AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

August 31, 2006

CORPORATE GOVERNANCE ALERT

SEC ADOPTS FINAL EXECUTIVE COMPENSATION DISCLOSURE RULES

On July 26, 2006, the Securities and Exchange Commission adopted 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. The SEC published its initial proposal in January 2006, and the rules have been the subject of significant attention and debate, generating over 20,000 comment letters suggesting refinements to the proposal. The final rules do not differ substantially from those proposed, although the SEC made a number of modifications to address various points raised in the comment letters. The SEC is also seeking additional comments on a handful of issues. The new rules generally do not take effect until December 2006, but amendments to Form 8-K will apply to triggering events that occur on or after 60 days after publication of the final rules in the Federal Register.

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, 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 final rules 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 new rules generally require that disclosure be provided in plain English.

The final rules represent a major undertaking in revising the scope and breadth of disclosure about executive compensation, which has not changed significantly since the SEC last amended the executive compensation disclosure rules in 1992. Key elements of the final rules include:

- creation of a new "Compensation Discussion and Analysis" section
- significant revisions to the tabular disclosure regarding director and executive officer compensation

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- 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.

Although the proposed rules would have abolished the compensation committee report and stock performance graph, the final rules retain these popular elements, albeit in a somewhat different format. The SEC has also delayed action on the so-called "Katie Couric" rule that would have required enhanced disclosures of payments made to up to three of a registrant's most-highly compensated non-executive employees. Instead, the SEC has revised this proposal to make clear that it applies only to policy-making personnel—not investment bankers, media personalities or star athletes—and is seeking additional comments on the revised rule. In light of the recent controversy involving stock option grants at a number of well-known companies, the SEC's final rules also include provisions intended to improve disclosure about registrants' procedures concerning stock option grants.

COMPENSATION DISCUSSION AND ANALYSIS

Overview

The centerpiece of the final executive compensation disclosure scheme is 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 will 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 encourages registrants to avoid the use of boilerplate in CD&A and to resist the temptation simply to rehash in narrative form the tabular data that follows, though the adopting release makes clear that references to appropriate tables is permissible when such references make the narrative discussion more robust.

The CD&A discussion must describe:

- the objectives of the registrant's compensation programs
- what the compensation program is designed to 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.

In preparing CD&A, the adopting release clarifies that registrants should not necessarily limit the discussion to the prior fiscal year, as was the case with the old compensation committee report. Instead, CD&A may also require discussion of post-termination compensation arrangements, on-going compensation arrangements, and policies that the registrant may apply on a going-forward basis. CD&A should also address executive compensation matters that were taken after the

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

last fiscal year's end, such as the adoption or implementation of new or modified programs or other subsequent events that could affect a fair understanding of a named executive officer's compensation for the last fiscal year. Nevertheless, registrants need not disclose target levels with respect to specific performance-related factors considered by the compensation committee or other proprietary or confidential information that would result in competitive harm to the registrant. In making the confidentiality determination, the SEC cautioned in the adopting release that registrants should apply the same high standards as are required when making a formal request to the SEC for confidential treatment, though such a request need not actually be made. If the information is not disclosed, CD&A must discuss how difficult it will be for the executive and how likely it will be for the registrant to achieve the undisclosed target level.

To assist registrants in preparing CD&A, the SEC provided the following examples of issues for companies to address:

- policies for allocating between long-term and currently paid out compensation
- policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation
- the basis for allocating long-term compensation to each different form of award
- the determination as to when awards are granted, including awards of equity-based compensation such as options
- the specific items of corporate performance that are taken into account in setting compensation policies and making compensation decisions
- how specific elements of compensation are structured and implemented to reflect the registrant's performance and the executive's individual performance
- the factors considered in decisions to materially increase or decrease compensation
- how compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (such as how gains from prior option or stock awards are considered in setting retirement benefits)
- the impact of accounting and tax treatments of a particular form of compensation
- the registrant's equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership
- whether the registrant engaged in any benchmarking of total compensation or any material element of compensation, identifying the benchmark and, if applicable, its components
- the role of executive officers in the compensation process.

