the other conditions of the Instruction to Item 2.06 are satisfied, a filing would not be required under Item 2.06. [May 16, 2013]

Question 110.02

Question: Does the re-measurement of a deferred tax asset ("DTA") to incorporate the effects of newly enacted tax rates or other provisions of the Tax Cuts and Jobs Act ("Act") trigger an obligation to file under Item 2.06 of Form 8-K?

Answer: No, the re-measurement of a DTA to reflect the impact of a change in tax rate or tax laws is not an impairment under ASC Topic 740. However, the enactment of new tax rates or tax laws could have

implications for a registrant's financial statements, including whether it is more likely than not that the DTA will be realized. As discussed in Staff Accounting Bulletin No. 118 (Dec. 22, 2017), a registrant that has not yet completed its accounting for certain income tax effects of the Act by the time the registrant issues its financial statements for the period that includes December 22, 2017 (the date of the Act's enactment) may apply a "measurement period" approach to complying with ASC Topic 740. Registrants employing the "measurement period" approach as contemplated by SAB 118 that conclude that an impairment has occurred due to changes resulting from the enactment of the Act may rely on the Instruction to Item 2.06 and disclose the impairment, or a provisional amount with respect to that possible impairment, in its next periodic report. [December 22, 2017]

Section 111. Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

None

Section 112. Item 3.02 Unregistered Sales of Equity Securities

Question 112.01

Question: Does the grant of stock options pursuant to an employee stock option plan require disclosure under Item 3.02 of Form 8-K?

Answer: If a grant of stock options pursuant to an employee stock option plan does not constitute a "sale" or "offer to sell" under Securities Act Section 2(a)(3), the grant need not be reported under Item 3.02 of Form 8-K. *See, e.g., Millennium Pharmaceuticals, Inc.* (May 21, 1998). [April 2, 2008]

Question 112.02

Question: If a registrant sells, in an unregistered transaction, shares of a class of equity securities that is not currently outstanding, would the volume threshold under Item 3.02 of Form 8-K be exceeded by such sale?

Answer: Yes. As such, in these circumstances, an Item 3.02 Form 8-K filing requirement would be triggered. [April 2, 2008]

Section 113. Item 3.03 Material Modification to Rights of Security Holders

None

Section 114. Item 4.01 Changes in Registrant's Certifying Accountant

Question 114.01

Question: If a principal accountant resigns, declines to stand for re-election or is dismissed because its registration with the PCAOB has been revoked, should the registrant disclose this fact when filing an Item 4.01 Form 8-K to report a change in certifying accountant?

Answer: Yes. Disclosure of the revocation of the accountant's PCAOB registration is necessary to understanding the required disclosure with respect to whether the former accountant resigned, declined to stand for re-election or was dismissed. [Jan. 14, 2011]

Question 114.02

Question: A registrant engages a new principal accountant that is related in some manner to the former principal accountant (e.g., the firms are affiliates or are member firms of the same network), but the new principal accountant is a separate legal entity and is separately registered with the PCAOB. Should the registrant file an Item 4.01 Form 8-K to report a change in certifying accountant?

Answer: Yes. Because the new principal accountant is a different legal entity from the former principal accountant and is separately registered with the PCAOB, there is a change in certifying accountant, which must be reported on Item 4.01 Form 8 K. [Jan. 14, 2011]

Question 114.03

Question: If a registrant's principal accountant enters into a business combination with another accounting firm, should the registrant file an Item 4.01 Form 8-K to report a change in certifying accountant?

Answer: Whether an Item 4.01 Form 8-K is required will depend on how the combination is structured and on other facts and circumstances. Accounting firms that enter into business combinations are encouraged to discuss their transactions with the Division's Office of Chief Accountant. [Jan. 14, 2011]

Section 115. Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

Question 115.01

Question: If a registrant has taken appropriate action to prevent reliance on the financial statements and also has filed a Form 8-K under Item 4.02(a), must the registrant file a second Form 8-K under Item 4.02(b) if it is separately advised by, or receives notice from, its auditor that the auditor has reached the same conclusion?

Answer: No. If the registrant has reported that reliance should not be placed on previously issued financial statements because of an error in such financial statements, the issuer does not need to file a second Form 8-K to indicate that the auditor also has concluded that future reliance should not be placed on its audit report, unless the auditor's conclusion relates to an error or matter different from that which triggered the registrant's filing under Item 4.02(a). [April 2, 2008]

Question 115.02

Question: Does the Item 4.02 requirement to file a Form 8-K if a company concludes that any previously issued financial statements should no longer be relied upon because of an error in such financial statements, as addressed in FASB Statement of Financial Accounting Standards No. 154, Accounting Changes and Error Corrections, apply to pro forma financial information?

Answer: No. The Item 4.02 requirement does not apply to pro forma financial information. If an error is detected in pro forma financial information, an amendment to the form containing such information may be required to correct the error. [April 2, 2008]

Question 115.03

Question: Must a filer provide disclosures under Item 4.02(a) of Form 8-K when it discovers a material error in its Interactive Data File while the financial statements upon which they are based do not contain an error and may continue to be relied on?

Answer: No. Item 4.02(a) requires a Form 8-K only when the filer determines that previously issued financial statements should no longer be relied upon because of an error in those financial statements. If a filer wants to voluntarily provide non-reliance disclosure similar to Item 4.02(a) that pertains only to the interactive data, it can do so under either Item 7.01 or Item 8.01 of Form 8-K. In any event, if a filer finds a

material error in its Interactive Data File, it must file an amendment to correct the error. In addition, once a filer becomes aware of the error in its Interactive Data File, it must correct the error promptly in order for the Interactive Data File to be eligible for the modified treatment under the federal securities laws provided by Rule 406T of Regulation S-T. [May 29, 2009]

Section 116. Item 5.01 Changes in Control of Registrant

None

Section 117. Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

Question 117.01

Question: When is the obligation to report an event specified in Item 5.02(b) of Form 8-K triggered? Must the Form 8-K filed to report an Item 5.02(b) event disclose the effective date of the resignation or other event?

Answer: With respect to any resignation, retirement or refusal to stand for re-election reportable under Item 5.02(b), other than in the corporate governance policy situations addressed in Question 117.15, the Form 8-K reporting obligation is triggered by a notice of a decision to resign, retire or refuse to stand for re-election provided by the director, whether or not such notice is written, and regardless of whether the resignation, retirement or refusal to stand for re-election is conditional or subject to acceptance. The disclosure shall specify the effective date of the resignation or retirement. In the case of a refusal to stand for re-election, the registrant must disclose when the election in question will occur, for example, at the registrant's next annual meeting. No disclosure is required solely by reason of Item 5.02(b) of discussions or consideration of resignation, retirement or refusal to stand for re-election. Whether communications represent discussion or consideration, on the one hand, or notice of a decision, on the other hand, is a facts and circumstances determination. A registrant should ensure that it has appropriate disclosure controls and procedures in place – for example, a board policy that all directors must provide any such notice directly to the corporate secretary – to determine when a notice of resignation, retirement or refusal has been communicated to the registrant. [June 26, 2008]

Question 117.02

Question: Item 5.02(b) of Form 8-K requires current disclosure when any named executive officer retires, resigns or is terminated from that position. Since status as a named executive officer is determined based on the level of total compensation under Item 402(a)(3) of Regulation S-K, does this mean that disclosure on Form 8-K is triggered when the person is no longer required to be included in the Summary Compensation Table because of the executive officer's level of total compensation?

Answer: No. Under Instruction 4 to Item 5.02, the term "named executive officer" refers to those executive officers for whom disclosure under Item 402(c) of Regulation S-K was required in the most recent Commission filing. A Form 8-K is triggered under Item 5.02(b) when one of those officers retires, resigns or is terminated from the position that the executive officer is listed as holding in the most recent filing including executive compensation disclosure under Item 402(c) of Regulation S-K. [April 2, 2008]

Question 117.03

Question: A registrant's principal operating officer has his duties and responsibilities as principal operating officer removed and reassigned to other personnel in the organization; however, the person remains employed by the registrant, and the person's title remains the same. Is the registrant required to file a Form 8-K under Item 5.02 to report the principal operating officer's termination?

Answer: Yes. The term "termination" includes situations where an officer identified in Item 5.02 has been demoted or has had his or her duties and responsibilities removed such that he or she no longer functions in the position of that officer. [April 2, 2008]

Question 117.04

Question: If a registrant decides not to nominate a director for re-election at its next annual meeting, is a Form 8-K required?

Answer: No. That situation is not covered under the phrase "is removed." However, if the director, upon receiving notice from the registrant that it does not intend to nominate him or her for re-election, then resigns his or her position as a director, then a Form 8-K would be required pursuant to Item 5.02. If the director tells the registrant that he or she refuses to stand for re-election, a Form 8-K is required because the director has communicated a "refusal to stand for re-election," whether or not in response to an offer by the registrant to be nominated. [April 2, 2008]

Question 117.05

Question: If a registrant appoints a new executive officer, it may delay disclosure until it makes a public announcement of the event under the Instruction to Item 5.02(c). If the new executive officer were simultaneously appointed to the board of directors of the registrant, would the registrant have to disclose such appointment pursuant to Item 5.02(d) within four business days following such appointment, even if that date is before the public announcement of the officer's appointment?

