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CORPORATE GOVERNANCE ALERT

SEC PROPOSES NEW EXECUTIVE COMPENSATION DISCLOSURE RULES — WHAT COMPANIES SHOULD CONSIDER FOR THE 2006 PROXY SEASON

On January 27, 2006, the Securities and Exchange Commission proposed for comment new and wide-ranging disclosure rules regarding executive and director compensation, insider stock ownership, related party transactions, director independence and other corporate governance matters of reporting public companies. Because the comment period for the proposed rules expires on April 10, 2006, any final rules to come out of the proposal will not be effective for the many public companies that hold their annual meetings in the first half of 2006. In this Alert we provide a relatively high-level overview of the proposed rules and then conclude with our recommendations for registrants who wish to incorporate voluntarily some of the proposed disclosures into their period reports prior to official adoption in an effort to enhance stockholder understanding of executive compensation and corporate governance matters.

OVERVIEW

The SEC's stated goal for the new disclosure scheme is to provide investors with a more complete picture of the total compensation earned by a registrant's principal executive officer, principal financial officer and highest-paid executive officers and members of its board of directors. Moreover, the SEC intends for the new rules to provide better information about key financial relationships among registrants and their executive officers, directors, significant shareholders and their respective immediate family members. The proposals rely heavily on the increased use of tabular disclosure of financial and statistical information, as well as an enhanced requirement for narrative descriptions of critical elements. To aid investor understanding of these complex subjects, the proposals would generally require that disclosure be provided in plain English.

Item 402 of Regulation S-K and Regulation S-B, the primary rule relating to disclosure of executive compensation, was last amended in 1992. Over the years it has become the subject of criticism by a wide variety of corporate governance authorities and shareholder activists. The topics of criticism are also very broad, but relate primarily to the perception that the current rules do not require transparent disclosure of all components of executive pay, which has permitted some public companies to conceal the total economic cost of executive compensation.

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The proposed rules represent a major undertaking in revising the scope and breadth of disclosure about executive compensation. The notice of proposed rule-making runs 370 pages in length; we expect that the SEC will receive a relatively large number of public comments about the rules, and will no doubt refine them before adopting the final version. Nevertheless, we expect that the final rules will address the same substance as those proposed, and generally follow the same format.

Key elements of the proposed rules include—

- creation of a new "Compensation Discussion and Analysis" section
- significant revisions to the tabular disclosure regarding director and executive officer compensation
- amendments to the Form 8-K disclosure requirements concerning employment agreements and other executive compensation arrangements
- updated standards for disclosure of related party transactions
- consolidation of corporate governance disclosures into a new Item 407 of Regulation S-K.

This Alert focuses primarily on registrants subject to the disclosure obligations of Regulation S-K. Regulation S-B filers and foreign private issuers would also be subject to many of these disclosure requirements, though they would have slightly less-detailed reporting obligations. To a lesser extent, registered investment companies and issuers of asset-backed securities would also be subject to a number of the proposed rules.

COMPENSATION DISCUSSION AND ANALYSIS

The centerpiece of the proposed disclosure scheme would be a new narrative section entitled "Compensation Discussion and Analysis," or CD&A. Intended to satisfy many of the same objectives as the Management's Discussion and Analysis of Financial Condition and Results of Operations section familiar to all registrants, CD&A would focus on the material principles underlying a registrant's executive compensation policies and decisions, and the most important factors relevant to analysis of those policies and decisions. As with the SEC's recent MD&A guidance, the SEC would encourage registrants to avoid the use of boilerplate in CD&A and resist the temptation simply to rehash in narrative form the tabular data that would follow.

The CD&A discussion would describe—

- the objectives of the registrant's compensation programs
- what the compensation program is designed to reward and not reward
- each element of compensation
- why the registrant chooses to pay each element
- how the registrant determines the amount (and, where applicable, the formula) for each element of pay
- how each compensation element and the registrant's decisions regarding that element fit into the registrant's overall compensation objectives and affect decisions regarding other elements.

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Under the proposed rules, CD&A would be considered a part of the proxy statement and any other filing in which it is included. Unlike the current Compensation Committee Report and Performance Graph, which would be eliminated under the SEC's proposals, CD&A would also be considered soliciting material and would be deemed filed with the SEC. Additionally, to the extent that the CD&A discussion and any of the other disclosure regarding executive officer and director compensation or other matters is included or incorporated by reference into a periodic report, the disclosure would be covered by the certifications that principal executive officers and principal financial officers are required to make under the Sarbanes-Oxley Act of 2002.

