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March 9, 2006

Via Internet Comment Form

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

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

Dear Ms. Morris:

On February 8, 2006, the Commission published in the Federal Register proposed amendments to the proxy statement disclosure rules for the compensation of executives and directors, related party transactions, director independence and other corporate governance matters, as well as security ownership of officers and directors. This letter sets forth the comments of Frederic W. Cook & Co., Inc., which relate primarily to the proposed rules applicable to the disclosure of executive and director compensation under Item 402 of Regulation S-K.

Frederic W. Cook & Co., Inc. provides compensation consulting services to corporations, boards of directors and compensation committees with respect to the compensation of executives and directors. The Firm's services are provided to companies in all industries and size categories. We have provided compensation consulting services to more than 1,800 companies since we were founded 33 years ago, including approximately 40% of the *Fortune* 200 during the past two years.

**Introduction**

We applaud the Commission's efforts in proposing comprehensive revisions to the disclosure requirements that are intended to provide greater transparency for investors. We firmly believe that they must have available sufficient and clear information about the compensation of executives and directors in order to properly evaluate the reasonableness and appropriateness of such compensation. We are mindful of the difficult balance between the transparency of compensation and the burdens that it can place on public companies subject to the requirements of providing such disclosure. Companies have been subject in recent years to greatly increased

time, effort and expense to comply with increased regulatory burdens, including those resulting from the Sarbanes-Oxley Act of 2002 and the accounting standards of FAS Statement 123(R) for equity compensation.

Our comments follow, in general, the organization of proposed Item 402 of Regulation S-K. We are also submitting comments about certain aspects of proposed Item 403 of Regulation S-K relating to security ownership of management, and proposed Item 407 of Regulation S-K with respect to the compensation committee. In addition, we have suggested modifying current Item 201(d) of Regulation S-K relating to equity compensation plan information.

### **Item 402(a) – General**

Persons Covered. We agree that the company's principal financial officer ("PFO") should automatically be a named executive officer ("NEO") in addition to the company's principal executive officer ("PEO") in light of the increased responsibility of the PFO after the Sarbanes-Oxley Act of 2002, for the reasons set forth in the discussion of the proposed rules (Federal Register page 6563).

However, we recommend against determining the other NEOs based on the Total Column in the Summary Compensation Table. Many of the elements of compensation that are to be reported in that Column are affected by individual circumstances and decisions that are unrelated to whether an executive officer is truly among the three most highly compensated officers other than the PEO and PFO for the most recent fiscal year. For example:

- The aggregate increase in actuarial value of defined benefit and actuarial pension plans accrued during the year is affected by the age of the executive officer (actuarial value of the same accrual is higher for each year an officer's age increases).
- Earnings on non-qualified deferred compensation often depend on voluntary deferrals by the executive officer and the officer's investment acumen in selecting among notional investments used to determine earnings.
- Bonus, stock awards and non-stock incentive plan compensation may be made on a one-time basis in order to recruit or retain an executive officer.

Accordingly, in order to provide for greater consistency in the determination of the other NEOs, the determination should continue to be based on salary and bonus only as currently provided under Item 402(a). The instruction to current Item 402(a) should be clarified to provide that one-time recruitment and retention bonuses may be disregarded in determining the other NEOs. Further, the instructions for this Item (or the definition of executive officers for purposes of Item 402) should be clarified to include the heads of divisions and subsidiaries.

## **Item 402(b) – Compensation Discussion and Analyses**

Filed vs. Furnished. We support the items to be discussed in the proposed Compensation Discussion and Analysis (“CD&A”) because they will be of significant value to investors. However, the CD&A should be over the names of the members of the compensation committee and the CD&A should be “furnished” and not “filed”. It is the compensation committee that is responsible for most of the elements of compensation of NEOs that are to be discussed in the CD&A. In our experience, actions by members of the compensation committee often take into account the disclosure that will appear in the Compensation Committee Report because the report is over their names. Requiring the PEO and PFO to certify the CD&A, which would be required if it is “filed,” would be very difficult since governance best practices and the rules of the New York Stock Exchange and the NASDAQ do not permit them to be present when their own compensation is discussed. In addition, the PFO is typically not present at compensation committee meetings.

Period Covered. An additional instruction should clarify that the CD&A should be based on the last fiscal year, as is the case for the Compensation Committee Report under the current rules.

PEO Compensation. The current requirements that the compensation committee specifically discuss the basis for the PEO’s compensation for the last year should be continued. In our experience, there is often a significant distinction in the approach and determination of PEO compensation compared to that of the other NEOs, including the PFO.

