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Via e-mail at [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Ms. Elizabeth M. Murphy, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington D.C. 20549-1090

Re: SEC Release Nos. 33-9052; 34-60280; IC-28817; File No. S7-13-09  
Proxy Disclosure and Solicitation Enhancements (the **Release**);  
Comments on Proposed Modifications to Summary Compensation Table  
Reporting of Share-Based Payment Awards

Dear Ms. Murphy:

This letter is being jointly submitted by Don Meiers, a former member of the staff of the SEC's Division of Corporation Finance (now in private practice), and by Dan Gode, Clinical Associate Professor of Accounting at New York University's Stern School of Business. We are submitting this letter in our individual capacities, and not on behalf of the respective organizations we are associated with or any specific client.

This letter responds to the Securities and Exchange Commission's solicitation of comments on the above-referenced proposed rule-making. Our comments in this letter focus entirely on the proposed amendments to Item 402 of Regulation S-K with respect to the reporting of share-based payment awards (contained in Section II.A.2 of the Release) that, if adopted, would:

1. require registrants to disclose in the Summary Compensation Table (**SCT**) and Director Compensation Table (**DCT**) the aggregate grant date fair value of share-based payment awards granted in the applicable fiscal year, estimated in accordance with Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), *Share-Based Payment* (**FAS 123R**);
2. no longer require registrants to disclose in the Grants of Plan-Based Awards Table (and corresponding footnote disclosure to the DCT) the grant date fair value of share-based payment awards, on a grant-by-grant basis, granted in the last completed fiscal year; and

3. no longer require registrants to report in the "Salary" and "Bonus" columns of the SCT, as applicable, the dollar value of base salary or bonus earned by a named executive officer (**NEO**) during the applicable fiscal year that the NEO elected to forgo or defer in accordance with a registrant program under which stock, equity-based or other forms of non-cash compensation may be received in lieu of such annual cash compensation. Such amounts would, instead, be reported in the column of the SCT applicable to the form of non-cash compensation elected by the NEO.

The above proposals are contained in Section II.A.2 of the Release.

Please note that, consistent with the approach taken in the Release (see footnote 32), this letter makes use of the FAS 123R nomenclature.

## **I. Overview of Our Recommendations**

We do not believe that adoption of the SEC's relatively modest proposals in Section II.A.2 of the Release would further the objectives for executive compensation disclosure articulated in the Release:

1. to provide investors with clear, concise and meaningful executive compensation disclosure, through presenting a single total figure in the SCT that includes all compensation and is comparable across fiscal years and companies;
2. to report the compensatory value of share-based payment awards granted during a fiscal year;
3. to illustrate the relationship between pay and performance;
4. to facilitate year-to-year comparisons in a cost-effective way; and
5. to create greater linkage to the approaches being taken by registrants in the Compensation Discussion and Analysis (**CD&A**) sections of their executive compensation disclosure.

We believe the time has come for the compensation tables (and related narrative disclosure) to, among other things:

- put at investors' fingertips the information of greatest relevance to their investment and voting decisions;

- allow investors to instantly grasp the information presented in each table;
- meet the “plain English” standard, in part, by making the table captions understandable and significantly reducing the need for extensive footnote disclosures; and
- create a level playing field for all investors – whether or not they have any knowledge or understanding of the complexities of FAS 123R.

To achieve the above objectives, we believe the SEC staff should consider our recommendations with an open mind and not hesitate to implement bolder, more comprehensive changes, notwithstanding the relatively recent vintage of the existing rules, adopted in 2006. We believe it is possible to redesign several of the compensation tables to elicit more comprehensive and meaningful information, while at the same time reducing the time and effort required by the personnel within SEC-reporting companies charged with preparing the requisite disclosure.

With the foregoing in mind, our specific recommendations are as follows:

**Recommendation #1:**

Require registrants to disclose in the “Stock Awards” and “Option Awards” columns of the SCT the amounts currently required to be disclosed in columns (e) and (c), respectively, of the Option Exercises and Stock Vested Table. The same approach should be taken with the “Stock Awards” and “Option Awards” columns of the DCT. If this recommendation is adopted, we believe the Option Exercises and Stock Vested Table can be eliminated.

We believe implementing this recommendation would achieve several benefits, including:

- reducing the “apples-to-oranges” nature of the amounts reflected in the SCT across its columns;
- completely eliminating the use of FAS 123R concepts/amounts in the SCT; and
- providing investors with the real bottom-line of what the NEOs “banked” in the applicable year.

The one obvious criticism of our proposal is that the amounts disclosed with respect to option awards would be subject to significant variability from year-to-year and among the NEOs as a function of the individual circumstances that influence the timing of their option exercises. With that in mind, we believe it would be appropriate to exclude the “Option Awards” amounts from the calculation of total compensation, though solely for purposes of determining the NEOs, other than the principal executive officer and the principal financial officer, whose compensation is to be disclosed in the SCT and other compensation tables.