NEW TABULAR DISCLOSURE

Overview

Another critical element of the proposed rules would be a substantial reworking of the current tabular disclosure format for executive compensation. Following the CD&A discussion, registrants would be required to provide financial data in tabular form for various compensation elements, which would be disclosed through a new Summary Compensation Table and several additional supporting tables. The SEC organizes this data into three broad categories:

- compensation paid currently or deferred (including options, restricted stock and similar grants) and compensation consisting of current earnings or awards that are part of a plan
- holdings of equity-related interests that relate to compensation or are potential sources of future gains, with a focus on compensation-related equity interests that were awarded in prior years (and disclosed as current compensation for those years) and are "at risk," as well as recent realization on these interests, such as through vesting of restricted stock or the exercise of options
- retirement and other post-employment benefits, including retirement and defined contribution and other deferred compensation plans, other retirement benefits and other post-employment benefits, such as those payable in the event of a change in control.

The various new tables would replace those required under the current rules. The SEC anticipates that tabular disclosure for each of the above categories would be supplemented by appropriate narrative that provides material information necessary to an understanding of the information presented in the individual tables. Furthermore, registrants would be required to prepare a director compensation table and accompanying narrative that would be similar to the proposed Summary Compensation Table for named executive officers.

Named Executive Officers

The proposed rules would require tabular disclosure of compensation for each of the following named executive officers:

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

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- the registrant's three most highly compensated executive officers, other than the PEO and PFO, with total compensation in excess of $100,000, who were serving as executive officers at the end of the last completed fiscal year
- up to two additional individuals for whom disclosure would have been provided but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

The proposed rules depart from the current rules in a number of significant ways. For example, the PFO will be required to be listed as a named executive officer in all instances. Additionally, determination of named executive officers would be based on total compensation, rather than just salary and bonus as required under the current rules. Finally, the proposed rules would require narrative disclosure, by job position and not employee name, of the total compensation for up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any named executive officers.

Summary Compensation Table

Under the proposed rules, the Summary Compensation Table would be rearranged and would also include a new column totaling all compensation paid to each named executive. The new Summary Compensation Table would include, for three prior years—

- the name and principal position of the named executive officer
- the fiscal year covered
- the dollar value of total compensation for the covered fiscal year, i.e., the sum of all amounts reported in the remaining columns
- the dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered
- the dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered
- the dollar value of all stock awards granted to the named executive officer during the fiscal year covered, with the value being the grant date fair value of the award determined pursuant to Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (FAS 123R)
- the dollar value of all option awards granted to the named executive officer during the fiscal year covered, with the value being the grant date fair value determined pursuant to FAS 123R
- the dollar value of all non-stock incentive plan compensation
- the dollar value of "All Other Compensation."

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Perquisites and Other Personal Benefits

Consistent with the SEC's desire to capture "all" elements of executive compensation, the proposed rules would require disclosure of significantly more information about perquisites and other personal benefits than the current rules. Thus, all other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table would fall into the "All Other Compensation" column, with the only exception being perquisites and personal benefits if they aggregated less than $10,000 for a named executive. Each compensation item in the All Other Compensation column would be required to be identified and quantified in a footnote if the amount of the item exceeds $10,000. In the case of any perquisite or personal benefit, the compensation item would be required to be identified unless the aggregate value of perquisites and personal benefits is less than $10,000, and must be quantified in footnote disclosure if it is valued at the greater of $25,000 or 10 percent of total perquisites and other personal benefits for the named executive officer. Miscellaneous compensation would include—

- perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000
- all earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans
- all "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes
- for any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all shareholders or to all salaried employees of the registrant, the compensation cost computed in accordance with FAS 123R applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes
- the amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with 1) any termination, such as through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer's employment with the registrant and its subsidiaries, or 2) a change in control of the registrant
- registrant contributions or other allocations to vested and unvested defined contribution plans
- the aggregate increase in actuarial value to the named executive officer of all defined benefit and actuarial pension plans (including supplemental plans) accrued during the registrant's covered fiscal year
- the dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer.

In defining a "perquisite or personal benefit,' the SEC is hesitant to provide a rigid definition, and instead prefers to rely on a flexible standard:

- an item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties

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- otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the registrant, unless it is generally available on a nondiscriminatory basis to all employees.