Section 162(m) Policy. The CD&A should continue to include a discussion of the policy of the compensation committee with respect to the \$1 million annual deduction limit of Section 162(m) of the Internal Revenue Code with respect to the compensation of the PEO and the company’s other four most highly compensated officers. The discussion should contain an analysis of the application of Section 162(m) to the company’s incentive and equity compensation plans and should describe how the policy was applied in the most recent year.

Exclusion of Performance Targets. The ability to exclude performance targets from disclosure should continue based on the potential adverse effect to the company. These targets are typically based on business-plan goals that are confidential and their disclosure would assist competitors.

Repricing and Equity Grant Modifications. We recommend that the CD&A discuss the repricing, repurchase or restructuring of stock options and material modifications to other grants (e.g., acceleration of vesting). Investors should be furnished with both a description of the action taken and the reasons for the action, in order to understand and evaluate what has been done.

Stock Performance Graph. The requirement currently in effect under Item 402(e) for a stock performance graph should be continued. This graph provides useful information to investors and is not burdensome to prepare.

### **Item 402(c) – Summary Compensation Table**

Total Column. In general, the addition of this Column is a positive step for investors and will enable them to quickly compare total compensation for each of the three years reported without having to add the numbers in each column of the Summary Compensation Table. Nevertheless, we have the following concerns.

- This should be the last numerical column rather than the first numerical column in the Summary Compensation Table. The typical practice in presenting information in a table is to have the total amount in the last column on the right-hand side of the table. We are concerned that due to the attention that will likely be paid to the Total Column by investors, if it were the first numerical column many investors would ignore the remaining numerical columns.
- In light of the significance of this Column to investors, it is critical that the other columns in the Summary Compensation Table show the appropriate amount of “compensation” of the NEO for the year. As currently proposed, some items in the other columns will result in double counting or fail to give a true picture of the total compensation for the year (e.g., grant date value for stock and option awards, earned/realized value for non-stock incentive compensation and earnings on deferred compensation).

Salary and Bonus Columns. We agree with the approach in the proposed rules, including footnote disclosure of all amounts deferred.

#### Stock Awards Column

- *Performance-Based Awards* – This Column should report performance-based stock awards for the year earned, rather than when granted, as proposed. Otherwise there will be an inconsistency in the Summary Compensation Table because non-stock incentive plan compensation is reported for the year earned. This would result in the Total Column not properly reflecting compensation earned based on performance. Grants of stock awards that are performance-based would be reported in the Grants of Performance-Based Awards supplemental table for the year granted.
  - Reporting performance-based stock awards for the year earned would provide more accuracy for awards that combine annual and cumulative performance measures.
  - It would also remove the need to “true up” the actual shares earned at the end of the performance period (i.e., the difference between the number of shares earned and the number of shares granted).

If performance-based stock awards are to be reported in the year granted, the instructions should clarify that the target number of shares should be included rather than the

maximum number of shares that can be earned to avoid overstating payouts, as well as to avoid inconsistent treatment compared to performance contingent restricted stock (i.e., a fixed number of shares that vest based on performance).

We recommend that the instructions clarify whether awards of dollar denominated performance units that are earned based partially on the company's stock price (e.g., total shareholder return, which takes into account increase in stock price and the total dividends paid during the performance period) and are paid in cash are to be disclosed in this Column or the Non-Stock Incentive Plan Compensation Column.

- *Dividends* – Dividends (or dividend equivalents) on unvested stock awards should not be included in the Stock Awards Column because they are taken into account under FAS 123(R) in determining grant date fair value. Including them would be double-counting. Instead, dividends and dividend equivalents should be included in either the Grants of All Other Equity Awards supplemental table, or in the separate Option Exercises and Stock Vested Table.
- *Use of FAS 123(R) to Value Awards*
  - If dividend-paying stock is granted without the right to dividends or dividend equivalents, then the grant date value should be determined net of the present value of the foregone dividends as required by FAS 123(R).
  - The valuation method and assumptions used in determining the value of awards should be disclosed in a footnote to the Summary Compensation Table. Investors should not have to search for the method and assumptions in a separate document, such as the notes to the company's financial statements, especially since it would not be burdensome to the company to include the information.
- *Modified Awards* – If an award is modified, then only the incremental compensation should be disclosed, which is the FAS 123(R) approach. Otherwise, there would be double-counting of the award prior to modification.