Compensation Committee Report

Although the proposed rules would have abolished the Compensation Committee Report on Executive Compensation, a number of commenters advocated its retention as a way to continue to focus compensation committees on executive compensation disclosure. The SEC has therefore elected to retain the compensation committee report, but because a

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

number of elements of the report under the prior disclosure rules are now subsumed in CD&A, the SEC revised the format of the report. Under the new rules, a compensation committee report similar to the current audit committee report will be required. Like the audit committee report, the compensation committee report will only be required one time during any fiscal year. In the new report, the compensation committee will be required to state whether:

- the compensation committee has reviewed and discussed CD&A with management
- based on the review and discussions, the compensation committee recommended to the board of directors that CD&A be included in the registrant's annual report on Form 10-K and, as applicable, the registrant's proxy or information statement.

Filed Versus Furnished

CD&A will be considered soliciting material and 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 will be covered by the certifications that principal executive officers and principal financial officers are required to make under the Sarbanes-Oxley Act of 2002. Unlike the audit committee report, the compensation committee report will be required to be included or incorporated by reference into the registrant's annual report on Form 10-K so that it is presented along with CD&A. The compensation committee report will be deemed furnished, rather than filed, with the SEC. However, in providing the required Sarbanes-Oxley certifications, the principal executive and financial officers may look to the compensation committee report for support.

Performance Graph

Given the widespread availability of stock performance information about companies, the proposed rules sought to delete the requirement of a stock performance graph. Nevertheless, many commenters objected to its elimination and argued that the inclusion of a chart provides an easily accessible source of information and provides a standard format for presentation. Accordingly, in the final rules the SEC elected to retain the performance graph. The SEC noted, however, its continued view that the graph should not be presented as part of executive compensation disclosure. Instead, the graph will now be presented under the disclosure item entitled "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters." The new rules specify, however, that the performance graph need not be provided in any filing other than an annual report to security holders under Exchange Act rules 14a-3 or 14c-3, which is frequently referred to as the "glossy" annual report.

A performance graph included within an annual report will continue to be furnished rather than filed, and will not be deemed soliciting material under the proxy rules or incorporated by reference into any filing except to the extent a registrant specifically incorporates it.

NEW TABULAR DISCLOSURE

Overview

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

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- 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-based interests that relate to compensation or are potential sources of future gains, with a focus on compensation-related equity-based interests that were awarded in prior years (which will be 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 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 replace those required under the current rules. The SEC anticipates that tabular disclosure for each of the above categories will be supplemented by appropriate narrative that provides material information necessary to an understanding of the information presented in the individual tables. Furthermore, registrants will be required to prepare a director compensation table and accompanying narrative that is similar to the Summary Compensation Table for named executive officers.

Named Executive Officers

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

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

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

- 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 final rules depart from those currently in effect 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 will be based on total compensation, rather than just salary and bonus as required under the current rules. In measuring total compensation for purposes of identifying the named executive officers, registrants are instructed to exclude the economic benefit attributable to the annual change in actuarial value of executives' defined benefit plans and above-market or preferential earnings on nonqualified deferred compensation (which amounts are reported in column (h) of the Summary Compensation Table as set forth below).

Request for Additional Comment on Compensation Disclosure for Up to Three Additional Employees

Under the proposed rules, the SEC would have required 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.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

Nicknamed the "Katie Couric" rule after the well-known (and well-paid) television personality, this element of the original proposal drew a significant number of comments, many of them negative. In particular, a number of public companies expressed concern that they would be required to disclose the pay of professional athletes, movie stars, media personalities, stockbrokers or other investment banking personnel, which raised employee privacy concerns and potentially invited a bidding war for top talent from competing employers, all the while providing nominal benefits to investors.

The SEC remains concerned about disclosure concerning employees, particularly within very large organizations, whose total compensation is far greater than that of the named executive officers. Nevertheless, the SEC clarified that its concern is focused on those employees who exert a significant policy influence at the registrant, a significant subsidiary or principal business unit. Thus, a salesperson, entertainment personality, actor, singer, professional athlete or investment professional who is highly compensated but does not have responsibility for significant policy decisions would not be the type of employee for whom disclosure is sought. In contrast, the SEC believes employees who exercise significant strategic, technical, editorial, creative or managerial responsibilities (such as director of the news division of a major network, the principal creative leader of the entertainment function of a media conglomerate, the head of a principal business unit developing a significant technological innovation or a portfolio manager with oversight over a broad category of funds for an investment advisor) would be the types of employees for whom disclosure would be appropriate. The SEC continues to study this issue and is seeking additional comments on the proposal.