Answer: No. In these circumstances, disclosures under paragraph (d) of Item 5.02 may be delayed to the time of public announcement consistent with Item 5.02(c). Similarly, any disclosure required under paragraph (e) of Item 5.02 may be delayed to the time of public announcement consistent with Item 5.02(c). [April 2, 2008]

Question 117.06

Question: If the registrant does not consider its principal accounting officer an executive officer for purposes of Items 401 or 404 of Regulation S-K, must the registrant make all of the disclosures required by Item 5.02(c)(2) of Form 8-K?

Answer: Yes. All of the information required by Item 5.02(c)(2) regarding specified newly appointed officers, including a registrant's principal accounting officer, is required to be reported on Form 8-K even if the information was not required to be disclosed in the Form 10-K because the position does not fall within the definition of an executive officer for purposes of Items 401 or 404 of Regulation S-K. [April 2, 2008]

Question 117.07

Question: If a director is elected to the board of directors other than by a vote of security holders at a meeting, but the director's term will begin on a later date, when is the reporting requirement under Item 5.02(d) of Form 8-K triggered?

Answer: The reporting requirement is triggered as of the date of the director's election to the board. The Item 5.02(d) Form 8-K should disclose the date on which the director's term begins. [April 2, 2008]

Question 117.08

Question: The board of directors of the registrant adopts a material equity compensation plan in which named executive officers are eligible to participate. No awards have been made under the plan. Does board adoption of the plan trigger disclosure under Item 5.02(e)? Does the fact that adoption of the plan is subject to shareholder approval affect the timing of disclosure under Item 5.02(e)?

Answer: Adoption by the registrant's board of directors of a material equity compensation plan in which named executive officers are eligible to participate requires current disclosure pursuant to Item 5.02(e) of Form 8-K. Where the registrant's board adopts a compensation plan subject to shareholder approval, the obligation to file a Form 8-K pursuant to Item 5.02(e) is triggered upon receipt of shareholder approval of the plan. Similarly, if a reportable plan amendment or stock option grant is adopted subject to shareholder approval, the obligation to file a Form 8-K pursuant to Item 5.02 is triggered upon receipt of shareholder approval of the plan amendment or grant. [April 2, 2008]

Question 117.09

Question: The board of directors of the registrant adopts a material cash bonus plan under which named executive officers participate. No specific performance criteria, performance goals or bonus opportunities have been communicated to plan participants. Does the adoption of such a plan require disclosure pursuant to Item 5.02(e) of Form 8-K?

Answer: Yes. Moreover, if the plan is adopted and is also subject to shareholder approval, the receipt of shareholder approval – and not the plan's adoption – triggers the obligation to file a Form 8-K pursuant to Item 5.02(e). [April 2, 2008]

Question 117.10

Question: After the adoption of a material cash bonus plan has been disclosed in an Item 5.02(e) Form 8-K, the board of directors sets specific performance goals and business criteria for named executive officers during the performance period. Does this action require disclosure pursuant to Item 5.02(e) of Form 8-K if the specific performance goals and business criteria set for the performance period are materially consistent with the previously disclosed terms of the plan?

Answer: No. In reliance on Instruction 2 to Item 5.02(e), the registrant is not required to file an Item 5.02(e) Form 8-K to report this action if the specific performance goals and business criteria set for the

performance period are materially consistent with the previously disclosed terms of the plan, for example if the specific goals and criteria are among the previously disclosed performance goals and business criteria (such as EBITDA, return on equity or other applicable measure) that the plan may apply or has applied. [April 2, 2008]

Question 117.11

Question: A registrant pays out a material cash award pursuant to a cash bonus plan for which disclosure previously was filed consistent with Exchange Act Form 8-K Questions 117.09 and 117.10. Does payment of the award require disclosure pursuant to Item 5.02(e) of Form 8-K?

Answer: Disclosure under Item 5.02(e) depends on the circumstances relating to the payment of the cash award. If the registrant pays out a cash award upon determining that the performance criteria have been satisfied, pursuant to Instruction 2 to Item 5.02(e), a Form 8-K reporting such a payment would not be required under Item 5.02(e) because the payment was materially consistent with the previously disclosed terms of the plan. However, if the registrant exercised discretion to pay the bonus even though the specified performance criteria were not satisfied, a Form 8-K reporting such a payment would be required under Item 5.02(e) because the payment was not materially consistent with the previously disclosed terms of the plan, even if the plan provided for the exercise of such discretion. [April 2, 2008]

Question 117.12

Question: If an Item 5.02(e) Form 8-K is filed to disclose an annual non-equity incentive plan award, does the disclosure have to include the specific target levels?

Answer: The registrant is not required to provide disclosure pursuant to Item 5.02(e) of target levels with respect to specific quantitative or qualitative performance related-factors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant. This position is consistent with the treatment of similar information under Instruction 4 to Item 402(b) of Regulation S-K and Instruction 2 to Item 402(e)(1) of Regulation S-K. [April 24, 2009]

Question 117.13

Question: If a previously-disclosed employment agreement provides that the principal executive officer is entitled to receive a cash bonus in an amount determined by the compensation committee in its discretion, would an Item 5.02(e) Form 8-K be required when the committee makes an ad hoc determination of the amount of the principal executive officer's bonus at the end of the first year that the contract is in effect? Would an Item 5.02(e) Form 8-K be required if the committee makes an ad hoc determination of the amount of the CEO's bonus at the end of the second year in which the contract is in effect?

Answer: No. In both cases, no Item 5.02(e) Form 8-K would be required to report the discretionary bonus amount. Disclosure regarding material information about the bonus should be included in the registrant's Compensation Discussion and Analysis and related disclosures under Item 402 of Regulation S-K. [April 2, 2008]

Question 117.14

Question: A registrant intends to terminate an executive compensation plan. Item 5.02(e) requires that material amendments or modifications of compensatory arrangements be disclosed on Form 8-K. Does this item require disclosure of plan terminations?

Answer: Yes. A termination should be disclosed if it constitutes a material amendment or modification of the executive compensation plan. Release No. 33-8732A stated that "[i]nstead of being required to be disclosed based on the general requirements with regard to material definitive agreements in Item 1.01 and Item 1.02 of Form 8-K, employment compensation arrangements will now be covered under Item 5.02 of Form 8-K, as amended." [April 2, 2008]

Question 117.15

Question: If a company has a corporate governance policy that requires a director to tender her resignation from the board of directors upon the occurrence of an event — such as reaching mandatory retirement age, changing jobs or failing to receive a majority of votes cast for election of directors at the annual meeting of shareholders — when must a company file a Form 8-K under Item 5.02(b)?

Answer: Under these circumstances, in which a director tenders her resignation only because she is required to do so in order to comply with a corporate governance policy, the company must file a Form 8-K

under Item 5.02(b) within four business days of the board's decision to accept the director's tender of resignation. If the board does not accept the director's tender of resignation — and thus, the director remains on the board — the company should consider informing shareholders as to whether and to what extent corporate governance policies are being followed and enforced. [June 26, 2008]

Question 117.16

Question: A registrant appoints a new director, triggering the obligation to file a Form 8-K pursuant to Item 5.02(d). The newly appointed director enters into the standard compensatory and other agreements and arrangements that the company provides its non-employee directors (*e.g.*, an equity award, annual cash compensation and an indemnification agreement). Pursuant to Item 5.02(d)(5), must the Form 8-K describe these compensatory and other agreements and arrangements?

Answer: Yes. Item 5.02(d)(5) requires a brief description of the newly appointed director's compensatory and other agreements and arrangements, even if they are consistent with the registrant's previously disclosed standard agreements and arrangements for non-employee directors. In lieu of describing any material plan, contract or arrangement to which the director is a party or in which he or she participates, (but not material amendments or grants or awards or modifications thereto), the registrant may cross-reference the description of such plan, contract or arrangement from the Item 402 disclosure in the company's most recent annual report on Form 10-K or proxy statement. [May 29, 2009]

Section 118. Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

Question 118.01

Question: Does the restatement of a registrant's articles of incorporation, without any substantive amendments to those articles or any requirement to be approved by security holders, trigger a Form 8-K filing requirement?

Answer: No. An Item 5.03 Form 8-K is not required to be filed when the registrant is merely restating its articles of incorporation (*e.g.*, a restatement that merely consolidates previous amendments without any substantive changes to the articles of incorporation). However, the Division staff recommends that a registrant refile its complete articles of incorporation, if restated, in its next periodic report for ease of reference by investors. [April 2, 2008]

Section 119. Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans

Question 119.01

Question: Is a Form 8-K filing required for the notice of any time period that constitutes a "blackout period" for purposes of the notice requirements under ERISA, without regard to whether it is also a "blackout period" for purposes of Section 306(a) of the Sarbanes-Oxley Act of 2002 and Regulation BTR?

Answer: No. Item 5.04 applies only to a notice of a "blackout period" under Section 306(a) of Sarbanes-Oxley and Regulation BTR. [May 29, 2009]

Section 120. Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics

None

Section 121. Item 5.06 Change in Shell Company Status

None

Section 121A. Item 5.07 Submission of Matters to a Vote of Security Holders

Question 121A.01

Question: How should an issuer calculate the four business day filing period for an Item 5.07 Form 8-K?

Answer: Pursuant to Instruction 1 to Item 5.07, the date on which the shareholder meeting ends is the triggering event for an Item 5.07 Form 8-K. Day one of the four-business day filing period is the day after the date on which the shareholder meeting ends. For example, if the meeting ends on Tuesday, day one would be Wednesday, and the four-business day filing period would end on Monday. [Feb. 16, 2010]

Question 121A.02

Question: Does the Item 5.07(b) requirement to report the number of shareholder votes cast for, against or withheld with respect to a matter apply only to matters voted upon at a meeting that involves the election of directors?

