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April 10, 2006

VIA ELECTRONIC MAIL

Ms. Nancy M. Morris
Secretary
UNITED STATES SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.W.
Washington, D.C. 20549-9303
E-mail: rule-comments@sec.gov

**Re: File No. S7-03-06
Proposed Rule Comment**

Dear Ms. Morris:

The following comment is addressed to the proposed Compensation Discussion and Analysis Section (Item 402 (b)) and proposed instructions thereto.

To facilitate your consideration of this comment, I will give a brief description of my professional background, summarize my comment, and then explain the reasoning underlying the comment.

Writer's Background

I am an attorney in private civil practice. My practice experience includes representation of large and small companies before the SEC in various contexts, and almost 20 years of courtroom experience in securities, derivative and corporate litigation. I am the founding partner of a San Francisco law firm that specializes in representing and counseling institutional investors in securities matters. The firm's clients include several of the largest public pension funds in the United States and some of the world's largest financial organizations. I am a member of the National Association of Public Pension Attorneys and the International Corporate Governance Network, and an associate member of the Council of Institutional Investors. The views expressed in this comment are my own.

The efforts of Chairman Cox, the Commission and its staff to adhere to a balanced, common sense approach to enhancing the disclosure of executive compensation are to be commended. The following comment is offered with a similar view to containing the cost of any disclosure requirement in relation to the anticipated benefits.

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Brief Summary of Comment

The instructions to the new “Compensation Discussion and Analysis” (Proposed Item 402 (b)) should include a requirement that the company state whether the directors have evaluated the cost of the services provided by the company’s named executives in relation to qualified alternatives available to the company at substantially lower cost. A brief discussion of the board’s conclusions should be included.

Explanation of Comment

Executive pay levels at large US companies are the subject of ongoing public commentary. Most often, executive pay is seen as increasing while real wages of salaried employees stagnate or decrease. Critics of high executive pay attribute the unchecked growth in pay levels to weak governance and corporate boards that lack independence from management.

While investors benefit from disclosure of compensation levels in absolute terms, there has been little in the way of disclosure of the “how and why” behind the board’s decisions on executive compensation. Item 402 (b)’s requirement of a “Compensation Discussion and Analysis” section will provide much needed context for the decisions of directors relating to executive compensation.

By requiring discussion of the objectives and elements of the company’s compensation plans, the Commission proposal will give investors greater insight into the strategic thinking underlying board level compensation decisions. The Commission proposal recognizes that numbers alone are of limited benefit to investors unless they are accompanied by sufficient information to assess the quality of the board decision-making underlying executive compensation decisions. Proposed Rule 402 (b) would be considerably strengthened by including a requirement that the company discuss its compensation of senior executives in relation to alternatives.

There is no defensible reason for treating the decision of a company’s board of directors to contract for the services of an executive differently from any other board-level contracting decision. The amounts paid to senior executives often comprise a substantial portion of the company’s net earnings. Understanding the extent to which a board evaluates alternatives to contracting with a particular executive or group of executives is critical to evaluating the board’s independence from those executives.

A commitment to pay extraordinarily high compensation levels to an executive or management team when candidates of similar reputation and ability are available at a substantially lower cost suggests compensation decisions driven less by objective criteria than by the board’s lack of independence from management. It is well established that other board level actions must be justified by reference to arm’s length alternatives. A board would be hard pressed, for example, to justify the decision to retain an accounting firm at rates well in excess of those charged by major accounting firms on the grounds that the accounting firm’s services are so inherently unique as to make it indispensable that the firm be retained.

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While the selection of one executive in relation to another will usually have a far greater impact on a company's fortunes than its choice of accountants, executives are routinely rated, scored and evaluated in relation to each other and to various absolute measures of performance. Every argument that could be made in opposition to evaluating the cost of the services provided by executives in relation to those available from others has been made at one time or another by attorneys, accountants and other professionals and been rejected (and rightly so) by the very executives who employ those services. There is an active market for "executive talent," and the extent to which a board evaluates a candidate's accomplishments and compensation demands in relation to market alternatives is a critical indicator of board independence.

The cost of adding a requirement that companies disclose the extent to which the board has considered alternative candidates for named executive positions would not materially increase the cost of compliance with Rule 402 (b). A company that chooses, for whatever reason, not to consider alternative candidates would be free to indicate as much. One can conceive, for example, that a company's board might conclude that a particular executive is indispensable to carrying out specific board objectives, and choose not to consider alternative candidates for that reason. A statement that compensation levels are attributable to the board's conclusion that a particular candidate is considered critical to carrying out strategic business objectives and the board's supporting rationale would be of great assistance to investors seeking to evaluate board independence and the quality of the board's long-range strategic thinking. (A board level judgment that a particular individual is indispensable to the achievement of company business objectives would also presumably rise to the level of materiality and otherwise be subject to disclosure).

Similarly, if a board considers alternative candidates and concludes that the services provided by a particular executive could not be secured at a substantially lower cost by an equally qualified candidate, a brief statement that the board has undertaken such an inquiry and so concluded would be helpful to investors. Conversely, if a board concludes that an alternative candidate could provide the services for less but chooses nevertheless to retain an executive at a substantially greater cost, the board's decision and underlying rationale will likely be of great interest to investors.

The retention and compensation of executives is uniquely committed to the business judgment of a board's directors. A valid exercise of business judgment must be the product of informed deliberation, however. The Commission's proposal for a Compensation Discussion and Analysis section will provide new insight into the reasoning of corporate directors on matters of executive compensation. By requiring discussion of the extent to which directors have evaluated market alternatives in reaching their compensation decisions, the Commission proposal will further benefit investors by allowing them to evaluate the quality of decision-making underlying compensation actions that implicate a seemingly ever-increasing share of the company's earnings. By including such a requirement, the Commission would also limit the potential for the Compensation Discussion and Analysis section becoming an exercise in "boilerplate," as the disclosure requirements would not be satisfied by generalized expressions of the board's commitment to "linking pay to performance" and the like.

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The Commission is to be commended for its executive compensation proposals. Requiring that consideration of market alternatives be discussed could materially improve the quality of board deliberation on matters of executive compensation and encourage corporate directors to consider their actions in a broader economic perspective.

Thank you for your consideration.

Yours very truly,

GIRARD GIBBS
& De BARTOLOMEO, LLP

/s/ Daniel C. Girard

Daniel C. Girard