#### Option Award Column

- Grant date fair value under FAS 123(R) should be used for determining the amount that is shown in the Option Award Column as proposed, without adjustment for the time period over which the options vest. However, the expected term assumption should be modified to use what is appropriate for top executives rather than that applicable to all employees, since there is typically a substantial difference between the expected term for each group.

- The comments under “Stock Awards Column” above are generally applicable to this Column as well.
  - Options with a performance-vesting requirement based on market conditions should be included in this Column for the year when awarded. FAS 123(R) provides for a discount in determining the grant date fair value of such options, which is appropriate for this Column.
- Although we support including the dollar value of option awards and stock appreciation rights (SARs) in the Summary Compensation Table, we are concerned that this will be the only item reported that does not provide for a payment by the company in cash or stock, does not represent an accrued liability of the company to make a cash or stock payment, or is not an award that is earned based on performance (except for options with performance-based vesting, which are not typical).
  - Accordingly, including the amount in this Column in the Total Compensation Column will likely distort year-over-year comparisons of pay for performance (e.g., a new stock option grant after a year of poor financial performance).
- If an option or SAR is repriced or otherwise modified, only the incremental fair value should be included in the Summary Compensation Table, consistent with the treatment under FAS 123(R). Requiring inclusion in the Summary Compensation Table of the new fair value as a full award would double-count compensation.
- Companies should be permitted to report option awards in this Column (as well as non-performance-based stock awards in the Stock Awards Column) that are made during the portion of the current fiscal year before the issuance of the proxy statement, rather than waiting until the proxy statement for the fiscal year the award is made.
  - Such reporting would improve the timeliness of disclosure and the alignment of changes in total pay with year-over-year company stock performance. It would be similar to the treatment of bonus compensation which is reported for the year earned, not the year in which it is paid.
  - A company that elects to report awards in this manner would be required to continue to do so in future years, except for unusual circumstances that would have to be addressed both in footnote and narrative disclosure.

#### Non-Stock Incentive Plan Compensation Column

- We agree that non-stock incentive plan compensation should be reported for the year earned, if performance-based stock awards are also reported for the year earned, as recommended on page 4. Otherwise there would be an inconsistent approach with respect to performance-based awards that would make it difficult to compare

compensation at companies that differ in their compensation philosophy in terms of the mix of equity and cash performance-based awards.

- We recognize that the Option Awards Column and the Stock Awards Column for stock awards that are not performance-based would report the value of awards for the year granted. Nevertheless, there would be a consistent treatment for performance-based awards that may never be earned.

All Other Compensation Column. We support the combination of the current Other Annual Compensation and All Other Compensation Columns into one column. In addition, we agree with the \$10,000 threshold for separately identifying and quantifying any item in this Column (other than for perquisites and personal benefits that have a separate treatment as discussed below).

- *Perquisites and Other Personal Benefits* – In view of the attention, scrutiny and criticism from investors, shareholder advocacy groups and the press concerning perquisites and other personal benefits we support the \$10,000 threshold of the aggregate value for their disclosure in this Column (and identification in a footnote). In order to provide more transparency (especially in the event of a very high aggregate value), quantification of each item should also be required if the aggregate value of all items is at least \$25,000.

— Companies should be encouraged to provide disclosure in a table if quantification is required.

The guidance provided in the Supplementary Information to the proposed rules about what is considered a perquisite or other personal benefit is very meaningful and helpful. We agree that a “bright-line” definition should not be included in the rules due to the variety of fact patterns applicable to various items.

— Relocation assistance that is generally available to all employees should not be considered a perquisite or other personal benefit. The concern that it or any other item is not so available in practice should be resolved through enforcement and not by blanket exclusion.

Although we generally agree that valuation of perquisites and other personal benefits should be based on the incremental cost of the item to the company, we are concerned about the relationship of this standard to the general philosophy of the Summary Compensation Table. Accordingly, we recommend that disclosure be based on the greater of incremental cost or the value of the benefit received by the executive.

- *Earnings on Deferred Compensation* – The only earnings on deferred compensation that should be included in this Column are those from above-market interest, or on notional investments (i.e., hypothetical “investment funds”) that are not available generally to

employees in a tax-qualified defined contribution plan. Otherwise, this Column and the Total Column will not accurately reflect the compensation of NEOs.

- An NEO who defers substantial amounts will have greater earnings than a similarly situated NEO who defers lesser amounts.
- Even if deferral is not voluntary, an NEO with long tenure will likely have greater aggregate deferrals and therefore more earnings than an NEO with short tenure.
- Since many deferred compensation plans permit participants to choose among alternative notional investments, the earnings of an NEO will reflect his or her investment acumen (or lack thereof), which would further reduce the meaning of including all earnings in this Column.

