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July 5, 2006

Nancy Morris, Secretary
United States Securities and Exchange
Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Morris:

RE: Executive Compensation Disclosure Proposal File No. S7-03-06

This letter is submitted in response to the request by the Securities and Exchange Commission (the "Commission") for comments on proposed amendments to the disclosure requirements for executive and director compensation, security ownership of officers and directors and related matters (the "Proposals") set forth in the release described above dated January 27, 2006 (the "Proposing Release"). The comments expressed in this letter represent the views of the undersigned and do not necessarily reflect the views of Kirkpatrick & Lockhart Nicholson Graham LLP or its clients.

Introduction

Short- and long-term non-stock incentive compensation arrangements for named executive officers ("NEOs") can take a myriad of forms. Some of these forms fit neatly within the disclosure categories established by the Proposals and others do not. While it may not be feasible for the rules to address with specificity each and every incentive plan permutation that may exist, some general guidance for disclosure with respect to non-traditional incentive plan structures would be helpful. One form of plan that may be non-traditional, but is by no means uncommon, is the so-called "EVA plan"¹ under which executives accrue rights to certain compensation based on increases in the company's "economic value added." EVA is generally calculated with reference to a company's operating profit, the amount of capital employed in the company's business and the cost of such capital. While the design of such plans is not uniform, one typical approach is as follows:

EVA Plan Description

For each fiscal year with respect to which company EVA is a positive number, a fixed percentage of such EVA is set aside for the participating executives (typically each executive is assigned a fixed percentage of the pool). A portion of each executive's

¹ "EVA" is a trademark of Stern Stewart & Co.



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris
July 5, 2006
Page 2

annual EVA plan accrual is paid out in cash shortly after year-end. The plans of some companies base this payout amount on a "target bonus" for each executive (usually stated as a percentage of the executive's base salary) while other plans simply use a fixed percentage of the executive's EVA plan accrual. The remainder of each executive's EVA plan accrual is "banked," *i.e.* it is credited to an unfunded bookkeeping account for the executive. The banked amounts are credited with interest at a fixed rate or based on an interest or investment index ("interest credits"), and after each subsequent year for which EVA is a positive amount, one-third (or some other portion) of the banked amount is paid out to the executive in cash. If EVA is negative for a particular year, each executive is allocated a negative accrual that results in a reduction, *pro tanto*, of the executive's EVA plan bank account, and nothing is paid out to the executive for that year even if the bank account remains positive following such reduction.

Therefore, for years for which company EVA is positive, EVA plan payouts occur, and each such payout consists of both a portion of the prior year's plan accrual and a portion from the executive's EVA plan bank account. Banked amounts may be subject to forfeiture upon termination of employment. In many cases, the company has no other bonus or non-stock incentive plan.

Analysis

The Proposals do not, so far as I can tell, contain a definition of "bonus" or "bonus plan." The Proposals do contain the following definition of "incentive plan" (see proposed Item 402(a)(6)(iii)):

(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 small business issuer or an affiliate, the small business issuer's stock price, or any other measure. A non-stock incentive plan is an incentive plan or portion of an incentive plan where the relevant performance measure is not based on the price of the small business issuer's equity securities or the award does not permit settlement by issuance of the small business issuer's equity securities. The term incentive plan award means an award provided under an incentive plan.

This is in contrast to the current rule, in Regulation S-K Item 402(a)(7)(iii), which defines "long-term incentive plan" to include "any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year...." As a result of the elimination of the distinction between single-year and multi-year



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris
July 5, 2006
Page 3

incentive plans, it appears that many plans commonly thought of as "bonus plans" would fall within the proposed definition of "incentive plan." However, the proposed new Summary Compensation Table has separate columns for "bonus" and "non-stock incentive plan" payments, respectively. The Proposing Release describes the Commission's rationale for the elimination of the "long-term" concept as follows (see p. 54 of the Proposing Release):

[W]e also propose to revise the definition of 'long term incentive plan' to eliminate any distinction between a 'long term' plan and one that may provide for periods shorter than one year, because, like the captions, the current approach creates distinctions that may be confusing to users and preparers. The proposals would thus define an 'incentive plan' as any plan providing compensation intended to serve as incentive for performance to occur over a specified period. Consistent with this change, as described above, we propose to merge the current Other Annual Compensation column into the proposed All Other Compensation column, and include current information regarding incentive plan compensation in the appropriate column for the relevant form of award.