Answer: No. This reporting obligation applies with respect to any matter submitted to a vote of security holders, through the solicitation of proxies or otherwise. [June 4, 2010]

Question 121A.03

Question: Item 5.07(b) requires disclosure of the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each matter submitted to a vote of security holders. With respect to the advisory vote on the frequency of shareholder advisory votes on executive compensation, Item 5.07(b) requires disclosure of the number of votes cast for each of the one, two and three year frequency options, as well as the number of abstentions. Are companies also required to state the number of broker non-votes with respect to the frequency of shareholder advisory votes on executive compensation?

Answer: No. Item 5.07(b) does not require disclosure of the number of broker non-votes with respect to the advisory vote on the frequency of shareholder advisory votes on executive compensation. If a company believes this information would be useful for investors, then it may disclose such information under Item 5.07(b). [July 8, 2011]

Question 121A.04

Question: May an issuer disclose its decision as to how frequently it will include a shareholder advisory vote on executive compensation in its proxy materials in a periodic report instead of an Item 5.07 Form 8-K, pursuant to General Instruction B.3 to Form 8-K?

Answer: Yes. Pursuant to General Instruction B.3, an issuer may report Item 5.07 Form 8-K information in a periodic report that is filed on or before the date that an Item 5.07 Form 8-K would otherwise be due. If the issuer reports its annual meeting voting results in a Form 10-Q or Form 10-K, it may file a new Item 5.07 Form 8-K, rather than an amended Form 10-Q or Form 10-K, to report its decision as to how frequently it will include a shareholder advisory vote on executive compensation in its proxy materials. However, if the issuer reports its annual meeting voting results in an Item 5.07(b) Form 8-K and also intends to report its frequency decision in a Form 8-K, then, as required by Item 5.07(d), that Form 8-K must be filed as an amendment to the Item 5.07(b) Form 8-K—using submission type 8-K/A—and not as a new Form 8-K. [July 8, 2011]

Section 122. Item 6.01 ABS Information and Computational Material

None

Section 123. Item 6.02 Change of Servicer or Trustee

None

Section 124. Item 6.03 Change in Credit Enhancement or Other External Support

None

Section 125. Item 6.04 Failure to Make a Required Distribution

None

Section 126. Item 6.05 Securities Act Updating Disclosure

None

Section 127. Item 7.01 Regulation FD Disclosure

None

Section 128. Item 8.01 Other Events

None

Section 129. Item 9.01 Financial Statements and Exhibits

Question 129.01

Question: Is the automatic 71-day extension of time in Item 9.01 of Form 8-K available with respect to dispositions?

Answer: No. The automatic 71-day extension of time in Item 9.01 of Form 8-K is available only with respect to acquisitions, not dispositions. The Division's Office of the Chief Accountant will continue to address questions regarding dispositions on a case-by-case basis. [April 2, 2008]

Interpretive Responses Regarding Particular Situations

Section 201. Form 8-K – General Guidance

None

Section 202. Item 1.01 Entry into a Material Definitive Agreement

202.01 If an Item 1.01 Form 8-K filing requirement is triggered in early April for a registrant with a calendar year fiscal year (*i.e.*, after the end of the registrant's first quarter but before the registrant is required to file its Form 10-Q for that quarter), and the registrant timely files the Item 1.01 Form 8-K but does not file the agreement (to which the Item 1.01 Form 8-K relates) as an exhibit to that Form 8-K, the registrant is required to file the agreement as an exhibit to its second quarter Form 10-Q. The disclosure requirement under Item 1.01 of Form 8-K does not alter the existing requirements for the filing of exhibits under Item 601 of Regulation S-K. [April 10, 2008]

Section 203. Item 1.02 Termination of a Material Definitive Agreement

None

Section 204. Item 1.03 Bankruptcy or Receivership

None

Section 205. Item 2.01 Completion of Acquisition or Disposition of Assets

205.01 Item 2.01 of Form 8-K, which calls for disclosure of the acquisition or disposition of a significant amount of assets, does not require disclosure of the execution of a contract to acquire or dispose of the assets. Disclosure under Item 2.01 is specifically required only when such an acquisition or disposition is consummated. Nevertheless, the filing of a Form 8-K reporting the execution of a contract for the acquisition or disposition of assets may be required earlier by Item 1.01 of Form 8-K if the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant (or an amendment of such agreement that is material). Even if Item 1.01 and Item 2.01 do not require disclosure, if the registrant deems the contract to be of importance to security holders, then the registrant may voluntarily disclose it pursuant to Item 8.01. The financial statement requirement of Item 9.01 is triggered by Item 2.01, but is not triggered by Item 1.01 or 8.01. [April 2, 2008]

205.02 The purchase by a reporting company of a minority stock interest in a business from an independent third party (which is accounted for under the cost method) would not require the filing of the financial statements of that business with any Form 8-K filed to report the transaction, so long as that minority position did not result in the reporting company's control of the assets. [April 2, 2008]

205.03 A wholly-owned subsidiary acquires a significant amount of assets from its parent. Both the subsidiary and the parent are reporting companies. The term "any person" found in Instruction 1 to Item 2.01 of Form 8-K refers to the company that has the obligation to file the report. Therefore, while Instruction 1 would not require a filing by the parent, the subsidiary would be required to file the report. [April 2, 2008]

205.04 An indefinite closing of a portion of a company's restaurant facilities, coupled with a write-down of its assets in excess of 10 percent, constitutes an "other disposition" for purposes of Instruction 2 to Item 2.01 of Form 8-K, and thus requires the filing of a Form 8-K report. [April 2, 2008]

205.05 Paragraph (iii) of Instruction 1 to Item 2.01 of Form 8-K indicates that a Form 8-K filing is not required to report the redemption or acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities or by a wholly-owned subsidiary of that issuer. This instruction does not apply to the sale of a subsidiary's equity, because the subsidiary would not be wholly-owned after the transaction is completed. [April 2, 2008]

Section 206. Item 2.02 Results of Operations and Financial Condition

206.01 Item 2.02(b) provides that a Form 8-K is not required to report the disclosure of material nonpublic information that is disclosed orally, telephonically, by webcast, broadcast or similar means if, among other things, that presentation is complementary to and initially occurs within 48 hours following a related written announcement or release that has been furnished on an Item 2.02 Form 8-K. This 48-hour safe harbor is construed literally and is not the equivalent of two business or calendar days. [April 2, 2008]

Section 207. Item 2.03 Creation of a Direct Financial Obligation under an Off-Balance Sheet Arrangement of a Registrant

None

Section 208. Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement

208.01 A voluntary redemption of convertible notes by a registrant is not a triggering event for purposes of Item 2.04 of Form 8-K. [April 2, 2008]

208.02 A company disagrees with the legitimacy of a notice of default and brings the matter to arbitration, pursuant to its rights under the terms of the applicable loan agreement. The matter is pending with an arbitrator. Notwithstanding its good faith belief that no event of default has taken place and the fact that the arbitrator has yet to rule on the legitimacy of the event of default, the notice of default is a triggering event under Item 2.04. When the company files the Form 8-K, it may include a discussion of the basis for its belief that no event of default has occurred. [April 2, 2008]

Section 209. Item 2.05 Costs Associated with Exit or Disposal Activities

209.01 An Item 2.05 Form 8-K filing requirement is triggered when a registrant's board or board committee, or the registrant's officer(s) authorized to take such action if board action is not required, commits the registrant to a "plan of termination" that meets the description of such a plan in paragraph 8 of SFAS No. 146, under which material charges will be incurred under generally accepted accounting principles applicable to the registrant under the plan. The "plan of termination" need not fall within an "exit activity," as defined in SFAS No. 146, or otherwise constitute an "exit or disposal plan" (or part of one), to trigger an Item 2.05 Form 8-K filing requirement. [April 2, 2008]

Section 210. Item 2.06 Material Impairments

None

Section 211. Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

211.01 A registrant's common stock is traded on the OTC Bulletin Board, which is not an automated inter-dealer quotation system of a registered national securities association, and is not otherwise traded on an exchange. The registrant has applied to list its common stock on the American Stock Exchange. In this instance, an Item 3.01 Form 8-K filing requirement is not triggered upon the registrant's application for listing on the American Stock Exchange, or upon the approval of the application. [April 2, 2008]

Section 212. Item 3.02 Unregistered Sales of Equity Securities

212.01 An Item 3.02 Form 8-K filing requirement is triggered when a registrant enters into an agreement enforceable against the registrant to issue unregistered equity securities to a third party in exchange for services and the applicable volume threshold is exceeded. [April 2, 2008]

212.02 If an Exchange Act reporting, wholly-owned subsidiary receives an additional equity investment from its Exchange Act reporting parent and the volume threshold under Item 3.02 of Form 8-K is exceeded, the wholly-owned subsidiary is required to file an Item 3.02 Form 8-K to report the additional equity investment, regardless of whether the wholly-owned subsidiary meets the conditions for the filing of abbreviated periodic reports under General Instruction H of Form 10-Q and General Instruction I of Form 10-K. [April 2, 2008]