The earnings on deferred compensation will still be available to investors in the Nonqualified Defined Contribution and Other Deferred Compensation Plans table required by Item 402(j).

If the recommendation for limited disclosure of earnings on deferred compensation discussed above is accepted, we recommend that there also be included any dividends or dividend equivalents paid or credited on (i) unvested stock awards if the dividends are not subject to forfeiture if the award does not become vested and (ii) unexercised option awards. The dividends and dividend equivalents are effectively compensation since neither they nor the awards to which they relate have been earned, vested or exercised, as applicable, unlike deferred compensation that has been earned (with limited exceptions).

- *Increase in Pension Plan Actuarial Value* – Requiring companies to include in this Column the aggregate increase in the actuarial value accrued by an NEO during the fiscal year under all defined benefit and actuarial pension plans (regardless of whether they are tax-qualified plans or are excess benefit or supplemental plans) raises a number of issues that need to be considered.
  - Inasmuch as the increase in actuarial value is affected significantly by the age of the NEO, should only the accrual for the fiscal year be included? (The same accrual during the fiscal year will have a higher actuarial value for each year's increase in the age of an NEO (e.g., the actuarial value of the accrual for an NEO who is 55 can be as much as 240% of the accrual of an NEO who is 40).
    - In any event, the increase in actuarial value should not be included in the Total Column.
  - Similarly, the tenure of the NEO will affect the increase in actuarial value under many defined benefit pension plans, where the actuarial value will be higher for each year of service.



- There are several different methods to calculate the increase in actuarial value. The instructions should specify the method (or methods) that may be used to make the calculations (e.g., FAS 87); require that changes to the method be rare; and, if there is a change, require an explanation in the narrative discussion of the reason for the change and the difference in the amount of the actuarial value for the year of the change under the prior and new methods. Otherwise a company could choose on a year-by-year basis the method that will produce the lowest value, and comparisons from one year to the next may not be meaningful.
- *Miscellaneous* – Expand the list of items to be included to make it clear that amounts from the following should be included in this Column:
  - Insurance premiums or company payments for special benefits not available to salaried employees generally, such as executive medical, life insurance and disability benefits.
  - Director fees from affiliated and subsidiary companies.
  - Insurance premiums or accruals prior to the retirement of an NEO to provide special post-retirement benefits not available generally to salaried employees such as medical and life insurance benefits.

As discussed on page 6555 of the Federal Register, a supplemental table similar to the format set forth on that page would make this Column more understandable and meaningful.

#### **Item 402(d) –Grants of Performance-Based Awards Table**

General. This Table will be highly effective in supplementing the Stock Awards, Option Awards and Non-Stock Incentive Plan Columns of the Summary Compensation Table. Column (e) of the Table should be deleted because it is extremely rare for NEOs (or other executive officers) to be required to pay for a performance-based award.

Grant Date Value. A column should be added for the grant date value of performance-based stock awards in order to enable investors to better understand the nature of such awards. This would be particularly important if the Summary Compensation Table does not report grant date fair value as recommended on page 4. Grant date fair value would be determined under FAS 123(R), with the modifications suggested on page 5.

Separate Rows for Types of Awards. The Table appears to provide for one row to show all performance based awards for an NEO. As a result, the row will mix full-value stock awards, options and cash awards together. In order to provide information that is easier for investors to

understand, each type of award should be shown on a separate row, with a new column to be added to identify the type of award to which the row corresponds.

Change in Control. Information should be provided about the effects of a change in control on the vesting of awards in the Table, as well as the determination of the amount payable in the event of a change in control. This should be in a footnote or in narrative disclosure.

#### **Item 402(e) – Grants of All Other Equity Awards Table**

Separate Rows for Type of Awards. The recommendation above for a separate row for each type of equity award (i.e., full-value stock awards and options) applies to this Table as well.

Stock Option Awards. Two additional columns should be included to provide relevant information about stock options: (i) grant date fair value per share calculated under FAS 123(R), and (ii) the fair market value of company stock on the grant date for premium-priced options (i.e., options with an exercise price above fair market value).

Full-Value Awards. For full-value awards of stock or stock units, add a column for grant date fair value per share calculated under FAS 123(R).

Vesting and Grant Dates. Reverse the order of the vesting and grant date columns to be consistent with typical practice.

Vesting Schedule. In order to clarify vesting, a footnote to this table should describe the vesting schedule for awards that do not “cliff vest” on one date. It would also be useful if a footnote or narrative disclosure described the effects of a change in control on vesting of the awards in this table.

