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Executive Compensation Disclosure S-K Rules (and 8-K Rules)

Charles C. Shulman

I. Final Executive Compensation Disclosure Rules

- a. Sec Release 33-8732A (7/26/06). Final executive compensation disclosure rules adopted 7/26/06 - SEC Release 33-8732A, Executive Compensation and Related Person Disclosure, printed in 71 F.R. 53158 (Sept. 8, 2006) ("Adopting Release") (proposed in 71 F.R. 6542 (Jan. 27, 2006)), amended in Release 33-8765, Executive Compensation Disclosure, 12-22-06, printed in 71 F.R. 78338 (December 29, 2006) ("Amending Release").
- b. Amends Item 402 of S-K Rules. Amends Items 402 etc. of Regulation S-K, 17 C.F.R. § 229 etc., significantly, changing the 1992 S-K Regulations, giving a clearer and more complete picture of compensation of senior executives, in light of increasing focus on corporate governance and director independence.
- c. Effective Date. Applicable to 8-K filings for events occurring on or after November 7, 2006, 10-K filing for fiscal years ending on or after December 15, 2006 and proxies and registration statements filed on or after December 15, 2006 that are required to include Item 402 and 401 disclosure for fiscal years ending on or after December 15, 2006. Adopting Release pgs. 53158 & 53260 (text accompany note 546) [pgs. 2 and 196].

II. Item 402 of Regulation S-K – Executive Compensation (17 C.F.R. § 229.402)

a. General

1. Companies Subject to Rules. Applies to public companies. Small business issuers as defined in Item 10(a)(i) of Rule S-B have somewhat less burdensome disclosure but must still provide Summary Comp, Outstanding Equity at Year End, and Director Compensation tables (for last two years and for fewer executives). See pg 53192 of Adopting Release [pg. 128]. Foreign private issuer are deemed in compliance if meet requirements of Item 6.B and 6.E.2, of Form 20-F (generally, if disclosure provides for the company's directors and members of its management bodies, the amount of compensation paid, the benefits in kind granted in the last fiscal year and the amounts set aside or accrued by the company to provide pension or similar benefits, including a description of bonus and equity arrangements).
2. All Compensation. All compensation (plan and nonplan) to named executive officers and directors, and disclosure must be clear, concise and understandable.
3. Covered Persons (NEOs). Item 402 covers named executive officers ("NEOs"), who are principal executive officer, principal financial officer, next three highest paid executive officers - based on total compensation in the Summary Compensation Table (other than change in pension value) (no longer just salary and bonus); assuming total comp at least \$100,000). Also include up to two additional officers who would be covered other than for fact that they were not executive officers at end of year. (Item 402(a)(3)) (Proposal to include up to 3 employees who are not executive officers but whose total compensation is greater than the NEOs.) Overseas comp doesn't count in determining NEO status (402(a)(3) Inst. 3 [pg. 328]),

but if already in table count all comp, W. Alan Kailer, "Preparing Executive Compensation Tables" (Oct. 2007) ("Kailer").

4. Information for Full Fiscal Year. If CEO or CFO served in that capacity for any part of year, or if NEO served as executive officer for any part of year, must still disclose compensation for full fiscal year. (Instruction 4 to 402(a)(3) [pg. 328]) (See also I.c.k.)
5. Omission of Table or Column. Can omit table or column if no comp for NEOs and directors. (Instruction 5 to Item 402(a)(3) [pg. 328])
6. Exclusion of Company-Wide Welfare Plans. Company can omit information regarding group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executive officers or directors and are generally available to all salaried employees. (Item 402(a)(6)(ii) [pg. 329])
7. Definition of Plan and Incentive Plan. See Item 402(a)(6)(ii) and (iii) [pg. 329].
8. Double Entries. Preamble notes that while the same item of compensation may appear in more than one table, e.g., once when earned and once when paid out, however, it won't appear twice in same table. (Adopting Release, pg 53169, text accompanying note 122 [pg. 47]).
9. IPOs and Spinoffs. Item 402 disclosure is generally required on Form S-1 for the prior fiscal year, if applicable, including the CD&A. Generally don't include comp for old years (before last completed fiscal year) if wasn't public company for that year (or part of that year). See SEC (Corp. Finance) Compliance & Disclosure Interpretations, Item 402 of Regulation S-K (updated 8/08/07 and again in 7/03/08), reprinted at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm> ("Staff Guidance") § 217.01 that whether a spinoff is treated like an IPO depends on facts and circumstances (including continuity etc.) Also discusses successors, sub going public, and stub period where fiscal year changes (§§ 207.02, 207.03 & 217.05). See also Staff Guidance § 217.09 regarding where a parent and its consolidated subsidiary are both public companies and officer was CEO of sub for only part of year.
10. Forms. Exec Comp Disclosure (including CD&A) is now required for all filings for which Item 402 disclosure required, e.g. see S-1 Item 11, S-4 Item 19. 10-K would generally incorporate the Exec Comp disclosure in the proxy be reference.
11. Performance Graph Moved to 10-K. Performance graph now in Item 201(e), so it would go in the 10-K rather than the proxy.