212.03 An Item 3.02 Form 8-K filing requirement is triggered upon an unregistered sale of warrants to purchase equity securities (or an unregistered sale of options outside a stock option plan), if the volume threshold under Item 3.02 is exceeded, or upon an unregistered sale of convertible notes (convertible into equity securities), if the volume threshold under Item 3.02 of the underlying equity security issuable upon conversion is exceeded. Pursuant to Item 701(e) of Regulation S-K, the registrant must disclose the terms of, as applicable, the exercise of the warrants or the options or the conversion of the convertible notes in the Item 3.02 Form 8-K. If the Item 3.02 Form 8-K that discloses the initial sale of the warrants, the options, or the convertible notes also discloses the maximum amount of the underlying securities that may be issued through, as applicable, the exercise of the warrants or the options or the conversion of the convertible notes, then a subsequent Item 3.02 Form 8-K filing requirement is *not* triggered upon the exercise of the warrants or the options or the conversion of the notes. [April 2, 2008]

Section 213. Item 3.03 Material Modifications to Rights of Security Holders

213.01 Upon adoption of a shareholder rights plan, a registrant undertook to make a dividend of a preferred share purchase right for each outstanding share of common stock. The Plan was adopted by the board on August 9. The certificate of designation related to the preferred share purchase right was filed with the state on August 25. The dividend, not yet declared, will occur only upon certain change in control events. Under Item 3.03(b) of Form 8-K, the triggering event related to the plan occurs not upon adoption of the plan or upon filing of the certificate of designation with the state, but rather upon the issuance of the dividend. The rights of the holders of the registered common stock are not materially limited or qualified until the issuance of, in this case, the preferred share purchase rights. The preferred share purchase rights are not issued until the dividend is declared and the rights are distributed. Although the registrant is not

required to file an Item 3.03 Form 8-K until the issuance of the dividend, the registrant must file an Item 1.01 Form 8-K when it enters into the shareholder rights plan if the plan constitutes a material definitive agreement not made in the ordinary course of business. [April 2, 2008]

Section 214. Item 4.01 Changes in Registrant's Certifying Accountant

214.01 Item 4.01 of Form 8-K requires an issuer to report a change in its certifying accountant. The item also requires that the issuer request the former accountant to furnish a letter stating whether the former accountant agrees with the issuer's statements concerning the reasons for the change. Where the former accountant declines to provide such a letter, the issuer should indicate that fact in the Form 8-K. [April 2, 2008]

214.02 Item 4.01 of Form 8-K requires a registrant to report changes in its certifying accountant. The company must file the report on a Form 8-K and must file any required amendments to the report on a Form 8-K/A. It is not sufficient to report the event in a periodic report. See Exchange Act Form 8-K Question 101.01. [April 2, 2008]

Section 215. Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

215.01 Item 4.02 of Form 8-K requires an issuer to report a decision that its past financial statements should no longer be relied upon. The company must file the report on a Form 8-K and file any required amendments on a Form 8-K/A. It is not sufficient to report the event in a periodic report. See Exchange Act Form 8-K Question 101.01. [April 2, 2008]

Section 216. Item 5.01 Changes in Control of Registrant

None

Section 217. Item 5.02 Departure of Certain Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

217.01 Item 5.02(a) of Form 8-K requires registrants to describe the circumstances of a director's resignation when he or she resigned "because of a disagreement with the registrant... on any matter related to the registrant's operations, policies or practices." A disagreement with the process chosen by the

Chairman and other board members to address a director's alleged violation of a company's policy regarding unauthorized public disclosures and the board's related decision to ask the director to resign is a disagreement on matters "related to the registrant's operations, policies or practices." *See* In the Matter of Hewlett Packard Company, Release 34-55801 (May 23, 2007). [April 2, 2008]

217.02 When a principal financial officer temporarily turns his or her duties over to another person, a company must file a Form 8-K under Item 5.02(b) to report that the original principal financial officer has temporarily stepped down and under Item 5.02(c) to report that the replacement principal financial officer has been appointed. If the original principal financial officer returns to the position, then the company must file a Form 8-K under Item 5.02(b) to report the departure of the temporary principal financial officer and under Item 5.02(c) to report the "re-appointment" of the original principal financial officer. [April 2, 2008]

217.03 A director who is designated by an issuer's majority shareholder gives notice that he will resign if the majority shareholder sells its entire holdings of issuer stock. This notice triggers an obligation to file an Item 5.02(b) Form 8-K, which should state clearly the nature of the contingency and the extent to which the resigning director can control occurrence of the contingency. [April 2, 2008]

217.04 Item 5.02(b) of Form 8-K does not require a registrant to report the death of a director or listed officer. [April 2, 2008]

217.05 If, pursuant to a contractual provision in a named executive officer's employment contract or otherwise, the registrant must notify the named executive officer of the termination of his or her employment a specified number of days prior to the date on which the named executive officer's employment would end, an Item 5.02(b) Form 8-K filing requirement is triggered on the date the registrant notifies the named executive officer of his or her termination, not on the date the named executive officer's employment actually ends. [April 2, 2008]

217.06 A registrant appoints a new principal accounting officer, which triggers an Item 5.02(c) Form 8-K filing requirement. The registrant can decide to delay the filing of the Item 5.02(c) Form 8-K until it makes a public announcement of the appointment of the new principal accounting officer, pursuant to the Instruction to paragraph (c) of Item 5.02. The new principal accounting officer replaces the old principal accounting officer, who retired, resigned, or was terminated from that position. The retirement, resignation, or termination of the old principal accounting officer triggers an Item 5.02(b) Form 8-K filing requirement. The registrant may not delay the filing of the Item 5.02(b) Form 8-K until the filing of the Form 5.02(c) Form 8-K. Rather, the Item 5.02(b) Form 8-K filing obligation is triggered by the old principal accounting officer's

notice of a decision to retire or resign or by the notice of termination, whether or not such notice is written. [April 2, 2008]

217.07 A director was appointed by board vote and, at the same time, named to the audit committee. Both the appointment of the director to the board and the committee assignment were disclosed under Item 5.02(d) of Form 8-K. Three months later, the board rotates committee assignments, and the new director is moved from the audit committee to the compensation committee. No new Form 8-K or amendment to the Item 5.02(d) Form 8-K is required by Instruction 2 to Item 5.02 in this situation, provided that the change in committee assignment was not contemplated at the time of the director's initial election to the board and appointment to the audit committee. [April 2, 2008]

217.08 In the past, a named executive officer entered into an employment agreement that will, pursuant to its terms, expire after two years. The employment agreement automatically extends for an additional two-year term, unless the registrant or the named executive officer affirmatively gives notice that it is not renewing the agreement. The automatic renewal of the employment agreement (*i.e.*, when the original two-year term of the employment agreement expires and neither party gives notice that it does not wish to renew the agreement) does not trigger an Item 5.02(e) Form 8-K filing requirement. [April 2, 2008]

217.09 Foreign private issuers that satisfy the Item 402 of Regulation S-K disclosure requirement by providing compensation disclosure in accordance with Item 402(a)(1) should refer to Instruction 4 to Item 5.02 to determine who is a "named executive officer." The named executive officers will be those individuals for whom disclosure was provided in the last Securities Act or Exchange Act filing pursuant to Item 6.B or 6.E.2 of Form 20-F. [April 2, 2008]

Section 218. Item 5.03 Amendments to Articles of Incorporation or Bylaws; Changes in Fiscal Year

218.01 Release No. 34-26589, which significantly amended Rule 15d-10, states that "[a] change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year commencing within seven days of the month end (or from a 52-53 week to a month end) is not deemed a change in fiscal year for purposes of reporting subject to Rule 13a-10 or 15d-10 if the new fiscal year commences with the end of the old fiscal year. In such cases, a transition report would not be required. Either the old or new fiscal year could, therefore, be as short as 359 days, or as long as 371 days (372 in a leap year)." While a transition report would not be required in such a situation, an Item 5.03(b) Form 8-K would have to be filed to report the change in fiscal year-end. [April 2, 2008]

Section 219. Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans

None

Section 220. Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics

None

Section 221. Item 5.06 Change in Shell Company Status

None

Section 222. Item 6.01 ABS Information and Computational Material

None

Section 223. Item 6.02 Change of Servicer or Trustee

None

Section 224. Item 6.03 Change in Credit Enhancement or Other External Support

None

Section 225. Item 6.04 Failure to Make a Required Distribution

None

Section 226. Item 6.05 Securities Act Updating Disclosure

None

Section 227. Item 7.01 Regulation FD Disclosure

None

Section 228. Item 8.01 Other Events

None

Section 229. Item 9.01 Financial Statements and Exhibits

229.01 Item 20.D. of Industry Guide 5 requires, *inter alia*, an undertaking to file every three months post-effective amendments containing financial statements of acquired properties. Even if the automatic 71-day extension of time to file the financial statements for an acquired property is applicable to a Form 8-K, this extension does *not* apply to the Guide 5 post-effective amendment. Accordingly, the post-effective amendment must be filed when required by Item 20 of Guide 5, and must contain the required financial statements. This is the same position as that taken before the Form 8-K extensions were made automatic. [April 2, 2008]

229.02 During the pendency of a 71-day extension applicable to a Form 8-K, Securities Act offerings may not be made except as provided in the Instruction to Item 9.01 of Form 8-K. The Division staff has been asked whether this provision applies to real estate limited partnership offerings, thus prohibiting sales from being made until financial statements for properties acquired during the offering period have been filed (even when the quarterly post-effective amendment is not yet due). The amendment to Form 8-K was not intended to change the procedure established in Item 20.D. of Guide 5. Accordingly, when properties are acquired during the offering period, the registrant may continue sales activities notwithstanding the pendency of an 8-K extension, so long as the quarterly post-effective amendments containing the financial statements are filed when required. [April 2, 2008]