Summary Compensation Table

Under the final rules, the Summary Compensation Table will be rearranged in the format set forth below and must also include a new column totaling all compensation paid to each named executive officer.

Summary Compensation Table

Name and Principal Position	Year	Salary ($)	Bonus ($)	Stock Awards ($)	Option Awards ($)	Non-Equity Incentive Plan Compensation ($)	Change in Pension Value and Nonqualified Deferred Compensation Earnings ($)	All Other Compensation ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

The new Summary Compensation Table must include, for three prior years:

(a) the name and principal position of the named executive officer

(b) the fiscal year covered

(c) the dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

(d) the dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (this column is intended to include only discretionary bonuses; bonuses paid upon satisfaction of pre-determined performance goals that were uncertain to be met at the time the goals were established will be disclosed in the Non-Equity Incentive Plan Compensation column discussed below)

(e) 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)

(f) 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

(g) the dollar value of all non-equity incentive plan compensation earned during the year

(h) the dollar value of the annual change in actuarial value of defined benefit and actuarial pension plans and above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans

(i) the dollar value of "All Other Compensation"

(j) the dollar value of total compensation for the covered fiscal year, i.e., the sum of all amounts reported in the preceding columns.

As originally drafted, the proposed rules defined an executive's total compensation to include all earnings on deferred compensation plans and the annual increase in actuarial value of pension plans. Many commenters expressed concern that including these kinds of benefits might cause the list of named executive officers to fluctuate from year to year or be biased in favor of personnel with long tenure and sizable pension benefits. Responding to this concern, the SEC modified the final rule to create a separate column for the annual change in actuarial value of defined benefit plans and earnings on nonqualified deferred compensation, thus helping readers break these items out from the disclosure of total compensation.

All Other Compensation; Perquisites

Consistent with the SEC's desire to capture "all" elements of executive compensation, the final rules 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 officer. Each compensation item in the All Other Compensation column will 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 will 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. The requirements for identification and qualification of perquisites and personal benefits apply only to the last fiscal year. All Other Compensation will include:

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000
- 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) 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
- 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 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
- the dollar value of any dividends or other earnings paid on stock or option awards, when those amounts are not factored into the grant date fair value required to be reported in columns (e) or (f).

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
- 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 will construe the concept of a benefit that is "integrally and directly related" to job performance narrowly. The analysis draws a distinction between an item that a company provides because the executive needs the item to perform his or her job, making it integrally and directly related to the performance of duties, and an item provided for some other reason, which can involve both company benefit and personal benefit. 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.

When an item is integral and bears a direct connection to job performance, the second part of the analysis (i.e., whether there is also a personal benefit or whether the item is generally available to other employees) is irrelevant. Thus, by way of example, the SEC is of the view that a handheld e-mail device or laptop computer issued to employees would not constitute a perquisite, even though they may be used for personal business, so long as the registrant believes it is an integral part of the executive's duties to be accessible by e-mail when out of the office. If, however, an item is not integrally and directly related to the performance of an executive's duties, then the second step of the analysis must be applied. Accordingly, a registrant must consider whether the item confers a direct or indirect benefit that has a personal

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

aspect, without regard to whether it may be provided for some business reason. If so, then one must ask whether it is generally available on a non-discriminatory basis to all employees.

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 registrant
- personal travel otherwise financed by the registrant
- personal use of other property owned or leased by the registrant
- 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 registrant's convenience or benefit)
- discounts on the registrant's products or services not generally available to employees on a non-discriminatory basis.

If disclosure of perquisites is required, the perquisite must be valued based on the incremental cost to the registrant of providing the perquisite and there must be footnote disclosure of the methodology used to compute the incremental cost.

Additional Support for the Summary Compensation Table

The final rules further enhance disclosures under the Summary Compensation Table by requiring an additional table based in part on those required under the current rules. The new table, which is set forth below, will summarize "Grants of Plan-Based Awards" and will show only the terms of grants made during the most recently completed year.