This laudable attempt to eliminate confusion in the Summary Compensation Table may itself lead to some confusion on the part of some issuers. Very often, in my experience, it is primarily the duration of the performance period that distinguishes a bonus plan from other types of performance (incentive) arrangements. Moreover, some incentive plans, like the EVA plan described above, are really hybrid arrangements that do not easily fit within the categories set forth in the proposed rules.

To determine how the EVA plan should be disclosed in the compensation tables under the Proposal, several questions must be answered. The questions, along with my thoughts about them, are set forth below. While I do not expect that the Commission will specifically address each of these questions, I hope that the final rules will contain general principles that will aid issuers in preparing tabular disclosures with respect to non-traditional incentive plans.

1. How should the EVA plan be characterized for purposes of the new disclosure rules?

The EVA plan has some features of a bonus plan, a long-term incentive plan and a deferred compensation plan. Part of the plan has the characteristics of an annual bonus arrangement. This is the part that provides for a cash payment, shortly after year-end, of a portion of an NEO's EVA plan accrual for the year. This amount is both earned and paid based upon single-year performance. Such a payment is made for any year with respect to which the company's EVA is a positive number.



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris
July 5, 2006
Page 4

The bank account feature of the plan has characteristics of a long-term incentive plan in that payments from the account are earned based upon company performance over a period of more than one fiscal year (as well as upon the NEO's continued employment). A bank account credit occurs for a particular year based solely on the level of that year's EVA but the credit can subsequently be diminished or lost as a result of negative EVA in one or more later years. The initial determinant of the credit is one-year EVA, and that credit is unaffected by later performance so long as EVA remains positive, but the ultimate payment from the bank account is affected by subsequent performance if and to the extent EVA turns negative.

The bank account feature, with the interest credits, may have the appearance of a deferred compensation arrangement, but I believe it does not constitute deferred compensation for disclosure purposes, at least under the typical arrangement where the banked amounts, including the interest credits, are at all times subject to a substantial risk of forfeiture (*i.e.* they are forfeitable upon termination of employment) until the very time of payment.

From the standpoint of simplicity and the issuer's convenience, the preferable approach would be to include all payments from a single plan in the same column of the same table. However, because of the distinctive nature of the different elements that comprise a typical EVA plan, it may be appropriate to disaggregate plan payments for purposes of the applicable compensation disclosure tables.

2. How should the company report the portion of an NEO's total EVA plan accrual that is earned for a fiscal year and paid out shortly after year-end?

This payment is earned based on company performance for a single fiscal year. It is the equivalent of a bonus and should be reported as such in column (e) of the proposed Summary Compensation Table.

3. How should the company report the portion of an NEO's EVA plan accrual that is earned for a fiscal year and credited to the NEO's EVA plan bank account?

As noted above, an NEO's EVA plan bank account has characteristics of a long-term incentive compensation arrangement. Payments from the account are earned based upon company performance over a period of more than one fiscal year as well as upon continued employment. The Proposing Release states that non-stock, performance-based compensation under a long-term plan would be disclosed in the Summary Compensation Table "in the year when the relevant specified performance criteria under the plan are satisfied and the compensation earned, whether or not payment is actually



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris

July 5, 2006

Page 5

made to the named executive officer in that year.” In addition, it provides that “the grant of an award (providing for future compensation if [the applicable] performance measures are satisfied) under such a plan would be disclosed in the supplemental Grants of Performance-Based Awards Table in the year of grant, which would generally be some year prior to the year in which performance-based compensation under the plan is reported in the Summary Compensation Table.” See p. 37 of the Proposing Release.