229.03 The Instruction to Item 9.01 of Form 8-K addresses the status of transactions in securities registered under the Securities Act and Rule 144 sales during the pendency of an extension, but does not address the status of such sales after a denial of a request for waiver of financial statements. This question will be dealt with on a case-by-case basis. [April 2, 2008]

229.04 Item 17(b)(7) of Form S-4 states generally that the financial statements of acquired companies that were not previously Exchange Act reporting companies need be audited only to the extent practicable, unless the Form S-4 prospectus is to be used for resales by any person deemed an underwriter within the meaning of Rule 145(c), in which case such financial statements must be audited. The Division staff was asked whether a resale pursuant to Rule 145(d), in lieu of the Form S-4 prospectus, would require the financial statements to be audited. The Division staff noted that Rule 145(d) is not included in the Instruction to Item 9.01 of Form 8-K regarding sales pursuant to Rule 144 during the 71-day extension

period for filing financial statements. As the audited financial statements for the acquired company would be required pursuant to Item 9.01 of Form 8-K, a resale pursuant to Rule 145(d) would not be permitted until they are filed. [April 2, 2008]

Proxy Rules and Schedules 14A/14C

Last Update: December 6, 2022

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the proxy rules and Schedules 14A/C. They replace the interpretations published in the Proxy Rules and Schedule 14A Manual of Publicly Available Telephone Interpretations and the March 1999 Supplement to the Manual of Publicly Available Telephone Interpretations ("Telephone Interpretations"). In particular, C&DIs 124.01, 124.07, 126.02, 151.01, 161.03, and 163.01 reflect substantive changes to the Telephone Interpretations. C&DIs 126.04, 126.05, 158.01, and 158.03 reflect technical revisions to the Telephone Interpretations. The remaining C&DIs reflect only non-substantive changes to the Telephone Interpretations. The Division currently is in the process of updating other previously-published interpretations relating to the proxy rules and any revised or new interpretations will be published here.

The bracketed date following each C&DI is the latest date of publication or revision.

Questions and Answers of General Applicability

Sections 101 to 115. Section 14

Section 101. General

Question 101.01

Question: A cooperative subject to reporting obligations under Exchange Act Section 12 has a procedure for sending an advisory ballot to its members seeking their recommendations on who should be nominated to the board of directors. Are these advisory vote materials subject to the requirements of Exchange Act Section 14(a) and Regulation 14A?

Answer: Yes, the advisory vote materials constitute a solicitation for the election of directors. Accordingly, the advisory vote materials, including the advisory ballot, are required to comply with the requirements of Section 14(a) and Regulation 14A. [May 11, 2018]

Question 101.02

Question: An acquiror and a target company plan to engage in a business combination transaction. The acquiror is subject to the federal proxy rules and will file a proxy statement to solicit shareholder approval

for the transaction. The target company is a non-reporting company that does not need to file a proxy statement to solicit its own shareholders. It does plan to issue press releases and make other public communications, including through its social media channels, to publicize the merits of the proposed transaction and its benefits for both companies' shareholders. Could the target company's public communications constitute a solicitation subject to the proxy rules?

Answer: Yes. A solicitation includes any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." See Exchange Act Rule 14a-1(l)(1)(iii). Accordingly, a target company that does not plan to solicit its own shareholders could nevertheless be engaged in a solicitation of the acquiror's shareholders if its public communications promote the proposed transaction or may be reasonably expected to influence the voting decisions of the acquiror's shareholders. Any target company communication that constitutes a solicitation would be subject to the liability provision of Exchange Act Rule 14a-9, which prohibits materially false or misleading statements or material omissions, as well as the filing and information requirements of the federal proxy rules. Also see Question 132.01 below. [March 22, 2022]

Sections 116 to 120. [Reserved]

Sections 121 to 150. Regulation 14A, Solicitation of Proxies

Section 121. [Reserved]

Section 122. Rule 14a-2

Question 122.01

Question: Does a person holding securities in several nominee accounts count as one "person" for purposes of Rule 14a-2(b)(2)?

Answer: Yes. [May 11, 2018]

Question 122.02

Question: Does providing a form of proxy to a security holder in response to that security holder's unsolicited request count against the ten-person limit of Rule 14a-2(b)(2)?

Answer: No, because such an act is not a solicitation under Rule 14a-1(l)(2)(i). [May 11, 2018]

Question 122.03

Question: Can the filing of a Schedule 13D preclude reliance on Rule 14a-2(b)(2)?

Answer: Yes. A dissident intending to engage or engaging in a solicitation of no more than ten persons under Rule 14a-2(b)(2) should be mindful that its filing of a Schedule 13D – depending on the content of this document and other relevant facts and circumstances – may constitute a more widespread solicitation that may preclude reliance upon Rule 14a-2(b)(2). For example, the filing of a Schedule 13D that states no more than what is explicitly required by the schedule generally would not be viewed as a more widespread solicitation. By contrast, where the Schedule 13D or any of its exhibits invites security holders to contact the filer in order to discuss the solicitation, or urges security holders to take some action, the Schedule 13D filing may be viewed as a solicitation of all of the registrant's security holders. [May 11, 2018]

Question 122.04

Question: If securities are purchased prior to the record date, but title does not pass until after the record date, would the efforts by the purchaser to obtain proxies from the sellers be an exempt solicitation under Rule 14a-2(a)(2)? Would such efforts count toward the ten-person limitation of Rule 14a-2(b)(2)?

Answer: As these efforts would be an exempt solicitation under Rule 14a-2(a)(2), which exempts any solicitation by a person in respect of securities of which he or she is the beneficial owner, they would not count towards the ten-person limitation in Rule 14a-2(b)(2). [May 11, 2018]

Section 123. Rule 14a-3

Question 123.01

Question: If the information in an annual report to security holders required by Rule 14a-3 is included in a proxy statement contained in a Form S-4 filed for the same security holder meeting, is a separate Rule 14a-3 annual report nevertheless required?

Answer: No. [May 11, 2018]

Question 123.02

Question: A limited partnership has units registered under Exchange Act Section 12, but it does not hold director elections and therefore does not solicit proxies for the election of directors. Is the limited partnership required to file copies of its annual report with the Commission pursuant to Rule 14a-3?

Answer: No. [May 11, 2018]

Question 123.03

Question: Would a special meeting of a limited partnership held for the purpose of adding a general partner be an annual meeting (or a special meeting in lieu of an annual meeting) of security holders to elect directors of a corporation for purposes of Exchange Act Rule 14a-3?

Answer: Yes. Accordingly, an annual report prepared in accordance with Rule 14a-3 should be provided to the limited partners in connection with the meeting. However, the limited partnership would not be required to provide more than one annual report to its limited partners during any fiscal year. [May 11, 2018]

Question 123.04

Question: What does the reference to the "most recent fiscal years" in Rule 14a-3(b)(1) mean?

Answer: The "most recent fiscal years" referenced in Rule 14a-3(b)(1) are the most recently completed fiscal years as of the date of a registrant's annual meeting, not as of the date the registrant mails proxy materials for its annual meeting. For example, a registrant with a December 31 fiscal year end, holding an annual meeting in early February 2018, must include audited balance sheets as of the end of each of fiscal years 2017 and 2016 in the annual report that accompanied or preceded the annual meeting proxy statement.[May 11, 2018]

Section 124. Rule 14a-4

Question 124.01

Question: Rule 14a-4(b)(1) states that a proxy may confer discretionary authority with respect to matters as to which a choice has not been specified by the security holder, so long as the form of proxy states in bold-

faced type how the proxy holder will vote where no choice is specified. If action is to be taken with respect to the election of directors and the persons solicited have cumulative voting rights, can a soliciting party cumulate votes among director nominees by simply indicating this in bold-faced type on the proxy card?

Answer: Yes, as long as state law grants the proxy holder the authority to exercise discretion to cumulate votes and does not require separate security holder approval with respect to cumulative voting. [May 11, 2018]

Question 124.02

Question: When is notice of a non-Rule 14a-8 matter to be presented to a vote considered to be untimely under Rule 14a-4(c)?

Answer: Notice of a non-Rule 14a-8 matter to be presented to a vote that the registrant receives after the Rule 14a-4(c)(1) "timeliness" deadline (i.e., as measured under the registrant's advance notice provision or, absent such a provision, the 45-day standard of Rule 14a-4(c)(1)) is considered untimely. This means that a registrant can exclude the matter from its proxy statement, while preserving discretionary authority to vote management proxies on such matter, as long as the registrant includes a specific statement in its proxy statement regarding how it intends to exercise its discretionary authority to vote on the matter if presented at the meeting. Additional disclosure may be necessary to satisfy Rule 14a-9. State law governs whether the matter may be properly introduced and voted upon at the meeting.[May 11, 2018]

Question 124.03

Question: If the last day of the 45-day deadline in Rule 14a-4(c)(1) for a registrant to receive timely notice from a security holder of a matter to be presented to a vote outside of Rule 14a-8 is not a business day (e.g., such last day is a weekend day or a holiday), when does the notice have to be received in order to be timely for purposes of the rule?

Answer: The notice must be received on the preceding business day. [May 11, 2018]

Question 124.04

Question: If a registrant has an advance notice by-law or charter provision that governs when notice of a matter is deemed to be timely, may it exercise discretionary voting authority in accordance with Rule 14a-4(c)(1)?