#### **Item 402(f) – Narrative Disclosure to Summary Compensation Table and Subsidiary Table**

Additional Material Factors. The existence of a guaranteed bonus minimum, if any, would be a material factor for investors that should be discussed in the narrative to the Summary Compensation Table.

Employment Agreement Column. Do not include an additional Summary Compensation Table Column that would indicate by a checkmark whether an NEO has an employment agreement. The Summary Compensation Table is already cluttered and narrative description of the employment agreement is sufficient.

Repricing and Other Modifications. As noted previously in the discussion under Option Award Column on page 6, inclusion of the full value of a repriced or modified option or SAR should not be required. It would be appropriate, however, to require the narrative disclosure of repricings

and other modifications to include a discussion of the fair value of the original grant and the fair value of the new grant.

Disclosure of Up to Three Other Employees. Consider dropping the requirement of narrative disclosure of up to three other employees who are not executive officers.

- It would be very burdensome for companies to track this information, which would be interesting but of little value to investors, especially if the individuals are not named.
  - In many instances the employees whose compensation would be disclosed would be salesmen, insurance agents, traders, investment bankers and media stars.
  - Further, the compensation of such employees would typically not be subject to the oversight or control of the board of directors or the compensation committee.
- If the Commission is concerned that the compensation of heads of divisions and subsidiaries is escaping disclosure, the definition of executive officers for purposes of Item 402 of Regulation S-K should be appropriately clarified to specifically include such individuals.

#### **Item 402(g) – Outstanding Equity Awards at Fiscal Year-End Table**

Appropriate and Material Information. This Table and the Option Exercises and Stock Vested Table in Item 402(h) contain very useful and material information for investors. The information can assist them in understanding the “real value” of equity awards that are earned or accrued in contrast to the grant date fair value reported in the Summary Compensation Table.

Separate Table for Options/SARs and Stock Awards. The Tables proposed in Items 402(g) and (h) should be replaced by two other tables; one for stock options and SARs and the other for stock awards. Both Tables in the proposed rules contain information about stock options and SARs and stock awards. The tables that we recommend would separate the types of awards, which would be consistent with their treatment in the Summary Compensation Table. Our recommended tables are attached as Exhibits A and B. Both tables would be in the nature of balance sheets and would include information about:

- Beginning of the year shares (unexercised options and SARs; unvested stock awards) as well as end of the year shares and values.
- The value realized during the year (gains on exercises of options and SARs, and value on vesting of stock awards).
- The net gain or loss during the year.

Out-of-the-Money Options and SARs. Since stock options and SARs that are out-of-the-money have a zero value, there is no need to include disclosure about them.

#### **Item 402(h) – Option Exercises and Stock Vested Table**

See the comments to Item 402(g) above.

#### **Item 402(i) – Retirement Plan Potential Annual Payments and Benefits Table**

This Table represents a vast improvement over the disclosure required under the current rules and will provide a more clear understanding of the benefits payable to NEOs under the company's tax-qualified and supplemental pension plans.

Additional Column. The proposed Table should include an additional column for the amount of the benefit accrual for the year as opposed to its actuarial value. The amount will be of interest to investors, particularly if there is a substantial increase over prior years.

Lump Sum Aggregate Actuarial Value Column. If a lump sum payment is available, it should be included in the Table itself rather than the narrative accompanying the Table. Although this would necessitate an additional column, it would be of interest and would be easy to find and understand. If a lump sum is not available, the aggregate actuarial present value should be included in this column. (See also the issues discussed under "Increase in Pension Plan Actuarial Value" on pages 8-9.)

Additional Narrative Disclosure. The following information should be required to be discussed in the accompanying narrative disclosure:

- The definition(s) of compensation used in determining retirement plan benefits for NEOs and a comparison to the definition applicable to other salaried employees.
- Whether retirement benefits under supplemental plans for NEOs are funded in a rabbi trust or a secular trust, and who pays income taxes on secular trust funding.
- If a lump sum payment is permitted for NEOs, any differences in the requirements for, and determination of, the lump sum compared to the requirement and determination for lump sums for salaried employees under the company's tax-qualified retirement plan, including the discount (interest) rate and other actuarial assumptions.
- An explanation of any additional age and year of service credit granted to NEOs and why such credits were granted.

### **Item 402(j) – Nonqualified Defined Contribution and Other Deferred Compensation Plans Table**

Additional Information in Tables. The proposed Table will serve as an excellent source of information with respect to the benefits accruing to NEOs under non-qualified defined contribution plans and other deferred compensation plans.