**Recommendation #2:**

Replace the existing “Grants of Plan-Based Awards Table” with two *separate* tables, one covering non-equity incentive plan awards (the “**Non-Equity Incentive Plan Awards Table**”); the other, share-based payment awards (the “**Share-Based Payment Awards Table**”). Each table would parallel the SCT in requiring information for the three most recently completed fiscal years, so that investors can, at a glance, assess how effectively board compensation committees have been in aligning pay with performance – both on a year-to-year basis and over time. Further, we recommend that each table provide information not currently required in the Grants of Plan-Based Awards Table. Specifically:

The **Non-Equity Incentive Plan Awards Table** would require registrants to provide, for each fiscal year covered by the table:

- plan performance metrics (identifying the nature of the performance metrics);
- the relative weighting of each performance metric;
- plan performance metric threshold, target and maximum levels, as applicable, and the potential compensation associated with each level;
- for those performance metrics of a quantitative nature, actual performance information; and
- the dollar amounts earned (or earnable) under the plan.

Note that we are in agreement with those who advocate that the SEC mandate the disclosure of quantitative performance metrics and metric threshold, target and maximum levels for completed fiscal years. In our view, it is rarely the case, if ever, that disclosure of such information on an *after-the-fact* basis can be legitimately claimed to have the potential to cause competitive harm.



If a company has adopted separate annual and long-term non-equity incentive plans, we would support the presentation of the above information in separate annual and long-term non-equity incentive plan sub-tables, if that manner of presentation makes it easier for investors to understand.

The **Share-Based Payment Awards Table** would require registrants to provide, *on a grant-by-grant basis*, for each fiscal year covered by the table:

- the type/nature of the award;
- the number (or, in the case of an award with a service, performance or market condition that affects the number of instruments that may vest under the award, the range in number) of instruments subject to the award;
- the grant date(s) of the award;
- the length of the award's requisite service period(s);
- whether or not the award is subject to a vesting-related performance condition(s), or an exercisability-related market condition(s);
- the classification of the award (i.e., as a liability or in equity) at the time of grant, with a footnote indicating the basis of the classification if a liability award;
- the initial estimate of the grant date fair value of the award (or, if the award is classified as a liability, the fair value of the award as of the last day of the fiscal year in which the award was granted), calculated in accordance with FAS 123R [In the case of an award with a service or performance condition affecting a factor(s) other than the award's vesting, the initial estimate of the grant date fair value of the award would be that associated with the possible outcome deemed probable of achievement/satisfaction.]; and
- if the award has been modified, the date of the modification and the incremental fair value of the award resulting from the modification.

We believe implementing this recommendation would achieve several benefits, including:

- separating non-equity vs. equity incentive compensation information, consistent with the approach being taken by companies in their CD&As;

- providing readily-grasped, comprehensive information in each table;
- allowing investors to assess the effectiveness of companies' compensation committees in achieving pay-for-performance, both on a year-to-year basis and over the three years presented;
- making apparent whether award payouts under non-equity compensation plans were entirely "earned" (by virtue of meeting performance metrics) or whether portions of the payouts were paid on a discretionary basis; and
- with respect to share-based payment awards, presenting essentially all of the key building block FAS 123R information in a single table, which, when combined with brief explanatory narrative disclosure immediately following the table, will put investors on more of a level playing field in understanding the information.

**Recommendation #3:**

Replace the existing "Outstanding Equity Awards at Fiscal Year-End Table" with two *separate* tables, one covering outstanding *option* awards (the "**Outstanding Option Awards at Fiscal Year-End Table**"); the other, outstanding *stock* awards (the "**Outstanding Stock Awards at Fiscal Year-End Table**").

The **Outstanding Option Awards at Fiscal Year-End Table** would require registrants to provide:

- the year the option award was granted;
- whether the option award was granted under an equity incentive plan;
- the type of option award (e.g., options, stock appreciation rights, a tandem award);
- the number of instruments (or the range in the number of instruments) underlying the option award;
- the number of instruments underlying the option award that are vested/unvested as of the end of the most recently completed fiscal year;

- whether the option award is to be settled in cash or other assets (by the terms of the award or at the holder's election);
- the option award's exercise price(s); and
- the intrinsic value of the option award, based on the closing price of the registrant's stock at the end of the most recently completed fiscal year.

The **Outstanding Stock Awards at Fiscal Year-End Table** would require registrants to provide:

- the year the stock award was granted;
- whether the stock award was granted under an equity incentive plan;
- the type of stock award (e.g., restricted stock, restricted stock units, phantom stock, phantom stock units, performance shares or whatever other terminology the registrant may use);
- the number of instruments (or range in the number of instruments) subject to the stock award;
- the number of instruments subject to the stock award that are vested/unvested as of the end of the most recently completed fiscal year;
- whether the stock award is to be settled in cash or other assets (by the terms of the award or at the holder's election); and
- the market value of the stock award, based on the closing price of the registrant's stock at the end of the most recently completed fiscal year.