The SEC would construe the concept of a benefit that is "integrally and directly related" to job performance narrowly. The concept may, for example, extend to items such as office space at a company business location, a reserved parking space that is closer to business facilities but not otherwise preferential, or additional clerical or secretarial services devoted to company matters. However, the SEC does not believe the concept extends to items that merely facilitate job performance, such as use of company-provided aircraft, yachts or other watercraft, commuter transportation services, additional clerical or secretarial services devoted to personal matters, or investment management services. Whether a registrant has determined that an expense is an "ordinary" or "necessary" business expense for tax or other purposes or that an expense is for the benefit or convenience of the registrant is not necessarily responsive to the SEC inquiry.

Applying these concepts, the SEC believes some examples of items requiring disclosure as perquisites or personal benefits would include—

- club memberships not used exclusively for business entertainment purposes
- personal financial or tax advice
- personal travel using vehicles owned or leased by the company
- personal travel otherwise financed by the company
- personal use of other property owned or leased by the company
- housing and other living expenses (including relocation assistance and payments for the executive or director to stay at his or her personal residence)
- security provided at a personal residence or during personal travel
- commuting expenses (whether or not for the company's convenience or benefit)
- discounts on the company's products or services not generally available to employees on a non-discriminatory basis.

Additional Support for the Summary Compensation Table

The proposal would further enhance disclosures under the Summary Compensation Table by requiring two additional tables based in part on those required under the current rules. The two new tables would summarize "Grants of Performance-Based Awards" and "Grants of All Other Equity Awards." Each of the new tables would show only the terms of grants made during the most recently completed year.

Exercises and Holdings of Previously Awarded Equity

The next section of the executive compensation disclosure would describe equity compensation that has previously been awarded and remains outstanding, is unexercised or is unvested. This section also would disclose amounts realized on this type of compensation during the most recent fiscal year when, for example, a named executive officer exercises an

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option or his or her stock award vests. The two new tables would show “Outstanding Equity Awards at Fiscal Year End” and “Option Exercises and Stock Vested.”

Post-Employment Compensation

The proposed rules include significant revisions to the disclosure of post-employment compensation. The SEC believes that executive retirement packages and other post-termination compensation may represent a significant commitment of corporate resources and a significant portion of overall compensation. The proposed rules would replace the current pension plan table, alternative plan disclosure and some of the other narrative descriptions with two new tables showing “Retirement Plan Potential Annual Payments and Benefits,” and “Nonqualified Defined Contribution and Other Deferred Compensation Plans.” These new tables would provide disclosure with respect to each named executive officer. Additionally, the proposed rules would revise the requirements for disclosure of compensation arrangements triggered upon termination and on changes in control.

Director Compensation

The proposed rules would require a Director Compensation Table similar to the proposed Summary Compensation Table for executive officers, but would present information only for the current year. The Director Compensation Table would include—

- the name of each director unless such director is also a named executive officer and his or her compensation for service as a director is fully reflected in the Summary Compensation Table
- the dollar value of total compensation for the covered fiscal year, including the sum of all amounts reported in the remaining columns
- the aggregate dollar amount of all fees earned or paid in cash for services as a director, including annual retainer fees, committee or chairmanship fees, and meeting fees
- for awards of stock, including restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar instruments that do not have option-like features, the aggregate grant date fair value computed in accordance with FAS 123R, applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards
- for awards of stock options, with or without tandem SARs, freestanding SARs and other similar instruments with option-like features (including awards that subsequently have been transferred), the aggregate grant date fair value computed in accordance with FAS 123R applying the same valuation model and assumptions as the registrant applies for financial statement reporting purposes, and all earnings on any outstanding awards
- the dollar value of all non-stock incentive plan compensation.

As with the Summary Compensation Table, an “All Other Compensation” column would be a repository for compensation data that the registrant would not properly report in any other column of the Director Compensation Table. Each compensation item for the last completed fiscal year that is not properly reportable in the other columns would be required to be reported under “All Other Compensation” and would be required to be identified and quantified in a footnote if the amount of the item exceeds $10,000 (or in the case of any perquisites or personal benefits, must be

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itemized unless the aggregate value of perquisites and personal benefits is less than $10,000, and must be quantified if it is valued at the greater of $25,000 or 10 percent of total perquisites and personal benefits of the director). The proposed rules also provide additional guidance on what constitutes perquisite compensation for directors.