Grants of Plan-Based Awards

Name	Grant Date	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Future Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or Units (#)	All Other Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards ($/Sh)
		Threshold ($)	Target ($)	Maximum ($)	Threshold (#)	Target (#)	Maximum (#)			
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)

In addition, there must be a narrative discussion of any material factors necessary to understand the information included in the Summary Compensation Table and the Grants of Plan-Based Awards Table.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

The narrative disclosures should provide specific context to the disclosure in the tables, such as:

- descriptions of the material terms in the named executive officers' employment agreements
- descriptions of option repricings or material modifications of options or other equity-based awards
- material terms of awards, including a description of the formula or criteria applied in determining the amounts payable, the vesting schedule, and a description of performance-based or other material conditions applicable to the award.

Exercises and Holdings of Previously Awarded Equity

The next section of the executive compensation disclosure describes equity compensation that has previously been awarded and remains outstanding, is unexercised or is unvested. This section also discloses amounts realized on this type of compensation during the most recent fiscal year when, for example, a named executive officer exercises an option or his or her stock award vests. The two new tables show "Outstanding Equity Awards at Fiscal Year-end" and "Option Exercises and Stock Vested," each as set forth below:

Outstanding Equity Awards at Fiscal Year-end

	Option Awards					Stock Awards			
Name	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price ($)	Option Expiration Date	Number of Shares or Units of Stock That Have Not Vested (#)	Market Value of Shares or Units of Stock That Have Not Vested ($)	Equity Incentive Plan Awards: Number of Unearned Shares, Units or Other Rights That Have Not Vested (#)	Equity Incentive Plan Awards: Market or Payout Value of Unearned Shares, Units or Other Rights That Have Not Vested ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)

The table set forth above shows the amounts of awards outstanding at fiscal year-end. Separate disclosure is required for each award, though the registrant is allowed to aggregate multiple awards where the expiration date and the exercise and/or base price of the instruments are identical. Vesting dates for the awards will be provided through footnote disclosure.

Option Exercises and Stock Vested

	Option Awards		Stock Awards	
Name	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise ($)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting ($)
(a)	(b)	(c)	(d)	(e)

The table set forth above shows the amounts received upon exercise or vesting of equity awards during the fiscal year. As described below, in light of the recent controversy surrounding grants of stock options at some companies, the SEC

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

has revised the format of these tables relative to those originally proposed in an effort to provide greater transparency in the option granting process.

Post-Employment Compensation

The final 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 final rules replace the current pension plan table, alternative plan disclosure and some of the other narrative descriptions with a table showing pension benefits and a table disclosing information regarding nonqualified defined contribution plans and other deferred compensation, each with enhanced narrative disclosure. These new tables provide disclosure with respect to each named executive officer and are discussed in more detail below.

Pension Benefits

Name	Plan Name	Number of Years Credited Service (#)	Present Value of Accumulated Benefit ($)	Payments During Last Fiscal Year ($)
(a)	(b)	(c)	(d)	(e)

This table requires disclosure of the actuarial present value of each named executive officer's accumulated benefit under the plan as of the end of the registrant's last completed fiscal year and the number of years of service credited to the officer. Each plan in which a named executive officer participates must be provided in a separate row. To calculate the value for the table, the registrant must use the same assumptions, such as interest rate assumptions, used for financial reporting purposes under generally accepted accounting principles and should assume that retirement age is the normal retirement age as defined in the plan, or if not so defined, the earliest time at which a participant may retire under the plan without any reduction due to age. The valuation method and all material assumptions applied must be included in a narrative disclosure following the table. The narrative disclosure should also include other material factors necessary to an understanding of each plan disclosed, such as:

- material terms and conditions of benefits available under the plan
- specific elements of compensation included in applying the benefit formula, identifying each such element
- different purposes for multiple plans, if applicable
- policies with regard to matters such as granting extra years of credited service.