We believe implementing this recommendation would achieve several benefits, including:

- making readily apparent the values of the share-based awards (option and stock awards) held by the NEOs as of the end of the most recently completed fiscal year;

- separately presenting information regarding outstanding option and stock awards, thus providing more logical tie-in with the different objectives for such awards articulated by companies in their CD&As; and
- making apparent whether settlement of such awards will or may entail cash outlays.

## **II. Critical Assessment of Certain of the Existing Compensation Tables**

Before addressing the first of the SEC's proposed amendments, let's take a critical look at each of the SCT, the Grants of Plan-Based Awards Table and the Outstanding Equity Awards at Fiscal Year-End Table, and assess whether these tables achieve the objectives stated in the Release.

### **A. The Summary Compensation Table**

Over the last three years, the single-most frequent complaint we have heard about the SCT is that the layout/content of the table is confusing. The table gives one the impression that it contains annual compensation information for the three most recently completed fiscal years. But this is not the case. For example:

- The "Stock Awards" and "Option Awards" columns present compensation costs recognized in the applicable fiscal year (a concept lost on all but those with some knowledge of FAS 123R), without regard to the year of grant of the awards or the length of the service period over which the awards may vest.
- The "Non-Equity Incentive Plan Compensation" column reflects compensation earned, typically based on arrangements put in place in a prior year. In some cases, the payouts reflect compensation arrangements with a multi-year orientation.

The issues identified with these three incentive compensation-related columns make clear that the content of the SCT under the existing rules does not allow investors to readily grasp the impact of compensation decisions made during the applicable year. Nor does the SCT illustrate the relationship between pay and performance, or facilitate meaningful year-to-year comparisons.

When one recognizes that, in general, compensation consulting firms conduct surveys to generate peer company compensation information they supply to their clients, rather than relying on the publicly available information contained in companies' proxy statements or annual reports, it becomes apparent that the SCT and other compensation tables are

out-of-touch with what industry experts and their clients – and, in turn, investors, consider meaningful.

### **B. The Grants of Plan-Based Awards Table**

Over the last three years, we have heard a variety of criticisms about the Grants of Plan-Based Awards Table, both format- and content-related. Those criticisms have included:

- The table is too “busy” (i.e., there are too many columns).
- The wording of the column headings in the table is confusing. Some are confused by what columns (i) and (j) (the “All Other Stock/Option Awards” columns), as opposed to columns (f) – (h), cover.
- It is difficult for the eye to follow individual award information horizontally across the columns because of the many blanks in certain columns (e.g., grant date information pertains only to share-based payment awards).

Note that these criticisms are coming from people within SEC-reporting companies who have some role in preparing their companies’ executive compensation disclosure and are, thus, more familiar, with the disclosure requirements than the average investor. If their perspectives are representative, imagine the level of confusion on the part of the average investor.

More significantly, perhaps, the Grants of Plan-Based Awards Table appears to have become out-of-step with the general approach being taken by companies in their CD&As: providing separate discussions (under distinct captions) regarding their *cash* incentive compensation arrangements (which typically have a shorter-term orientation) and generally longer-term *equity* compensation arrangements.

### **C. The Outstanding Equity Awards at Fiscal Year-End Table**

Over the last three years, we have heard complaints about the Outstanding Equity Awards at Fiscal Year-End Table that are similar to those articulated above with respect to the Grants of Plan-Based Awards Table:

- The column headings in columns (b)-(d), and columns (g) and (i), are confusing.
- The distinction between awards granted *outside* (i.e., non-performance based) vs. *under* equity incentive plans is not apparent from the phrasing of the column headings.

- In the case of option awards, the distinction between earned vs. exercisable is not clear.
- Why doesn't the table provide value information with respect to option awards?
- It is difficult, if not impossible, to tie-in the information in the table with that contained in the other compensation tables.

We are not sure that investors place a great deal of importance on the intermediate stage information presented in the existing Outstanding Equity Awards at Fiscal Year-End Table (i.e., whether options are exercisable or unexercisable, or earned or unearned, at the end of the most recently completed fiscal year), or how this information would affect their voting or investment decisions.