Answer: Yes. A registrant that has an advance notice by-law or charter provision governing when notice of a matter is deemed timely may exercise discretionary voting authority in accordance with Rule 14a-4(c)(1), even if the advance notice provision does not specifically reference the use of discretionary voting authority. [May 11, 2018]

Question 124.05

Question: For purposes of determining whether it has discretionary authority under Rule 14a-4(c)(1), should a registrant rely on the deadline prescribed in its advance notice provision for submission of non-Rule 14a-8 matters, or should it instead rely on the 45-day deadline specified in Rule 14a-4(c)(1)?

Answer: A registrant must rely on the deadline for submission of non-Rule 14a-8 matters prescribed in its advance notice provision in determining when notice of a matter is received in a timely manner for purposes of Rule 14a-4(c)(1). See Exchange Act Release No. 39093 (Sept. 18, 1997) (noting that Rule 14a-4(c)(1) is not intended "to interfere with the operation of state law authorized definitions of advance notice set forth in corporate bylaws and/or articles of incorporation…"). Hence, if a registrant's advance notice provision requires receipt of notice of a matter 60 days before the date on which the registrant mailed its proxy materials for the prior year's annual meeting of security holders, the registrant should use this deadline to determine compliance with the "timely notice" standard defined in Rule 14a-4(c)(1), rather than the 45-day period in Rule 14a-4(c)(1). [May 11, 2018]

Question 124.06

Question: When a registrant has changed its annual meeting date to be more than 30 days from the date it was held the prior year, or if the registrant did not hold an annual meeting last year, what is a "reasonable time" for notice of a matter to be submitted by a security holder for purposes of Rule 14a-4(c)(1)?

Answer: The term "reasonable time" should be determined based upon the particular facts and circumstances. In such a situation, the registrant must publicly disclose through means reasonably calculated to inform security holders the date change and the date by which a notice of a matter proposed by security holders must be received. [May 11, 2018]

Question 124.07

Question: The Division has permitted registrants to avoid filing proxy materials in preliminary form despite receipt of adequate advance notification of a non-Rule 14a-8 matter as long as the registrant disclosed in its proxy statement the nature of the matter and how the registrant intends to exercise discretionary authority if the matter is actually presented for a vote at the meeting. See Section IV.D of Release No. 34-40018 (May 21, 1998). Can a registrant rely on this position if it cannot properly exercise discretionary authority on the matter in accordance with Rule 14a-4(c)(2)?

Answer: No. [May 11, 2018]

Question 124.08

Question: When a registrant receives notice of a matter submitted by a security holder that is timely but deficient for purposes of Rule 14a-4(c)(2)(i.e., it does not comply with the requirements listed in the rule by, for example, failing to indicate that the security holder intends to deliver a proxy statement and form of proxy to holders of at least that percentage of the registrant's voting shares necessary to approve the matter), does the registrant have discretionary voting authority on the matter?

Answer: If the notice is timely but deficient, the registrant would not be required to put the matter on its proxy card. The registrant's ability to exercise discretionary authority, however, is conditioned on including in its proxy statement advice on the nature of the matter and how the registrant intends to exercise its discretion to vote on that matter. The registrant's ability to avoid filing a preliminary proxy statement and instead file a definitive proxy statement pursuant to Rule 14a-6 will depend upon, among other factors, the extent of its comments on, or discussion in, its proxy material of any solicitation in opposition in connection with the meeting. [May 11, 2018]

Section 125. [Reserved]

Section 126. Rule 14a-6

Question 126.01

Question: If a registrant proposes to approve or ratify awards made pursuant to a compensation plan, is it required to file the proxy statement in preliminary form?

Answer: Yes. While Rule 14a-6(a)(5) relieves registrants of the obligation to file a proxy statement in preliminary form for solicitations relating to the approval or ratification of a compensation plan or

amendments, it does not extend to the ratification or approval by security holders of awards made pursuant to such plans. [May 11, 2018]

Question 126.02

Question: Is a registrant required to file a preliminary proxy statement in connection with a proposed corporate name change to be submitted for security holder approval at the annual meeting?

Answer: No. As set forth in Release No. 34-25217 (Dec. 21, 1987), the underlying purpose of the exclusions from the preliminary proxy filing requirement is "to relieve registrants and the Commission of unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that is currently subject to selective review procedures, but ordinarily is not selected for review in preliminary form." Consistent with this purpose, a change in the registrant's name, by itself, does not require the filing of a preliminary proxy statement. [May 11, 2018]

Question 126.03

Question: How are "days" counted for purposes of the "10 calendar day" period in Rule 14a-6?

Answer: For purposes of calculating the "10 calendar day" period in Rule 14a-6, the date of filing is day one pursuant to Rule 14a-6(k). For example, if the preliminary proxy statement is filed on January 6, then January 15 would be day ten for purposes of Rule 14a-6. The registrant may send the definitive proxy statement to security holders starting at 12:01 a.m. on January 16. [May 11, 2018]

Question 126.04

Question: Can a registrant that filed a Form S-4 send proxy cards to its security holders upon the filing of a preliminary proxy statement/prospectus?

Answer: No, as Exchange Act Rule 14a-4(f) prohibits the delivery of proxy cards unless the security holders concurrently or previously received a definitive proxy statement filed with the Commission. Further, because a vote on the transaction described also would amount to a sale of the securities being registered, no proxy card can be sent until after the Form S-4 is declared effective and the final prospectus has been furnished to security holders. [May 11, 2018]

Question 126.05

Question: A registrant files a registration statement on Form S-4 that contains its proxy statement disclosure pursuant to Instruction E.1 of Form S-4. After the effective date of the registration statement, the registrant sends an additional communication to security holders relating to the transaction. Does this communication need to be filed as other soliciting material pursuant to Rule 14a-6(b) no later than the date it is first sent or given to security holders?

Answer: Yes. Given the communication was sent after the furnishing of the definitive proxy statement, it should not be filed under Rule 14a-12. [May 11, 2018]

Question 126.06

Question: Exchange Act Rule 14a-6(g)(1) requires that any person who engages in a solicitation pursuant to Exchange Act Rule 14a-2(b)(1) and beneficially owns over $5 million of the class of securities that is the subject of the solicitation to furnish or mail to the Commission a statement containing the information specified in the Notice of Exempt Solicitation (Exchange Act Rule 14a-103) no later than three days after the date the written solicitation is first sent or given to any security holder. Rule 14a-103 requires the soliciting party to attach only those written soliciting materials "required to be submitted" pursuant to Rule 14a-6(g)(1). If a soliciting party is not subject to Rule 14a-6(g)(1), is it permitted to submit a Notice of Exempt Solicitation?

Answer: Although the requirements of Rule 14a-6(g)(1), including the submission of a Notice of Exempt Solicitation, only apply to a soliciting party who beneficially owns more than $5 million of the class of subject securities, the staff will not object to a voluntary submission of such a notice, provided that the written soliciting material is submitted under the cover of Notice of Exempt Solicitation as described in C&DI 126.07 and such cover notice clearly states that the notice is being provided on a voluntary basis. Doing so will make it clear to investors the nature of the submission and that it is being made on behalf of a soliciting party who does not beneficially own more than $5 million of the class of subject securities. [July 31, 2018]

Question 126.07

Question: Rule 14a-6(g)(1) requires a Notice of Exempt Solicitation to contain the information specified in Rule 14a-103, including the name and address of the person relying on the exemption in Rule 14a-2(b)(1), and that the written soliciting material be attached to the notice. When submitting a Notice of Exempt

Solicitation to the Commission electronically on EDGAR, can the written soliciting material appear in the notice before the Rule 14a-103 information is presented?

Answer: No. Rule 14a-103 is designed to be a "cover" to which previously disseminated written soliciting material is "attached." See Rule 14a-103 ("Attach written material required to be submitted pursuant to Rule 14a-6(g)(1)."); Release No. 34-31326 (Oct. 16, 1992)(noting that the written soliciting material must be submitted "under cover" of the Notice of Exempt Solicitation). Therefore, when submitting a notice on EDGAR, whether voluntarily or to satisfy the requirements of Rule 14a-6(g)(1), all of the information required by Rule 14a-103 must be presented in the submission before any written soliciting materials (including any logo or other graphics used by the soliciting party) are presented. To the extent that the notice itself is being used as a means of solicitation, the failure to present the Rule 14a-103 information in this manner may, depending upon the particular facts and circumstances, be misleading within the meaning of Exchange Act Rule 14a-9. [July 31, 2018]

Sections 127 to 131. [Reserved]

Section 132. Rule 14a-12

Question 132.01

Question: Under the factual circumstances described in Question 101.02 above, can the target company rely upon Exchange Act Rule 14a-12 to communicate publicly about the proposed business combination transaction even though it does not plan to file its own definitive proxy statement?

Answer: Yes, subject to the conditions described below. Rule 14a-12 permits solicitations before the furnishing of a proxy statement, provided, among other things, that "a definitive proxy statement…is sent or given to security holders solicited in reliance" on the rule. See Rule 14a-12(a)(2). Recognizing the need for the target company to publicly announce the proposed transaction and the fact that the acquiror will send its own definitive proxy statement to its shareholders, the staff will not object if the target company relies on Rule 14a-12 for its public written communications, provided that:

- the target company identifies itself as a participant in the acquiror's proxy solicitation;
- the target company satisfies the remaining applicable requirements of Rule 14a-12, including the filing of its communications with the Commission; and
- the acquiror complies with the conditions specified in Question 102.04 of the Exchange Act Form 8-K C&DIs.