- Inclusion of aggregate earnings for the last fiscal year is appropriate here, as opposed to only above market or preferential earnings in the All Other Compensation Column of the Summary Compensation Table (see the discussion on pages 7-8 under “Earnings on Deferred Compensation”).
  - Companies should be permitted to include in a footnote the percentage or dollar amount of the aggregate earnings attributable to voluntary deferrals by NEOs.
- It is not necessary to add a column showing aggregate earnings since the inception of the NEO’s participation in the plan through the end of the last year. This information is not helpful and is likely to be misunderstood, especially in terms of double counting.
- A narrative description of the tax implications of the plans to NEOs and the company would not be useful to investors.

Phantom Stock. The instructions to this Table should make it clear that deferrals credited in the form of “phantom” company stock should be included, and that footnote disclosure should indicate:

- The number of phantom shares credited to the NEO’s account at the beginning of the last fiscal year.
- The number of additional shares credited during the last fiscal year from deferrals and contributions by the NEO, the company and dividend equivalents.
- The increase or decrease in value of the shares credited to the NEO’s account during the last fiscal year.
- The number of shares credited to the NEO’s account at the end of the last fiscal year.

### **Item 402(k) – Potential Payment upon Termination or Change in Control**

Tabular Disclosure. Information about termination and change in control payment has received tremendous scrutiny and criticism in recent years, especially due to the size of such payments. At the same time, there is a great deal of confusion about what is the appropriate amount of the payments because many reports include items that have already been earned and vested (e.g., stock options and other equity awards).

In order to improve investors' understanding of these payments, tabular format should be required together with narrative disclosure. The table should include separate rows for payments on termination unrelated to a change in control, and termination in connection with a change in control; in each case whether due to termination by the company or termination by the NEO for "good reason" (i.e., constructive termination). Separate columns should be required for:

- Cash payments of severance and other unvested amounts.
- Cash payments of previously vested amounts.
- Number of shares and value of previously unvested stock options and stock awards that become vested due to termination of employment; or, if applicable, upon the occurrence of a change in control.
- Number of shares and value of previously vested stock options and stock awards.

Special payments at retirement are much less typical and, accordingly, we recommend that any disclosure be permitted in either a narrative format or a separate table.

Safe-Harbor Assumptions. Companies have legitimate concerns about criticism of, and potential litigation with respect to, the disclosure of such payments. It is also very important that comparability across companies be increased, and that companies not be able to use a methodology that minimizes the amount disclosed. Accordingly, the instructions to this item should provide for "safe-harbor" assumptions that may be used in calculating the amounts disclosed, and require companies that do not use such assumptions to set forth the assumptions used and not to change their assumptions more often than once every three years unless they disclose amounts payable under both sets of assumptions.

The "safe-harbor" assumptions we recommend are as follows:

- All hypothetical terminations occur at the end of the company's current fiscal year.
- All compensation earned in the last fiscal year (e.g., bonus) is not part of severance pay.
- Severance pay is to be calculated based on salary and either actual, target or maximum bonus as applicable under the agreement or plan providing for severance pay, as in effect for the last fiscal year if actual bonus is used and the current year if target or maximum is used.
- The fair market value of the company's stock is equal to its closing price at the end of the last fiscal year.

Golden Parachute Excise Tax Gross-Up Payment. Calculation of the excise tax imposed by Internal Revenue Code Section 4999 can be complicated and expensive. Although many NEOs are entitled to a gross-up payment to make them whole for the excise tax, the entire payment is made to the United States Treasury. Nevertheless, without the gross-up payment, the amounts to be received by the NEO could be reduced substantially before income taxes are imposed. The disclosure with respect to a gross-up payment should therefore be permitted to set forth the excise tax separately from the gross-up payment.

The narrative disclosure to the table should in any event disclose whether the NEO is entitled to a gross-up payment or whether payments will be reduced to avoid the exercise tax, and the circumstances under which the reduction will occur (e.g., in all events, or only if the excise tax would be avoided by a reduction of a percentage or dollar amount of payments).

The instructions should provide a safe harbor assumption for determining the excise tax gross-up. Income taxes should be calculated using the maximum Federal rate without taking into account state and local taxes.