Nonqualified Deferred Compensation

Name	Executive Contributions in Last FY ($)	Registrant Contributions in Last FY ($)	Aggregate Earnings in Last FY ($)	Aggregate Withdrawals/ Distributions ($)	Aggregate Balance at Last FYE ($)
(a)	(b)	(c)	(d)	(e)	(f)

This table will disclose contributions, earnings, withdrawals and balances for the named executive officers under each of the registrant's nonqualified defined contribution or other plan that provides for deferred compensation. The extent to

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

which amounts in the contributions and earnings columns are reported as compensation in the year in question and other amounts reported in the table in the aggregate balance column were reported previously in the Summary Compensation Table for prior years will be quantified in the footnotes to the table. This information allows investors to avoid "double counting" of deferred amounts by clarifying which amounts represent previously reported compensation rather than additional currently earned compensation. The table will be followed by a narrative description of material factors necessary to understand the disclosure in the tables, including the types of compensation permitted to be deferred, the measures of calculating interest or other plan earnings and material terms with respect to payouts, withdrawals and other distributions.

Termination and Changes in Control

The final rules revise the requirements for narrative disclosure of compensation arrangements triggered upon termination of employment and on changes in control. These rules require disclosures of specific aspects of written or unwritten arrangements that provide for payments at, following or in connection with the resignation, severance, retirement or other termination of a named executive officer, a change in his or her responsibilities, or a change in control of the registrant. The following information regarding such arrangements should be included in the narrative disclosure:

- the specific circumstances that would trigger payments or the provision of other benefits
- the estimated payments and benefits that would be provided in each circumstance, and whether they would be lump sum or annual, disclosing the duration and by whom they would be provided
- how the appropriate payment and benefit levels are determined under the various circumstances that would trigger payments or provision of benefits
- any material conditions or obligations applicable to the receipt of payments or benefits, including to non-compete, non-solicitation, non-disparagement or confidentiality covenants
- any other material factors regarding each such contract, agreement, plan or arrangement.

Director Compensation

The final rules require a Director Compensation Table as set forth below similar to the proposed Summary Compensation Table for executive officers, but it will present information only for the current year.

Name	Fees Earned or Paid in Cash ($)	Stock Awards ($)	Option Awards ($)	Non-Equity Incentive Plan Compensation ($)	Change in Pension Value and Nonqualified Deferred Compensation Earnings ($)	All Other Compensation ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)

The Director Compensation Table includes:

(a) 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

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

(b) 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

(c) 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

(d) 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

(e) the dollar value of all earnings for services performed during the fiscal year pursuant to non-equity incentive plans and all earnings on any outstanding awards

(f) the dollar value of the annual change in defined benefit and actuarial pension plans and above-market or preferential earnings on nonqualified deferred compensation

(g) the dollar value of All Other Compensation

(h) the dollar value of total compensation for the covered fiscal year, including the sum of all amounts reported in the preceding columns.

As with the Summary Compensation Table, the "All Other Compensation" column will 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 will be required to be reported under "All Other Compensation" and will 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 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). Also included within All Other Compensation are consulting fees paid by the registrant or its subsidiaries and the annual costs of payments or promises of payments pursuant to legacy programs and similar charitable award programs.

Consistent with the modifications to the Summary Compensation Table, the final rules differ from the proposed ones in that pension and nonqualified deferred compensation plan disclosure is moved from All Other Compensation to a separate column. Also consistent with the modified disclosures concerning executive officer compensation, disclosure regarding stock option timing or dating practices may be necessary as part of the narrative disclosure. The final rules also provide additional guidance on what constitutes perquisite compensation for directors.

Beneficial Ownership Disclosure

The final rules 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 rules 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.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

Corporate Governance Disclosure

The final rules 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 and the operations of the compensation committee of the board of directors. In particular, the final rules require disclosure identifying the independent directors of the company, including any nominees for directors, under the definition for determining board independence. Further, any registrant that has adopted definitions of independence for directors and committee members must disclose whether the definitions are posted on the registrant's Website, and if not, the registrant must include the definitions as an appendix to its proxy or information statement at least once every three years or if the definitions have been materially amended since the beginning of the registrant's last fiscal year.

The final rules also require, for each director or director nominee identified as independent, a description, by specific category or type, of any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) that were considered by the board of directors in determining whether the applicable independence standards were met. This disclosure is required on a director-by-director basis, with separate disclosures for each, sufficiently detailed so that the nature of the transactions, relationships or arrangements is readily apparent.