The target company may have its written communication filed by the acquiror on its behalf and under the acquiror's Exchange Act file number, provided the communication is clearly identified as that of the target company. [March 22, 2022]

Question 132.02

Question: Is the Rule 14a-12 position described in Question 132.01 above also available for an acquiror that makes public communications regarding a proposed business combination transaction in which it will not file a definitive proxy statement for the transaction but the target company will?

Answer: Yes, as long as the following conditions are satisfied:

- the acquiror identifies itself as a participant in the target company's proxy solicitation;
- the acquiror complies with all other requirements of Rule 14a-12, including the filing of its communications with the Commission; and
- the target company complies with the conditions specified in Question 102.04 of the Exchange Act Form 8-K C&DIs.

The acquiror may have its written communication filed by the target company on its behalf and under the target company's Exchange Act file number, provided the communication is clearly identified as that of the acquiror. [March 22, 2022]

Section 133. Rule 14a-13

Question 133.01

Question: Is a broker search letter a proxy solicitation within the meaning of Exchange Act Rule 14a-1(l)?

Answer: No, it is not a proxy soliciting material where it is sent to a broker and only requests information about the number of copies of the proxy materials that the broker will need to forward to beneficial owners. [May 11, 2018]

Section 139. Rule 14a-19

Question 139.01

Question: Rule 14a-19(a)(1), in conjunction with Rule 14a-19(b), generally requires a dissident shareholder in an election contest to provide the registrant with notice of the names of the dissident shareholder's

nominees for whom it intends to solicit proxies at least 60 calendar days before the anniversary of the prior year's annual meeting date. Can a dissident shareholder include in the Rule 14a-19(b) notice the names of more nominees than there are director seats up for election, without the intent of actually soliciting proxies for all of them but, instead, finalizing its slate of nominees after the Rule 14a-19(b) deadline and closer to the date of the shareholder meeting?

Answer: No. The Rule 14a-19(b) notice must contain only the names of nominees for whom the dissident shareholder intends to solicit proxies. The purpose of this requirement is to provide a definitive date by which the parties in a contested election will have the names of all nominees in order to compile a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021). Knowingly submitting the names of more nominees than there are director seats up for election, with the intention of finalizing the actual slate of nominees after the Rule 14a-19(b) notice deadline, would be inconsistent with the purpose of the rule.

The staff, however, recognizes that a dissident shareholder may need to change its slate of nominees after the Rule 14a-19(b) notice deadline (for example, because a nominee withdraws from the slate or the registrant increases the number of director seats up for election). Therefore, the staff will not object if the dissident shareholder includes in its Rule 14a-19(b) notice: (1) the names of the nominees for whom it intends to solicit proxies and (2) the names of additional or alternate nominees who, in accordance with the registrant's governing documents and state law, would be presented for election in the event of a need to change the original slate, so long as the notice clearly identifies the persons who are being presented as additional or alternate nominees. If the dissident shareholder later changes its slate to include any of the additional or alternate nominees, then it must promptly notify the registrant of the change as required by Rule 14a-19(c).

The views above also apply to the ability of a registrant to include in its Rule 14a-19(d) notice the names of more nominees than director seats up for election. [August 25, 2022]

Question 139.02

Question: Rule 14a-19(b) generally requires a dissident shareholder in an election contest to send a notice to the registrant with the names of its nominees. Similarly, Rule 14a-19(d) requires the registrant to provide the names of the registrant's nominees to any person conducting a solicitation pursuant to Rule 14a-19. In a contested director election where more than one dissident shareholder intends to present a slate of director nominees, should the registrant inform each dissident shareholder of the Rule 14a-19(b) notice that the registrant received with respect to persons nominated by other dissident shareholders?

Answer: Yes. The Rule 14a-19 notification requirements are intended to provide the parties in a contested election with the names of all director nominees by a definitive date so they can compile a universal proxy

card. See Release No. 34-93596 (Nov. 17, 2021). Although Rule 14a-19 does not expressly address a situation where there is more than one dissident shareholder submitting a slate of nominees, the registrant is best positioned to notify all parties of the slates submitted by the dissident shareholders as it alone receives the Rule 14a-19(b) notices that all dissident shareholders must send in a contested election. Accordingly, the registrant should notify each dissident shareholder, by the deadline prescribed in Rule 14a-19(d), of not only the names of its nominees and any nominees submitted under a "proxy access" provision but also of the names of any other persons nominated by another dissident shareholder who provided a Rule 14a-19(b) notice. This view also applies to the Rule 14a-19 requirements with respect to prompt notifications of any changes in the registrant's and dissident shareholders' slates of nominees. [August 25, 2022]

Question 139.03

Question: Rule 14a-19(b)(1) requires the dissident shareholder in an election contest to send notice of its director nominees generally no later than 60 calendar days before the anniversary of the prior year's annual meeting. In addition, Rule 14a-5(e)(4) requires the registrant to disclose in its proxy statement the Rule 14a-19(b)(1) deadline for a dissident shareholder to provide notice of its director nominees for election at the next annual meeting. If the registrant's advance notice bylaw provision imposes an earlier deadline for notice of a dissident shareholder's nominees than Rule 14a-19(b)(1), must the registrant's proxy statement also include disclosure of Rule 14a-19(b)(1)'s later deadline?

Answer: Rule 14a-19(b)(1) establishes a minimum, not a maximum, notice period for a dissident shareholder to inform the registrant of its intent to present its own director nominees. See Release No. 34-93596 (Nov. 17, 2021)("Rule 14a-19's notice requirement is a minimum period that does not override or supersede a longer period established in the registrant's governing documents."). Accordingly, where the registrant's advance notice bylaw provision requires earlier notice than Rule 14a-19(b)(1), then the registrant disclosing only the earlier advance notice bylaw deadline would satisfy Rule 14a-5(e)(4).

Note, however, that Rule 14a-19(b) requires specific information to be included in the notice, such as a statement that the dissident shareholder intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. To the extent that the registrant's advance notice bylaw provision does not require the same information as that required by Rule 14a-19(b), then the registrant's proxy statement must clearly state the need for a dissident shareholder to comply with the additional requirements of Rule 14a-19(b). [August 25, 2022]

Question 139.04

Question: A registrant receives director nominations from a dissident shareholder purporting to nominate candidates for election to the registrant's board of directors at an upcoming annual meeting. The registrant, however, determines that the nominations are invalid due to the dissident shareholder's failure to comply with its advance notice bylaw requirements. Must the registrant include the names of the dissident shareholder's nominees on its proxy card pursuant to Rule 14a-19(e)(1) under these circumstances?

Answer: No. Only duly nominated candidates are required to be included on a universal proxy card. See Release No. 34-93596 (Nov. 17, 2021) (noting that universal proxy cards "must include the names of all duly nominated director candidates presented for election by any party…", and explaining that "[a] duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations"). If the registrant determines, in accordance with state or foreign law, that the dissident shareholder's nominations do not comply with its advance notice bylaw requirements, then it can omit the dissident shareholder's nominees from its proxy card. [December 6, 2022]

Question 139.05

Question: A registrant determines that a dissident shareholder's director nominations do not comply with its advance notice bylaw requirements and excludes the dissident shareholder's nominees from its proxy card. The dissident shareholder then initiates litigation challenging the registrant's determination regarding the validity of the director nominations. Under these factual circumstances, what are the registrant's obligations with respect to its proxy statement disclosures and solicitation efforts?

Answer: The registrant must disclose in its proxy statement its determination that the dissident shareholder's director nominations are invalid, a brief description of the basis for that determination, the fact that the dissident shareholder initiated litigation challenging the determination, and the potential implications (including any risks to the registrant or its shareholders) if the dissident shareholder's nominations are ultimately deemed to be valid.

If a registrant furnishes proxy cards that do not include the dissident shareholder's director candidates and a court subsequently determines that the dissident shareholder's candidates are duly nominated, then the registrant is obligated under Rule 14a-19 to furnish universal proxy cards with the dissident shareholder's candidates. Accordingly, it should discard any previously-furnished proxy cards that it

received. The registrant also should ensure that shareholders are provided with sufficient time to receive and cast their votes on the universal proxy cards prior to the shareholder meeting, including, if necessary, through the postponement or adjournment of the meeting. [December 6, 2022]

Question 139.06

Question: Can a dissident shareholder conducting a non-exempt solicitation in support of its own director nominees simply file a proxy statement on EDGAR, avoid providing its own proxy card, and instead rely exclusively on the registrant's proxy card to seek to have its director nominees elected?

Answer: No. Rule 14a-19(e) requires each soliciting party in a director election contest to use a universal proxy card that includes the names of all director candidates, including those nominated by other soliciting parties and proxy access nominees. Rule 14a-19(a)(3) further requires a dissident shareholder to solicit holders of at least 67% of the voting power of shares entitled to vote on the director election contest and to include a representation to that effect in its proxy statement. This requirement is intended to prevent a dissident shareholder from capitalizing on the inclusion of its nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. See Release No. 34-93596 (Nov. 17, 2021). A dissident shareholder would fail to comply with these rules if it does not furnish its own universal proxy cards to holders of at least 67% of the voting power through permitted methods of delivering proxy materials (such as the Rule 14a-16 "notice and access" method). [December 6, 2022]

Sections 151 to 164. Schedule 14A: Information Required in Proxy Statement

Section 151. General

Question 151.01

Question: A registrant solicits its security holders to approve the authorization of additional common stock for issuance in a public offering. While the registrant could use the cash proceeds from the public offering as consideration for a recently announced acquisition of another company, it has alternative means for fully financing the acquisition (such as available credit under an executed credit agreement in the full amount of the acquisition consideration) and may choose to use those alternative financing means instead. Would the proposal to authorize additional common stock "involve" the acquisition for purposes of Note A of Schedule 14A?