Additional Narrative Disclosure. The following additional items should be required to be included in the narrative disclosure to the Table:

- Whether an NEO can receive simultaneously severance pay and retirement payments under tax-qualified and supplemental retirement plans and arrangements.
- Whether an NEO can retire and receive the same health and life insurance benefits to which active employees are entitled.
- Whether severance is payable on the death or disability of an NEO.
- If restrictive covenants (e.g., non-competition; non-solicitation of employees and customers; non-disclosure) are violated, whether the company can cease or “claw back” (i.e., recover) severance payments.
- Whether severance pay and health and life insurance benefits continue on or after normal retirement date.
- Whether there is a different treatment on or after a change in control.

#### **Item 402(I) – Compensation of Directors**

Form of Disclosure. The proposed Table would be a very significant improvement over the narrative disclosure required by the current rules. As discussed on page 4, the Total Column should be the last numerical column rather than the first column. The comments to the Use of FAS 123(R) to Value Awards and the Option Award Column on page 5, as well as to Perquisites and Other Personal Benefits on pages 7-9 are applicable here as well.

The details of equity grants to directors would be material information to investors and should be placed in a separate supplemental table. Since it is unusual for directors to receive performance-based awards, the information could be contained in one supplemental table that shows:

- Stock option grants: grant date, number of shares, exercise price and vesting date.
- Stock and stock unit grants: grant date, number of shares (units), grant date price to determine company stock value and vesting date.

#### Columns to be Omitted or Added

- The Non-Stock Incentive Compensation Plan Column should be omitted since, as noted above, it is unprecedented in our experience for directors to receive such compensation.
- Separate columns should be added, in lieu of the Fees Earned or Paid in Cash Column, showing the cash amounts of board retainer, total board meeting fees, committee chair and membership retainer and total committee meeting fees.
  - The narrative disclosure should describe the nature of each of the above, other than the Board retainer (e.g., each director receives \$\_\_\_\_\_ for each meeting attended; the chair of the audit committee receives an additional retainer of \$\_\_\_\_\_).

#### Narrative Disclosure

- If a director receives fees from the company for consulting services, then the fees should be described and quantified in narrative disclosure.
- Narrative disclosure of policies and objectives with respect to director compensation and ownership or retention of stock should be included here. It would be useful information for investors and would be far less effective if included in the CD&A.

#### **Item 403(b) – Security Ownership of Certain Beneficial Owners and Management Shares Pledged as Collateral**

We support the requirement to include footnote disclosure of the number of shares that are pledged by NEOs, directors and director nominees as collateral. All categories of loans should be treated in the same manner. If a company chooses to do so it can include additional information about different categories in the footnote. We do recommend a one-year delay in the effective date of this item in order to give NEOs and directors an opportunity to restructure loans involving shares pledged as collateral.



Carried Interest Ownership. While we acknowledge that the purpose of this Table is to disclose voting power, consideration should be given to adding information in order to provide disclosure of carried interest ownership consisting of all options, shares and stock units to make this Table more meaningful. The value of the Table under the current rule is reduced due to the exclusion of most unvested options and stock units (i.e., all unvested options and stock units other than those that will vest within 60 days), the requirement to break-out options, stock units and shares using footnotes, and the exclusion of deferred stock units in many instances. By using carried interest ownership, the Table would provide a much clearer picture of the interest of NEOs and directors in stock of the company. To further clarify the disclosure, separate columns should show:

- All stock options.
- Shares owned, whether acquired separately or granted by the company and vested.
- Unvested shares granted.
- Vested stock units with deferred payment.
- Unvested stock units.

Additional Information. This item should also require narrative disclosure of:

- Company stock ownership and retention policies for executive officers, including the definition of ownership for purposes of the policies.
- Trading policies and prohibitions applicable to executive officers and directors (e.g., no hedging, no margining of company stock, and sales of company stock only under Rule 10b5-1 plans).
- A table showing ownership of executive officers at the beginning and end of the last fiscal year in relationship to any ownership guidelines.

#### **Item 407(e) – Compensation Committee**

This item will result in the disclosure of meaningful information about the compensation committee and its operations, including the use of compensation consultants. Although we support the identification of any compensation consultant retained by the committee and the role of the consultant, we are concerned about the following:

- In contrast to the role of outside auditors, neither the compensation committee nor the company is required to follow the advice of compensation consultants and there are no prescriptive rules in compensation planning that are comparable to GAAP accounting.

- This item does not require similar disclosure with respect to any other third party (e.g., a law firm) that functions effectively as a compensation consultant.
- The requirement that disclosure be made "...identifying any executive officer within the registrant the consultants contacted in carrying out their assignment" could have a chilling effect on the exchange of vital information. This requirement should therefore be dropped, since it is essential in most instances for the compensation consultant advising the compensation committee to interact with various members of senior management (e.g., PEO, PFO, head of human resources and general counsel).