The final rules also require new disclosures regarding the compensation committee that are similar to disclosures required for audit and nominating committees. The registrant must state whether the compensation committee has a charter and must make such charter available through its Website or proxy materials. Further, the final rules require disclosure on the compensation committee's processes and procedures for the consideration and determination of executive and director compensation, including:

- the scope of authority of the compensation committee
- the extent to which the compensation committee may delegate authority to other persons, specifying what authority may be delegated and to whom
- any role of executive officers in determining or recommending the amount or form of executive and director compensation
- any role of compensation consultants in determining or recommending the amount or form of executive and director compensation and details related thereto.

OPTIONS DISCLOSURE

In response to recent questions that have arisen with respect to timing, documentation and other governance matters concerning employee stock options, the SEC included some additional guidance about stock options in the context of the new executive compensation disclosures. In the adopting release, the SEC stressed that it does not seek to encourage or discourage the use of stock options or any other type of executive compensation. The SEC pointed out, however, that the federal securities laws require full and fair disclosure of compensation information to the extent material or otherwise required by SEC rules.

As a threshold matter, the new disclosure tables described above will require significantly more information about stock options and similar forms of compensation than was previously required. Timing of a stock option grant and determination of the exercise price are areas of renewed SEC focus. Thus, the new rules require that:

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- grants of stock options be disclosed in the Summary Compensation Table at their fair value on the date of grant, as determined under FAS 123R, which will give shareholders an accurate picture of the value of options at the time they are actually granted

- the Grants of Plan-Based Awards Table requires disclosure of the grant date as determined pursuant to FAS 123R, which is generally considered the day the decision is made to award the option as long as recipients of the award are notified promptly

- if the exercise price is less than the closing market price of the underlying security on the date of grant, the market price on the date of grant must be disclosed

- if the grant date is different from the date the compensation committee or board takes action to grant an option, the date the compensation committee or board took action must be disclosed.

The SEC is also requiring greater narrative discussion of a registrant's process for awarding stock options, and in particular the timing of grants. Registrants should consider the following when drafting this disclosure pursuant to the new CD&A:

- whether the registrant has any program, plan or practice to time option grants to its executives in coordination with the release of material non-public information and how does any such program, plan or practice fit in the context of the registrant's program, plan or practice, if any, with regard to option grants to employees more generally

- what is the role of the compensation committee in approving and administering such a program, plan or practice; how does the board or compensation committee take such information into account when determining whether and in what amounts to make grants; does the compensation committee delegate any aspect of the actual administration of a program, plan or practice to any other persons

- what is the role of executive officers in the registrant's program, plan or practice of option timing

- does the registrant set the grant date of its stock option grants to new executives in coordination with the release of material non-public information

- does the registrant plan to time, or has it timed, its release of material non-public information for the purpose of affecting the value of executive compensation.

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 final rules include revised disclosure obligations under Items 1.01 and 5.02.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

The final rules make clear that employment agreements and other executive compensation plans need not be disclosed under Item 1.01. Instead, disclosure under Item 5.02 will 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 previously disclosed plans or arrangements and they are disclosed the next time the registrant 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.

In adopting these changes, the SEC adopting release made clear that Form 8-K disclosure will be required only of those executive compensation arrangements that the SEC believes are “unquestionably or presumptively material.” The SEC emphasized that disclosure under Item 5.02 should not be voluminous or of the same scope required under new 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.

The new Form 8-K disclosure rules will apply to triggering events that occur 60 days after publication of the final rules in the Federal Register.

DISCLOSURE OF RELATED PARTY TRANSACTIONS

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

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

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

The materiality of an interest will 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 will be expanded to include stepchildren, stepparents and any person (other than a tenant or employee) sharing the household of a director, nominee for director, executive officer or significant shareholder of the registrant. Under new Item 404, the disclosure formerly required under paragraph (c) of Item 404 has been integrated into Item 404(a), thus requiring disclosure of indebtedness transactions with regard to all related persons under the general transaction disclosure standard. Although the proposed rules would have required disclosure of indebtedness with respect to significant shareholders, the final rules do not require disclosure of indebtedness transactions of significant shareholders or their immediate family members. Additionally, the final rules require disclosure regarding a registrant's policies and procedures for the review, approval or ratification of related party transactions.