Beneficial Ownership Disclosure

The proposed rules would amend Item 403(b) of Regulation S-K concerning securities ownership of management to require footnote disclosure of the number of shares pledged as security by named executive officers, directors and director nominees. The proposals would also require disclosure of beneficial ownership of directors' qualifying shares (i.e., securities that must be held to satisfy minimum ownership requirements or guidelines for directors or executive officers), which is not currently required.

Corporate Governance Disclosure

The proposed rules would create a new Item 407 of Regulation S-K to consolidate corporate governance disclosures currently scattered throughout the SEC rules and provide enhanced disclosure on a number of matters concerning director independence.

PROPOSED REVISIONS TO FORM 8-K

Among a host of new required Form 8-K disclosures that became effective on August 23, 2004, are Item 1.01 (Entry into a Material Definitive Agreement), and Item 5.02 (Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers). Since their adoption, Items 1.01 and 5.02 have raised a wide variety of interpretive issues concerning the timing, scope and breadth of director and executive compensation disclosure in Form 8-K. The SEC staff attempted to address many of these issues through responses to Frequently Asked Questions released November 23, 2004, but some confusion persists (particularly as to the threshold for materiality), and the SEC is still not satisfied with the current state of disclosure. Accordingly, the proposed rules include revised disclosure obligations under Items 1.01 and 5.02.

The proposed rules would make clear that employment agreements and other executive compensation plans need not be disclosed under Item 1.01. Instead, disclosure under Item 5.02 would be enhanced by—

- expanding the information regarding retirement, resignation or termination to include all named executive officers for the prior fiscal year, whether or not included in the list currently specified in Item 5.02
- expanding the disclosure items covered under Item 5.02 beyond employment agreements to require a brief description of any material plan, contract or arrangement to which a covered officer or director is a party or in which he or she participates that is entered into, materially amended or modified in connection with any of the triggering events specified in Item 5.02, or any grant or award to any such covered person, or modification thereto, under any such plan, contract or arrangement in connection with any such event
- for the principal executive officer, the principal financial officer and named executive officers for the prior fiscal year, expanding the disclosure items to include a brief description of any material new compensatory plan, contract or arrangement, or new grant or award thereunder (whether or not written), and any material amendment to any compensatory plan, contract or arrangement (or modification to a grant or award thereunder), whether or not such occurrence is in connection with a triggering event specified in Item 5.02. Grants or awards or modifications will not be required to be disclosed if they are consistent with the terms of

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previously disclosed plans or arrangements and they are disclosed the next time the company is required to provide new disclosure under Item 402 of Regulation S-K

- adding a requirement for disclosure of salary and bonus for the most recent fiscal year that was not available at the latest practicable date in connection with disclosure under Item 402 of Regulation S-K.

The SEC emphasized that disclosure under Item 5.02 should not be voluminous or of the same scope required under proposed Item 402 of Regulation S-K. Moreover, a registrant need not provide information with respect to plans, contracts, and arrangements to the extent they do not discriminate in scope, terms or operation in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

DISCLOSURE OF RELATED PARTY TRANSACTIONS

The proposed rules would modify the somewhat formulaic approach to analyzing whether a related party transaction must be disclosed under Item 404 of Regulation S-K by replacing it with a more principles-based approach. The proposed rules would also increase the disclosure threshold from $60,000 to $120,000. Thus, the new standard for disclosure would be—

- any transaction since the beginning of the company's last fiscal year, or any currently proposed transaction
- in which the company was or is to be a participant
- in which the amount involved exceeds $120,000, and
- in which any related person had, or will have, a direct or indirect material interest.

The materiality of an interest would continue to be determined on the basis of the significance of the information to investors in light of all the circumstances and the significance of the interest to the person having the interest. The definition of related person would be expanded to include stepchildren, stepparents and any person (other than a tenant or employee) sharing the household of a related person. The proposed rules would also eliminate the current distinction between indebtedness and other types of related party transactions, such that disclosure of indebtedness with respect to significant shareholders would be required.

Additionally, the proposed rules would require disclosure regarding a registrants' policies and procedures for the review, approval or ratification of related party transactions.

RELIEF FOR SMALL BUSINESS AND FOREIGN PRIVATE ISSUERS

In an effort to balance the increased burden of complying with the proposed rules that would be placed on registrants against the public policy in favor of disclosure underlying the securities laws, the proposed rules provide some relief for small business and foreign private issuers. Small-business issuers would be subject to most of the enhanced disclosure described in this Alert, though the corresponding amendments to Regulation S-B would be made in a somewhat streamlined fashion. Small-business issuers would not, for example, be required to prepare a CD&A discussion. The tabular disclosure for executive compensation would also be less detailed for small-business issuers, providing two years of disclosure only, requiring disclosure only for the principal executive officer and the two highest-paid executives, and eliminating some of the Regulation S-K tables in favor of three consolidated tables: Summary Compensation (without the two supporting tables), Outstanding Equity Awards and Director Compensation.