### **III. Critical Assessment of Proposed Substitution of Grant Date Fair Values for Recognized Compensation Cost Amounts; Our Recommendation #1**

We believe that the proposed rule amendment to require the substitution of one FAS 123R concept (i.e., grant date fair values) for another FAS 123R concept (i.e., compensation cost recognized) would have only marginal benefit. The Release focuses on aspects of the disclosure of compensation cost recognized under FAS 123R that can confuse investors, but consider the issues presented by the disclosure of grant date fair values:

- Registrants use different methodologies and financial valuation models (e.g., Black-Scholes-Merton; binomial lattice models; Monte Carlo simulations), and different underlying assumptions/parameters (e.g., expected term; expected stock price volatility, using, in some cases, historical volatility, comparable firm volatility and/or implied volatility; risk-free interest rate(s); expected dividend yields) to derive their initial estimates of the grant date fair values of option awards – estimates that affect the amounts of compensation cost recognized with respect to such awards. Does that translate into comparability across companies?
- The grant date fair values of share-based payment awards are *estimates*. Is that clear to the average investor?
- If an award is subject to a service condition or performance condition affecting factors other than the vesting of the award (e.g., the exercise price, conversion ratio, number of instruments subject to the award), how likely is it that investors will understand that the initial estimate of the grant date fair value of the award is

that associated with the probable outcome? [Note that the Release is silent on this topic.]

- In the case of share-based payment awards classified as liabilities, the grant date fair values of such awards are, from a financial statement reporting perspective, largely meaningless. Under FAS 123R, a liability award is re-measured at the end of each reporting period. Ultimately, the measurement date, for purposes of calculating the amount of compensation cost recognized with respect to a liability award, is the date of settlement of the award. Note that, under the current rules, none of the existing compensation tables require disclosure of a share-based payment award's classification.

With the above issues in mind, we recommend that the SEC consider completely decoupling the amounts disclosed in the Stock Awards and Option Awards columns of the SCT from FAS 123R. Our Recommendation #1 is that the SEC amend its rules to require registrants to disclose in the "Stock Awards" and "Option Awards" columns of the SCT the amounts currently required to be disclosed in columns (e) and (c), respectively, of the Option Exercises and Stock Vested Table. In other words, the amount disclosed in the "Stock Awards" column would be the aggregate value realized upon the vesting (or the transfer for value) of stock awards, as well as the vesting of earnings on such awards, in the applicable fiscal year. The amount disclosed in the "Option Awards" column would be the aggregate value realized upon the exercise (or upon the transfer for value) of option awards in the applicable fiscal year.

For several reasons, we believe this approach would result in a significant improvement in furthering at least three of the five objectives listed above (i.e., objectives 1, 3 and 4):

- We believe that investors would find disclosure of the "final stage" actual value associated with stock and option awards to be more informative and meaningful to their voting and investment decisions. The average investor is not interested in hypothetical values of stock and option awards; the average investor simply wants to know how much a company's NEOs "banked" from one year to the next.
- Our recommended approach would better align the amounts disclosed in the "Stock Awards" and "Option Awards" columns of the SCT with the amounts disclosed in the "Non-Equity Incentive Plan Compensation" column. The latter captures information as to actual payouts under such plans when the performance conditions are satisfied and the compensation is earned, no matter when the award was granted or over what period of time the awards are earned. The amount disclosed need not be revised in subsequent years, eliminating the issue of



amounts in the SCT changing from one year's proxy statement to the next – typically without explanation.

- Perceived compensation “best practices” are driving companies to increase the percentage of total compensation that is at-risk and longer-term in nature. This makes it increasingly difficult for investors to identify and track the effects of board compensation committee compensation decisions on a year-to-year basis. Under the circumstances, we do not believe the objective ought to be to try to prioritize disclosure as to the *timing* of board compensation committee compensation actions (the apparent focus of objective #2). Instead, we believe priority should be given to disclosure of the actual *effects* of such actions. Further, if one considers that, notwithstanding the greater number of companies whose board compensation committees are implementing executive compensation arrangements with a longer-term orientation, those committees, in general, continue to grant multi-year share-based payment awards (and non-equity incentive plan awards) on an *annual* basis, the timing of their actions would seem to have little importance. If a board compensation committee is implementing effective pay-for-performance compensation practices, this will be more readily apparent by adopting our recommendation.

As an aside, consider column (h) of the SCT, which covers, for each of the three most recently completed fiscal years, the change in the value of the accumulated benefits under defined benefit, SERP and other actuarial pension plans, and above-market or preferential earnings on account balances in non-qualified defined contribution and other deferred compensation plans. A company's board may have originally adopted one or more of these plans many years before the fiscal years for which information is presented in the SCT, but does this matter to investors? We don't believe so.

#### **IV. Our Recommendations #2 and #3**

We appreciate that the SEC staff views all the compensation tables other than SCT as being ancillary or subordinate to the SCT, but speculate that this mindset may have contributed to the less-than-optimal realization of the disclosure objectives articulated in the Release. We believe there is a benefit to viewing all the tables as being of equal stature/relevance, with each table other than the SCT covering a key compensation component. Further, each of the compensation tables should further the same disclosure objectives the SEC aspires to achieve with the SCT – which implies that they be clear, concise and comprehensive in scope. These principles underlie our Recommendations #2 and #3.