The SEC had proposed to eliminate three brightline exceptions to the related party disclosure. In response to comments, however, the SEC elected to retain these exceptions for:

- any transaction where the rates or charges involved are determined by competitive bids, or where the transaction involves the rendering of services as a common carrier, public utility, or at rates fixed by law
- any transaction involving services by the registrant or its affiliates as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services
- any transaction in which the interest of the related person arises solely from the ownership of a class of equity securities of the registrant and all holders of that class of equity security receive the same benefit ratably.

RELIEF FOR SMALL-BUSINESS AND FOREIGN PRIVATE ISSUERS

In an effort to balance the increased burden of complying with the new rules that will be placed on registrants against the public policy in favor of disclosure underlying the securities laws, the final rules provide some relief for small-business and foreign private issuers. Small-business issuers will be subject to most of the enhanced disclosure described in this Alert, though the corresponding amendments to Regulation S-B will be made in a somewhat streamlined fashion. Small-business issuers will not, for example, be required to prepare a CD&A discussion. The tabular disclosure for executive compensation will 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. Additionally, the final rules will 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.

EFFECTIVE DATES AND TRANSITION

The new rules and amendments will become effective as follows:

- for Forms 10-K and 10-KSB, for fiscal years ending on or after December 15, 2006, which generally means the new rules will be effective for the 2007 proxy season
- for Forms 8-K, for triggering events that occur 60 days or more after publication of the final rules in the Federal Register

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- for Securities Act registration statements (including pre- and post-effective amendments) and Exchange Act registration statements, compliance is required for registration statements that are filed with the SEC on or after December 15, 2006, and that are required to include Item 402 and Item 404 disclosure for fiscal years ending on or after December 15, 2006
- for Investment Company Act registration statements (including post-effective amendments that are annual updates to effective registration statements), compliance is required for registration statements that are filed with the SEC on or after December 15, 2006
- for proxy and information statements for registrants other than registered investment companies, compliance is required for filings made on or after December 15, 2006, that are required to include Items 402 and 404 disclosure for fiscal years ending on or after December 15, 2006, again in time for the 2007 proxy season.

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 final Summary Compensation Table and disclosure required by Item 402(a) will be required only for the most recent fiscal year and therefore the information for years prior to the most recent fiscal year will not have to be presented at all. This policy will 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

Now that the rules are in their final form, we recommend that registrants begin discussing how their disclosures will change under the new rules. Although the rules in most cases do not take effect for a few months, companies should begin taking the following actions immediately to ensure they can timely comply with the new rules:

- Registrants should begin assembling the documentation and putting in place the systems necessary to compile the various components of director and executive compensation that is required to be disclosed under the new rules. The new rules have different categories for various types of compensation, requiring registrants to analyze and break down the information differently than in the past. Many companies may not track, for example, perquisite compensation to the granular detail that is required under the new rules. This support, together with the modifications to disclosure controls and procedures, 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 disclosures made under the final rules.
- Registrants should begin preparing a compensation narrative that complies with the new CD&A requirements. As discussed throughout this Alert, the new CD&A requires a detailed and comprehensive analysis of the registrant's executive compensation policies, plans and procedures and their related purposes. This process is likely to be very time-consuming and will require assistance and guidance from a variety of individuals, including members of the compensation committee, the registrant's financial officers, the human resources department, counsel, auditors and management.
- Registrants need to revisit their disclosure controls and procedures to determine if any modifications need to be made to ensure that the necessary information will be available in a timely fashion.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP

- Registrants should review their practices relating to option grants in light of the recent scrutiny and increased disclosure required under the new rules. Because of the issues companies are facing on the timing of option grants, registrants should carefully review their existing policies on granting options. Registrants should also keep these new rules in mind, along with the related disclosures, when implementing any changes to their executive compensation policies.

CONTACT INFORMATION

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

Ambika Kuckreja
akuckreja@akingump.com
1.866.AKIN LAW

Austin Brussels Dallas Dubai Houston London Los Angeles Moscow
New York Philadelphia San Antonio San Francisco Silicon Valley Taipei Washington, D.C.

This document is distributed for informational use only; it does not constitute legal advice and should not be used as such.
© 2006 Akin Gump Strauss Hauer & Feld LLP