Thus, an amount credited an NEO’s bank account for a fiscal year under the EVA plan is reportable in the Summary Compensation Table only if and when the “performance criteria under the plan are satisfied and the compensation earned.” Under the EVA plan, the applicable performance criteria are not fully met and the compensation is not completely earned when an amount is first credited to the NEO’s bank account. Until an amount is actually paid from the bank account it remains subject to (i) elimination, in whole or in part, as a result of negative EVA in future years and (ii) forfeiture in the event of termination of the NEO’s employment. It appears, therefore, that such bank account credits would not be reportable in the “Non-Stock Incentive Compensation” column (column (h)) of the proposed Summary Compensation Table (or in any other column of that table) for the year for which the credit is made.

An amount would be reportable, for the fiscal year for which it is credited, in column (d) of the Grants of Performance-Based Awards table if it is deemed to provide “for future compensation if [the applicable] performance measures are satisfied.” The bank account feature of the EVA plan does not fit this description in a classic sense in that the sole element of future performance that matters is future negative EVA. Nevertheless, the bank account is affected, and is ultimately determined, by multi-year performance, so it would seem appropriate to consider annual credits to the account as reportable in column (d) of the Grants of Performance-Based Awards table for year to which such credits relate.

The EVA plan does not involve “Threshold,” “Maximum” and “Target” concepts, so disclosure of “Estimated Future Payouts” in columns (h), (i) and (j) of the Grants of Performance-Based Awards table is problematic. Reporting of estimated payouts is further complicated by the following features of a typical EVA plan (i) one-third of the NEO’s total bank account is paid out following any year for which EVA is a positive amount, (ii) the bank account is subject to decline if EVA in future years is negative and (iii) the bank account balance is forfeited in most cases if the NEO’s employment terminates.



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris
July 5, 2006
Page 6

4. How should the company report interest credits that are allocated to an NEO's EVA plan bank account for a fiscal year?

The Proposing Release states that "As with the Stock Awards and Option Awards columns, earnings on outstanding awards of other incentive plans would also be included in the Non-Stock Incentive Plan Compensation column." This assumes, I believe, that the earnings are credited on incentive compensation that is considered "earned" as discussed above under question 3 and was or is being reported in the Non-Stock Incentive Plan Compensation column of the Summary Compensation Table. Under the EVA plan, interest credits on an NEO's bank account are subject to reduction or elimination as a result of future negative EVA and, accordingly, are apparently not earned and reportable as "Non-Stock Incentive Compensation" in column (h) of the Summary Compensation Table for the year in which the credits are made.

5. How should the company report the total amount credited to an NEO's EVA plan bank account as of the end of a fiscal year?

I believe that an NEO's bank account balance at year-end would be reportable, if at all, either as a footnote to either the Summary Compensation Table or the Grants of Performance-Based Awards table or in the narrative discussion of the plan.

6. How should the company report an amount banked in a previous year and paid out in the current year?

As described above, shortly following the end of any fiscal year for which EVA is a positive amount, an NEO is entitled to receive a payment in cash equal to one-third of the balance credited to his or her EVA plan bank account. In effect, amounts credited to the bank account are earned only when they are paid; until payment, the bank account amount remains subject to reduction (or elimination) by negative EVA and to forfeiture upon termination of the NEO's employment.

7. How should the company report, if at all, the effect of a negative EVA plan accrual for a fiscal year?

If EVA is negative for a fiscal year, the NEO's EVA plan accrual for the year will be a negative amount. Such negative amount will reduce, *pro tanto*, the NEO's bank account. No payout of any kind will be made to the NEO for such year. Because there is no payout or positive bank account credit for such year, it seems that nothing would be reportable in any table for that year except perhaps for any interest credit earned that year.



Kirkpatrick & Lockhart Nicholson Graham LLP

Nancy Morris
July 5, 2006
Page 7

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I appreciate the opportunity to provide this information to the Commission. If you have any questions with respect to the information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard E. Wood', written over a light blue horizontal line.

Richard E. Wood

REW/vlw-p