**A. Recommendation #2: Replace the Grants of Plan-Based Awards Table with Separate Tables for Non-Equity Incentive Plan Awards and Share-Based Payment Awards**

Our Recommendation #2 is to replace the Grants of Plan-Based Awards Table with two separate tables, a Non-Equity Incentive Awards Table and a Share-Based Payment Awards Table, each of which would parallel the SCT by requiring information for the three most recently completed fiscal years, facilitating investors' assessment of these two key incentive compensation components on a year-to-year and longer-term basis.

We envision that the Non-Equity Incentive Plan Awards Table would have a format and required content along the lines of the following:

### Non-Equity Incentive Plan Awards Table

Name (a)	Fiscal Year (b)	Name of Plan (c)	Performance Metrics (d)	Weighting (if any) (e)	Performance Metric Levels/Potential Compensation			Actual Performance (i)	Award Payout (j)	Total Payout in Applicable Year (k)
					Threshold (f)	Target (g)	Maximum (h)			
PEO	2010		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2009		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2008		Metric 1	[ ]%						
			Metric 2	[ ]%						
PFO	2010		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2009		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2008		Metric 1	[ ]%						
			Metric 2	[ ]%						
A	2010		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2009		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2008		Metric 1	[ ]%						
			Metric 2	[ ]%						
B	2010		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2009		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2008		Metric 1	[ ]%						
			Metric 2	[ ]%						
C	2010		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2009		Metric 1	[ ]%						
			Metric 2	[ ]%						
	2008		Metric 1	[ ]%						
			Metric 2	[ ]%						

We envision that the Share-Based Payment Awards Table would have a format and required content along the lines of the following:

**Share-Based Payment Awards Table**

Name (a)	Fiscal Year (b)	Type of Award (c)	No. of Instruments Subject to Award (d)	Grant Date(s) (e)	Requisite Service Period (f)	Award Subject to Vesting-Related Performance Condition or Exercisability- Related Market Condition (Yes/No) (g)	Award Classification (Equity or Liability) (h)	Initial Estimate of Grant Date Fair Value (if Equity Award)/Fair Value of Award at Fiscal Year-End (if Liability Award) (S) (i)	Date and Incremental Fair Value of Award Modification (j)	Total Fair Value of Share- Based Payment awards for Applicable Fiscal Year (k)
PEO	2010									
	2009									
	2008									
PFO	2010									
	2009									
	2008									
A	2010									
	2009									
	2008									
B	2010									
	2009									
	2008									
C	2010									
	2009									
	2008									

Note that the suggested content for the Share-Based Payment Awards Table consists entirely of FAS 123R-related information. Indeed, the suggested content of the table would contain far more complete FAS 123R-related information than is elicited under the SEC's existing or proposed rules. We believe that presenting this information in a single table would benefit investors who have a knowledge of the intricacies of FAS 123R and, with the inclusion of what we believe can be a brief narrative explanation of the basic concepts and terminology of FAS 123R following the table, add to the understanding of even those who do not have such knowledge – putting them on a more equal

informational footing. While the table would not require disclosure of recognized compensation cost amounts, the disclosure of the requisite service period of the share-based payment awards would provide investors with the ability to estimate such amounts, should they be so inclined.

**B. Recommendation #3: Replace the Outstanding Equity Awards at Fiscal Year-End Table with Separate Option and Stock Awards Tables**

Our Recommendation #3 is to replace the existing Outstanding Equity Awards at Fiscal Year-End Table with two *separate* tables, one covering outstanding *option* awards (the Outstanding Option Awards at Fiscal Year-End Table); the other, outstanding *stock* awards (the Outstanding Stock Awards at Fiscal Year-End Table). This recommendation stems, in part, from our awareness of the increasing number of SEC-reporting companies that are now disclosing in their CD&As that their compensation committees have different objectives in granting option vs. stock awards. The CD&A disclosure typically highlights that options only have value if the price of the underlying stock exceeds the exercise price, which creates a volatility risk, while stock awards without vesting-based performance conditions or exercisability-based market conditions serve a retention objective.

We envision that the Outstanding Option Awards at Fiscal Year-End Table would have a format and required content along the lines of the following:

### Outstanding Option Awards at Fiscal Year-End Table

[illegible]

We envision that the Outstanding Stock Awards at Fiscal Year-End would have a format and required content along the lines of the following:

**Outstanding Stock Awards at Fiscal Year-End Table**

Name (a)	Fiscal Year Award Granted (b)	Award Granted Under an Equity Incentive Plan (Yes/No) (c)	Type of Stock Award (d)	No. of Instruments Subject to Award (e)	No. of Instruments Vested/Unvested at End of Most Recently Completed Fiscal Year (f)	Settlement of Award in Cash (by terms of award or at holder's election) (Yes/No) (g)	Market Value at End of Most Recently Completed Fiscal Year (\$) (h)	Total Market Value of all Outstanding Stock Awards at End of Most Recently Completed Fiscal Year (i)
PEO								
PFO								
A								
B								
C								

**V. Response to Request for Comment on Other Matters in Section II.A.2 of the Release**

Sections I and II of this letter focus primarily on the first two of the three proposed amendments to Item 402 of Regulation S-K in Section II.A.2 of the Release. We would like to comment on the last of the three proposed amendments, then respond to the questions posed at the end of Section II.A.2 of the Release.