We recommend that this item require disclosure of whether the compensation consultant may be retained by management for projects that are separate from the work the consultant performs on behalf of the compensation committee (e.g., projects unrelated to executive compensation). This would assist investors in determining the degree to which the consultant could be influenced by its relationships with management and the nature of economic influence unrelated to compensation consulting. The disclosure should indicate the fees payable to the compensation consultant for the last fiscal year from work on behalf of the compensation committee, compared to work done separately at management's request.

#### **Item 201(d) -- Equity Compensation Plan Information**

We recommend a modification to the requirements of this Item in light of the shareholder approval rules of the New York Stock Exchange and the NASDAQ (effective June 30, 2003) that require equity compensation plans for employees and directors to be approved by shareholders, with limited exceptions. Individual arrangements for equity compensation must also be approved by shareholders, subject to an exemption for employment inducement awards. Accordingly, this Item should no longer require separate disclosure of information with respect to plans approved by shareholders and plans not approved by shareholders.

#### **Transition**

The proposed effective dates for proxy statements filed more than 90 days after publication of the final rules is workable, subject to the following key factors:

- The transition provision for the Summary Compensation Table and proposed Item 404(a) under which initially the disclosure would be required only for the most recent fiscal year and would be phased in over the succeeding two years; and
- In view of the fact that a very high percentage of public companies file their proxy statements during the months of January, February and March, the final rules are published no later than September 30, 2006.

Companies will incur substantial costs in preparing the initial proxy statement subject to the new rules. Information needs to be gathered from a variety of sources from within the company and

Ms. Nancy M. Morris

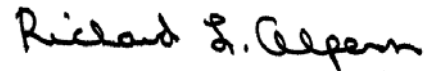
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from outside parties (e.g., retirement plan actuary and deferred compensation plan record keepers). In many instances, this information is either not readily available or must be prepared in a different manner than in the past. The likelihood that there will be deletions, additions and other changes to the proposed rules make it very difficult for companies to begin the process of obtaining the necessary information prior to the release of the final rules. We would encourage the Commission to finalize the rules as soon as possible and consider increasing the lead time for compliance by delaying the effective date by 15 days for each 15 days that the rules are finalized after September 30.

We would be pleased to discuss any questions about our comments at your convenience. Please call me at 212-299-3599 if you have any questions or if we can provide other supporting information.

Very truly yours

A handwritten signature in black ink that reads "Richard L. Alpern". The signature is written in a cursive style with a large initial 'R'.

Richard L. Alpern

RLA:emg  
Enclosures

**STOCK OPTION/SARS EXERCISES AND OUTSTANDING**

Name of Executive Officer (a)	Start of Year In-the Money Accrued Option Gains <sup>1</sup> (b)	Option Gains Realized During Year (c)	End of Year In-the-Money Accrued Option Gains <sup>2</sup> (d)	Net Option Gain/Loss for Year (d+c-b) (e)
PEO -- Shares -- Dollars	\$	\$	\$	\$
PFO -- Shares -- Dollars	\$	\$	\$	\$
A -- Shares -- Dollars	\$	\$	\$	\$
B -- Shares -- Dollars	\$	\$	\$	\$
C -- Shares -- Dollars	\$	\$	\$	\$

Note: Companies should be permitted to subdivide columns (b) and (d) into exercisable and non-exercisable awards

<sup>1</sup> Based on 200X closing price of \$\_\_\_\_/sh.

<sup>2</sup> Based on 200Y closing price of \$\_\_\_\_/sh.

**Exhibit B**

**STOCK AWARD VESTING AND OUTSTANDING**

<b>Name of Executive Officer (a)</b>	<b>Start of Year Stock Value Unvested Awards<sup>3</sup> (b)</b>	<b>Value Realized On Vesting (c)</b>	<b>End of Year Stock Value Unvested Awards<sup>4</sup> (d)</b>	<b>Net Gain/Loss for Year (d+c-b) (e)</b>
PEO -- Shares				
-- Dollars	\$	\$	\$	\$
PFO -- Shares				
-- Dollars	\$	\$	\$	\$
A -- Shares				
-- Dollars	\$	\$	\$	\$
B -- Shares				
-- Dollars	\$	\$	\$	\$
C -- Shares				
-- Dollars	\$	\$	\$	\$

<sup>3</sup> Based on 200X closing price of \$\_\_\_\_/sh.

<sup>4</sup> Based on 200Y closing price of \$\_\_\_\_/sh.