Answer: No. Raising proceeds through a sale of common stock is not an integral part of the acquisition transaction because at the time the acquisition consideration is payable, the registrant has other means of fully financing the acquisition. The proposal would therefore not involve the acquisition and Note A would

not apply. By contrast, if the cash proceeds from the public offering are expected to be used to pay any material portion of the consideration for the acquisition, then Note A would apply. [May 11, 2018]

Sections 152 to 154. [Reserved]

Section 155. Item 4

Question 155.01

Question: Is a subsidiary created by a parent for the purpose of engaging in a proxy solicitation a participant in the solicitation?

Answer: Yes. Both the parent and the subsidiary would be participants in the solicitation pursuant to Instruction 3(a)(vi) to Item 4 of Schedule 14A. [May 11, 2018]

Sections 156 to 157. [Reserved]

Section 158. Item 7

Question 158.01

Question: A registrant will hold a special meeting to elect one new person to its board of directors. The incumbent directors were elected at the annual security holder meeting three months ago and will not be up for re-election. Do the proxy materials for the special meeting have to include the information required by Items 7 and 8 of Schedule 14A for the incumbent directors?

Answer: Yes. [May 11, 2018]

Question 158.02

Question: Does a registrant soliciting proxies for a special meeting at which management will propose a classification of the board of directors (but not the election of any directors under the proposed new board structure) need to include information pursuant to Items 7 and 8 of Schedule 14A in the proxy statement for the special meeting?

Answer: No, provided that the proposal, if adopted, will not have the effect of shortening or lengthening the term of any incumbent directors. [May 11, 2018]

Question 158.03

Question: B is to be merged into A in a Rule 145 transaction. B's security holders will be voting to approve the proposed transaction and will become security holders of A. A's security holders are not voting on the proposed transaction. Three of B's directors will become directors of A. Is it necessary to include the information required by Items 7 and 8 of Schedule 14A as to the directors of A in A's Form S-4, which includes B's proxy statement?

Answer: Yes. Pursuant to Note A to Schedule 14A, the Form S-4 should contain the information required by Items 7 and 8 of Schedule 14A as to the A directors. [May 11, 2018]

Sections 159 to 160. [Reserved]

Section 161. Item 10

Question 161.01

Question: Do all actions on compensation plans that must be submitted for security holder approval need all of the disclosure required under Item 10 of Schedule 14A?

Answer: Any action on a compensation plan that must be submitted for security holder approval requires all of the disclosure called for under Item 10 of Schedule 14A. If the action proposed is only an amendment to an existing plan (e.g., adding shares available under an option plan, or adding a new class of participants), the Item 10 disclosure still must include a complete description of any material features of the plan (Item 10(a)(1)), including the material differences from the existing plan (Instruction 2). [May 11, 2018]

Question 161.02

Question: When should registrants provide the disclosure required by Item 10(a)(2)(i) of Schedule 14A regarding the benefits or amounts that will be received or allocated to each of the named executive officers and certain groups?

Answer: Item 10(a)(2)(i) disclosure regarding benefits or amounts that will be received by or allocated to each of the named executive officers and certain groups will only be called for if the plan being acted upon is: (i) a plan with set benefits or amounts (e.g., director option plans); or (ii) one under which some grants or awards have been made by the board or compensation committee subject to security holder approval

(e.g., action is to add shares available under an existing option plan because there are not enough shares remaining under the plan to honor exercises of all outstanding options). [May 11, 2018]

Question 161.03

Question: If a registrant is required to disclose the New Plan Benefits Table called for under Item 10(a)(2) of Schedule 14A, should it list in the table all of the individuals and groups for which award and benefit information is required, even if the amount to be reported is "0"?

Answer: Yes. Alternatively, the registrant can choose to identify any individual or group for which the award and benefit information to be reported is "0" through narrative disclosure that accompanies the New Plan Benefits Table. [May 11, 2018]

Question 161.04

Question: Can a registrant include other information, such as that called for by Item 10(b) of Schedule 14A, in the New Plan Benefits Table mandated by Item 10(a)(2) of Schedule 14A?

Answer: No. [May 11, 2018]

Question 161.05

Question: Should a registrant report the "dollar value" for option plans in the New Plan Benefits Table required by Item 10(a)(2) of Schedule 14A?

Answer: For option plans, no "dollar value" information should be given in the table (i.e., no Black-Scholes or other valuation). The number of shares underlying the options should be provided in the "Number of Units" column. [May 11, 2018]

Question 161.06

Question: Does Item 10(a)(2)(iii) of Schedule 14A require disclosure of actual awards made under an existing plan for the prior fiscal year?

Answer: No. The language of Item 10(a)(2)(iii) stating "if the plan had been in effect" contemplates plans that were not in effect for the prior fiscal year. Accordingly, Item 10(a)(2)(iii) disclosure of actual awards under an existing plan for the last fiscal year is not required. Disclosure under this item would be required

when action is being taken on an existing plan only where the existing plan is being amended to alter a formula or other objective criteria to be applied to determine benefits. [May 11, 2018]

Question 161.07

Question: Does Item 10(a)(2)(i) or 10(a)(2)(iii) of Schedule 14A require a "pro forma" presentation of the benefits or amounts that would have been received under a plan where such awards or benefits are discretionary?

Answer: No, as such discretionary awards or benefits would not be considered to be determinable for purposes of these two item requirements. [May 11, 2018]

Question 161.08

Question: Does the disclosure requirement in Item 10(a)(2)(iii) of Schedule 14A apply to all compensation plans?

Answer: This disclosure requirement applies only to plans that have objective criteria for determining the compensation payable under the plan so that the registrant can take the criteria and, assuming the variables of the last year, determine what would have been paid under the plan had it been in place then. An example would be a bonus or long-term incentive plan with award opportunities based upon a fixed percentage of salary and actual payment earned based upon corporate performance against fixed measures (such as percentage growth in earnings over previous years). [May 11, 2018]

Question 161.09

Question: How should the "market value of the securities underlying the options, warrants, or rights as of the latest practicable date" be calculated for purposes of Item 10(b)(2)(i)(D) of Schedule 14A?

Answer: The "market value of the securities underlying the options, warrants, or rights as of the latest practicable date" may be presented as either: (i) market price per share or (ii) aggregate market value of the total number of shares underlying all options (granted or available for grant) under the plan. [May 11, 2018]

Question 161.10

Question: Does Item 10(b)(2)(ii) of Schedule 14A, which requires the registrant to state separately the amount of options received or to be received, cover options under all plans or only the plan upon which action is to be taken?

Answer: The requirement covers only options under the plan upon which action is being taken. For example, it would be inapplicable if a new plan was being considered because there would be no grants under that new plan to report. No disclosure is required if a new plan is being considered, even if the registrant has other plans under which there have been or will be options granted, and even if a previous or existing plan appears identical to the new plan in all but name. [May 11, 2018]

Question 161.11

Question: Does the disclosure under Item 10(b)(2)(ii) of Schedule 14A need to appear in a table?

Answer: No. This disclosure does not have to be in a table; narrative disclosure is acceptable. [May 11, 2018]

Question 161.12

Question: Does Item 10(b)(2)(ii) of Schedule 14A apply only to options received during the last year?

Answer: No. It applies to all options received at any time (not just last year) and options to be received (if determinable) by the specified persons and groups. The information called for under this item requirement should be given for each individual and group (including those for which the amount of options received or to be received is "0"). [May 11, 2018]

Section 162. [Reserved]

Section 163. Item 12

Question 163.01

Question: Does a proxy statement seeking security holder approval for the elimination of preemptive rights from a security involve a modification of that security for purposes of Item 12 of Schedule 14A?

Answer: Yes. Accordingly, financial and other information would be required in the proxy statement to the extent required by Item13 of Schedule 14A. [May 11, 2018]

Section 164. Item 13

Question 164.01

Question: Does a proxy statement seeking security holder approval of an increase in authorized common shares and the elimination of an authorized but unissued class of preferred stock require the inclusion or incorporation of financial statements?

Answer: No, unless the authorization is being sought in connection with an exchange, merger, consolidation, acquisition, or similar transaction. See Instruction 1 of Item 13 of Schedule 14A. [May 11, 2018]

Question 164.02

Question: Is it permitted for a proxy statement to incorporate by reference the financial information required by Item 13(a) of Schedule 14A from a prospectus?

Answer: Yes. The proxy statement may incorporate by reference from a prospectus the information required by Item 13(a) despite the fact that Item 13(b)(2) refers only to a previously-filed "statement or report." [May 11, 2018]

Question 164.03

Question: Are the financial statements required by Item 13 of Schedule 14A needed for a proxy statement filed in connection with a merger that is intended solely to change the registrant's domicile from one state to another?

Answer: No. [May 11, 2018]

Question 164.04

Question: Instruction 1 to Item 13 of Schedule 14A states that the information required by Item 13(a) is not deemed material where the matter to be acted upon is the authorization of preferred stock for issuance for cash in an amount constituting fair value. For purposes of this instruction, is the issuance of preferred stock upon conversion of debentures the equivalent to the authorization of preferred stock for cash?

Answer: No, they are not equivalent. Therefore, the registrant must provide Item 13 financial information in the proxy statement to the extent the financial information is material. [May 11, 2018]

Sections 165 to 200. [Reserved]