**A. Amendment of Instruction 2 to Regulation S-K, Item 402(c)(2)(iii) and (iv)**

The third of the SEC's proposed amendments to the executive compensation disclosure rules is to no longer require registrants to report in the "Salary" and "Bonus" columns of the SCT, as applicable, the dollar value of base salary or bonus earned by an NEO during the applicable fiscal year that the NEO elected to forgo or defer in accordance with a

registrant program under which stock, equity-based or other forms of non-cash compensation may be received in lieu of such annual cash compensation. Instead, the SEC is presumably proposing that registrants disclose the grant date fair value of option/stock award(s) received in lieu of the cash compensation in the "Stock Awards" and/or "Option Awards" columns of the SCT.

The Release is silent on the rationale for this proposed amendment, but presumably it ties in with the proposed disclosure of the grant date fair values of all stock and option awards in the year of grant. Because we do not perceive the first of the proposed rule amendments as furthering the SEC's disclosure objectives, we think this proposed amendment should be reconsidered, as well.

We offer the following observations about this proposed amendment to Instruction 2 to Item 402(c)(2)(iii) and (iv):

- In general, under the current rules the amounts of salary or bonus compensation deferred or forgone are reflected in the "Salary" and "Bonus" columns of the SCT, with footnote disclosure of such arrangements. Thus, the existing rules achieve a certain level of transparency about these arrangements, identifying the fundamental nature of the compensation and the relevant circumstances. This would seem to be lost if the proposed amendment were adopted. We believe that this would, in turn, translate into less linkage to the CD&A sections of companies' executive compensation disclosure. In this regard, we are aware that many companies have disclosed in their CD&As that they have discontinued such arrangements. Those that have such arrangements typically disclose the same in their CD&As.
- One of the two exceptions to the general rule cited in the prior bullet point is that registrants are to report the incremental value of the non-cash compensation (i.e., if the amount of compensation cost recognized in the applicable fiscal year exceeds the amount of the salary or bonus deferred or forgone) in the "Stock Awards" or "Option Awards" columns of the SCT, with accompanying footnote disclosure. We have not researched the frequency with which SEC-reporting companies have reported such incremental values over the past three years, but the proposed amendment would result in such disclosure (and the attendant transparency) being eliminated.
- The Release is silent on whether the SEC proposes to no longer require registrants to provide appropriate disclosure about the deferral following the Grants of Plan-Based Awards Table, the Outstanding Equity Awards at Fiscal Year-End Table and the Option Exercises and Stock Vested Table, as per the Staff Compliance &

Disclosure Interpretations, Section 119, Question 119.03 (July 3, 2008). If the SEC decides to adopt this proposed amendment, we suggest that this be clarified in the adopting release.

**B. SEC's Questions at the End of Section II.A.2 of the Release**

For ease of reference, we have included the text of the SEC's list of questions below.

- *Is the proposed Summary Compensation Table reporting of equity awards a better approach for providing investors clear, meaningful, and comparable executive compensation disclosure consistent with the objectives of providing concise analysis in CD&A and a clear understanding of total compensation for the year? Would the proposals facilitate better informed investment and voting decisions?*

Consistent with our comments above, we believe that the proposed SCT reporting of share-based payment awards would have a very marginal effect in furthering the objectives articulated in the question and in Section II.A.2 of the Release.

- *The proposal contemplates that the Summary Compensation Table would report the aggregate grant date fair value of stock awards and option awards granted during the relevant fiscal year, just as the Grants of Plan-Based Awards Table reports each grant of an award made to a named executive officer in the last completed fiscal year. Should the Summary Compensation Table instead report the aggregate grant date fair value of equity awards granted for services in the relevant fiscal year, even if the awards were granted after fiscal year end? Explain why or why not. For example, could such an approach be applied in a manner inconsistent with the purposes of our compensation disclosure rules, for example by distorting the determination of named executive officers? If we change our approach with respect to the Summary Compensation Table, should the Grants of Plan-Based Awards Table be amended correspondingly to conform to the scope of the awards reported in that table?*

We interpret the first of these questions to posit a fact pattern in which, in accordance with FAS 123R –

- (i) one of the conditions to establishing the grant date of a share-based payment award occurs in the year following the inception of the award (e.g., one or more of the key terms and conditions of the award are not established at the time the requisite approvals of the award are obtained), and

- (ii) the service inception date of the award precedes the grant date (i.e., either the terms of the award do not require the award recipient to render service after the grant date, or the award contains a performance condition or market condition that, if not satisfied during the service period that precedes the award's grant date, will result in the forfeiture of the award).