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Additionally, the proposed rules would continue the current practice whereby foreign private issuers are deemed to comply with Item 402 of Regulation S-K if they provide the information required by Items 6.B. and 6.E.2. of Form 20-F.

TRANSITION

The SEC has proposed that, assuming their adoption, the proposed new rules and amendments would become effective following publication of the adopting release in the Federal Register as follows:

- for Forms 10-K and 10-KSB, for fiscal years ending 60 days or more after publication
- for Forms 8-K, for triggering events that occur 60 days or more after publication
- for Securities Act and Investment Company Act registration statements (including post-effective amendments) and Exchange Act registration statements that become effective 120 days or more after publication
- for proxy statements that are filed 90 days or more after publication.

The SEC does not expect registrants to "restate" compensation or related person transaction disclosure for fiscal years for which they previously were required to apply the current rules. Instead, the proposed Summary Compensation Table and disclosure required by proposed Item 402(a) would be required only for the most recent fiscal year. This policy would result in phased-in implementation of the proposed Summary Compensation Table amendments and proposed Item 402(a) disclosure over a three-year period for Regulation S-K companies, and a two-year period for Regulation S-B companies.

OUR RECOMMENDATIONS

Although any final rules would not be effective for most registrants until the 2007 proxy season at the earliest, many forward-looking companies may elect voluntarily to adopt the heightened disclosure obligations for their 2006 proxy statements and other periodic reports and registration statements. Of course, any such action would be entirely optional, as the proposed rules are subject to public comment and will in all likelihood be modified before final adoption. Furthermore, registrants are still subject to the current reporting obligations, and any effort at early adoption must be done in a manner that is consistent with satisfying those current obligations. Accordingly, some of the actions that we recommend for registrants considering early adoption include the following:

- Registrants may wish to consider providing greater narrative descriptions of executive employment and compensation arrangements, with an increased emphasis on plain English drafting, including tabular data, bullet points and liberal use of headings and subheadings.
- Although the current disclosure tables required by Item 402 must be reported in their entirety, registrants may add columns to the required tables (e.g., a "Total Compensation Column") or add supplemental tables disclosing information not required under the current rules (e.g., a director compensation table).
- Registrants could provide enhanced disclosure of executive perquisites in line with proposed Item 402. We believe the proposed rules' discussion of what constitutes a perquisite is a definitive statement by the SEC of its thinking on the subject, irrespective of whether the proposed rules are adopted.

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- Likewise, though the compensation committee report must be included under the current rules, registrants may make the report more robust by incorporating some or all of the six substantive discussion points that would be included in a CD&A discussion under the proposed rules.

- The security ownership table for executive officers and directors could be supplemented to add the disclosure of pledged shares that would be required under proposed Item 403(b).

- Registrants could enhance their description of related party transactions by disclosing their policies for the review, approval or ratification of related party transactions.

These recommendations are also in line with what other advocates of improved corporate governance recommend. Institutional Shareholder Services, for example, has historically not had a formal policy with regard to enhanced CEO pay disclosure. For the 2006 proxy season, however, ISS strongly encourages companies to provide better and more transparent disclosure with respect to CEO pay. Such disclosure would, at a minimum, include robust disclosure of base salary, annual incentives, stock option grants, restricted stock grants, deferred compensation, value of supplemental retirement benefits, executive perquisites, gross-ups, severance associated with change-in-control, termination for cause/not-for-cause and post-retirement package, and would include the rationale for these awards. ISS further recommends disclosure of a tally sheet listing all the major components of CEO pay, with appropriate explanations and totals. ISS also recommends that explanations be written in plain English without reliance on boilerplate descriptions.

Finally, we also recommend that registrants begin assembling the documentation and putting in place the systems that will be necessary to compile the various components of director and executive compensation that will be required to be disclosed under the proposed rules. Many companies may not track, for example, perquisite compensation to the granular detail that would be required under the proposed rules. This support will also be necessary to give comfort to the CEO and CFO as they make their required certifications under the Sarbanes-Oxley Act in conjunction with the proposed rules.

CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

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