Under these circumstances, FAS 123R dictates the accrual of compensation cost with respect to such an award for periods before the grant date based on the fair value of the award at the service inception date or any subsequent reporting date (requiring a re-measurement of the fair value of the award at such date) prior to the grant date. In contrast, if an award includes a future requisite service condition that exists at the grant date, the service inception date cannot precede the grant date, notwithstanding the characterization of the award as being in consideration of services rendered in a prior period.

Given the SEC's proposal to disclose the grant date fair value of share-based payment awards in the "Stock Awards" and "Option Awards" columns of the SCT (and the DCT), we assume that the year in which the grant date fair values of those awards would be disclosed would be consistent with their grant dates, as determined in accordance with FAS 123R. To do otherwise would likely confuse those investors who understand the intricacies of FAS 123R. Accordingly, we don't understand the premise behind the staff's question in this instance.

- *If the Summary Compensation Table is amended as proposed, should the Grants of Plan-Based Awards Table disclosure of the full grant date fair value of each individual award be retained, rather than rescinded as proposed? Should the Grants of Plan-Based Awards Table continue to disclose the incremental fair value with respect to individual awards that were repriced or otherwise materially modified during the last completed fiscal year? If so, why? If disclosure of grant date fair value of individual awards is retained, should it also be made applicable to smaller reporting companies?*

We believe that to accomplish the objectives the SEC articulated in the Release for execution compensation disclosure it is necessary to provide information about share-based payment awards on a grant-by-grant basis. Indeed, our recommendations, if adopted, would require additional information regarding individual share-based payment awards beyond that required under the current rules. Without an individual award orientation, we do not believe that investors would otherwise be able to track such awards, and their impact on compensation levels, over time.



We also believe that investors are keenly interested in the repricing of option awards and, for the sake of completeness, believe it appropriate that the incremental fair value of awards associated with such actions be disclosed, again on an individual award basis.

We also believe that investors would benefit if all SEC-reporting companies subject to the disclosure requirements of Item 402 of Regulation S-K or Regulation S-B were required to provide the compensation tables (and the content of those tables) reflected in our three recommendations. In that regard, we do not believe that there would be any additional burden associated with doing so for small business issuers, as small business issuers already are required to disclose the compensation cost amounts recognized in the applicable fiscal year in the "Stock Awards" and "Option Awards" columns of the SCT.

- *As described above, one reason for adopting the financial statement recognition model was the potential for distortion in identifying the named executive officers when a single large grant, to be earned by services to be performed over multiple years, affects the list of named executive officers in the Summary Compensation Table, even though the executive earns a consistent level of compensation over the award's term. Are multi-year grants a common practice, so that they would introduce significant year-to-year variability in the list of named executive officers if the proposed amendments are adopted relative to the variability under the current rules? If so, how should our rules address this variability?*

Our perception, though we lack any statistical data to support it, is that the grant of share-based payment awards with multi-year vesting periods is becoming an increasingly common practice as board compensation committees seek to increase the proportion of executive compensation that is longer-term and at risk. However, we do not believe that such practices will introduce significant year-to-year variability in the list of NEOs, since, in general, these type of awards are granted to all (or substantially all) of a company's senior management at the same time. We acknowledge that someone might receive a large award at the inception of his/her employment with a company and that this could cause the award recipient to be an NEO in the year employment commenced and perhaps not thereafter. But we do not perceive this to be a material issue.

- *Under the proposal, all stock and option awards would be reported in the Summary Compensation Table at full grant date fair value, including awards with performance conditions. Would the proposal discourage companies from tying stock awards to performance conditions, since the full grant date fair value would be reported without regard to the likelihood of achieving the performance objective? If the proposal is adopted, is any disclosure other than that already currently required (e.g., in the Compensation Discussion and Analysis, the Grants of Plan-Based Awards Table, and the Outstanding Equity Awards at Fiscal Year-*

*End Table) needed to clarify that the amount of compensation ultimately realized under a performance-based equity award may be different?*

We concur with the view articulated in the comment letter submitted by Steven Hall & Partners referenced in footnote 22 of SEC Release Nos. 33-8765; 34-55009; File No. S7-03-06: accounting rules shape decision-making on executive compensation. However, we do not believe the disclosure of amounts in the “Stock Awards” and “Options Awards” columns of the SCT that include the grant date fair values of awards with vesting-based performance conditions, whether or not deemed probable of satisfaction, would discourage companies from making such awards subject to vesting-based performance conditions. Our view is that the accounting rules affect executive compensation practices as a result of the financial statement reporting implications, not the disclosure in the compensation tables.

With respect to the second question in the above bulleted text, see our comments in Section III of this letter – the basis of our recommendation that the SEC not adopt the first of its proposed rule changes. In addition to taking steps to better achieve the five objectives for executive compensation articulated in the Release, we believe that investors should be put on a more level playing field with respect to FAS 123R information – be it grant date fair values, the classification of awards (and the accounting implications of such classification), recognized compensation cost amounts, grant dates, etc. The abbreviated phrasing that companies have developed to comply with the Instruction to Item 402(c)(v) and (vi) of Regulation S-K is wholly inadequate. However, we believe that background information on FAS 123R that would level the playing field could be captured in text of no more than 2-3 relatively short paragraphs in length, and would be happy to provide the staff with proposed explanatory text.

- *As proposed, Instruction 2 to the salary and bonus columns would be revised to provide that any amount of salary or bonus forgone at the election of a named executive officer pursuant to a program under which a different, non-cash form of compensation may be received need not be included in the salary or bonus column, but instead would need to be reported in the appropriate other column of the Summary Compensation Table. Should this approach cover elections to receive salary or bonus in the form of equity compensation only if the opportunity to elect equity settlement is within the terms of the original compensatory arrangement, so that the original arrangement is within the scope of FAS 123R? Why or why not?*

Please see our comments on this specific proposed rule amendment in Section V.A of this letter. The staff’s question focuses on one of the two existing exceptions to the general rule that the amounts deferred be reflected in the “Salary” and “Bonus” columns of the

SCT. We would suggest that, under the existing rules, the distinct treatment provided for is neither transparent nor likely understood by investors, even those with an in-depth understanding of FAS 123R. We are of the view that, in the interests of transparency and comprehensibility, the amounts deferred – whether or not equity settlement is provided for under the terms of the original compensation arrangement – should be reflected in the “Salary” and “Bonus” columns of the SCT.

- *The Commission also has received a rulemaking petition requesting that we revise Summary Compensation Table disclosure of stock and option awards a different way. Instead of reporting the aggregate grant date fair value of awards granted during the year, as we propose, the petition’s suggested approach would report the annual change in value of awards, which could be a negative number if market values decline. For restricted stock, restricted stock units and performance shares, the reported amount would be the change in the in-the-money value over the same period. For stock options, it would be the change in the in-the-money value over the same period. Would the approach suggested by the rulemaking petition be easy to understand or difficult to understand? Would the information provided under the suggested approach be useful to investors? In particular, would investors be able to evaluate the decision making of directors with respect to executive compensation if the value of equity compensation on the date of the compensation decision is not disclosed, but instead investors are provided information regarding changes in value of the compensation, which changes occur after the compensation decision is made? Would it enhance or diminish the ability of companies to explain in CD&A the relationship between pay and company performance? Would it be more or less informative to voting and investment decisions than the aggregate grant date fair value approach we propose? Would it be a better measure for computing total compensation, including for purposes of identifying named executive officers? Are there any other ways of reporting stock and option awards that would better reflect their compensatory value? If so, please explain. For example, are there any potential amendments to the Grants of Plan-based Awards Table or the Outstanding Equity Awards at Fiscal Year-End Table that we should consider to better illustrate the relationship between pay and company performance?*

We find the rulemaking petition intriguing in that, like our Recommendation #1, it offers up a suggested approach that differs from the proposed reporting of the aggregate grant date fair value of share-based payments awards in the SCT. However, we believe the combined effect of our three recommendations would better serve to bridge the gap between disclosure regarding the timing of compensation decisions and the effects of such decisions over time.

- *The Summary Compensation Table requires disclosure for each of the registrant's last three completed fiscal years and with respect to smaller reporting companies, for each of the registrant's last two completed fiscal years. Regarding transition, our goal is to facilitate year-to-year comparisons in a cost-effective way. To this end, we are considering whether to require companies providing Item 402 disclosure for a fiscal year ending on or after December 15, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table, so that Stock Awards and Option Awards columns would present the applicable grant date fair values, and Total Compensation would be recomputed correspondingly. If a person who would be a named executive officer for the most recent fiscal year (2009) also was disclosed as a named executive officer for 2007, but not for 2008, we expect to require the named executive officer's compensation for each of those three fiscal years to be reported pursuant to the proposed amendments. However, we would not require companies to include different named executive officers for any preceding fiscal year based on recomputing total compensation for those years pursuant to the proposed amendments or to amend prior years' Item 402 disclosure in previously filed Form 10-K or other filings. Would recomputation of prior years included in the 2009 Summary Compensation table to substitute aggregate grant date fair value numbers for the financial statement recognition numbers previously reported for those years cause companies practical difficulties? Is there a better approach that would preserve the objective of year-to-year comparability on a cost-effective basis as a transitional matter?*

We do not believe the transition approach contemplated would cause companies any practical difficulties.

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Ms. Elizabeth Murphy  
U.S. Securities and Exchange Commission  
September 3, 2009  
Page 25

We appreciate the opportunity to comment on the proposed amendments to Item 402 of Regulation S-K in the Release. We would be happy to discuss our comments, including our three specific recommendations, with either or both of the contact persons identified in the Release at their convenience.

Regards,



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