b. Compensation Discussion and Analysis ("CD&A") – Item 402(b)

1. Discuss Compensation – What, Why, and How. 7 Mandatory topics. Discuss the compensation of NEOs, including:
 - (i) Material Elements. Explain all material elements of the NEOs' compensation.

- (ii) Objectives. Objectives of compensation program.
- (iii) Reward. What compensation program is designed to reward.
- (iv) Elements. Each element of compensation.
- (v) Why Pay Each Element. Why company chooses to pay each element.
- (vi) How Determine Amount Paid. How company determines the amount (and, where applicable, the formula) for each element of pay [e.g., performance based or discretionary, etc.]
- (vii) How Elements Fit In Overall Compensation Objectives. How each compensation element and decisions of the company regarding that element fits into overall compensation objectives and affect decisions regarding other elements (the wealth accumulation analysis).

Item 402(b)(1) [pg. 330].

2. Examples of What to Include in cd&A. Examples of info that may be included in CD&A if relevant (13 suggest topics – 20 in all):
 - (i) Long Term/Short Term. Policies for allocating between long-term compensation and immediate compensation.
 - (ii) Cash/Non-cash. Policies for allocating between cash and non-cash compensation and allocating among various forms of non-cash compensation.
 - (iii) Basis for Different Awards. For long term awards, the basis for allocating compensation to each different form of award.
 - (iv) Timing of Options, Etc. How determination is made as to the timing of grants, including options (but not limited to options according to Staff Guidance § 118.01).
 - (v) Corporate Performance Targets. What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
 - (vi) Company and Executive Performance. How specific forms of compensation are structured and implemented to reflect these items of the company's performance, including whether discretion can be used to increase or decrease award, identifying any particular exercise of discretion, and stating whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goals;

- (vii) Factors. How specific forms of compensation are structured and implemented to reflect the NEOs' individual performance and/or contribution to these items of the company's performance.
- (viii) Prior Comp. How gains from prior compensation (e.g., stock options) are considered in setting other compensation.
- (ix) Change of Control Rationale. For any arrangement that provides payment on termination or change of control, the basis (rationale) for selecting those events.
- (x) Accounting and Tax; 162(m). Any tax or accounting treatment, including but not limited to Section 162(m), that is material to the company's compensation policy or decisions with respect to a named executive officer should be discussed. The Adopting Release in footnote 82 on page 33 cites Section III of 1993 SEC Release No. 33-7032 [58 FR 63010] text accompanying notes 35-37 that Comp Committee Report had to discuss the 162(m) policy, but now its superseded under this Item 402(b)(2)(xii).

Examples:

(1) The bonuses paid under this program are intended to meet the requirements of Section 162(m) of the Code, which is discussed on page 27.

(2) While certain elements of executive compensation are designed to achieve favorable accounting and to preserve deductibility, we believe that stockholder interests are best served by not restricting flexibility in designing compensation programs, even though such programs may result in certain non-deductible compensation expenses. Accordingly, compensation arrangements for certain officers that are not fully deductible have been recommended to the Committee from time to time, and may be recommended in the future. Further, because of ambiguities and uncertainties as to the application and interpretation of Section 162(m), no assurance can be given, notwithstanding the Company's efforts, that compensation intended to satisfy the requirements for deductibility does, in fact, do so.

(3) Deductibility Cap on Executive Compensation - The Compensation Committee is aware that Section 162(m) of the Internal Revenue Code treats certain elements of executive compensation in excess of \$1,000,000 a year as an expense not deductible by the Company for federal income tax purposes. However, certain payments made to the named executive officers will not qualify as performance-based compensation under Section 162(m). The Compensation Committee reserves the right to pay compensation that may be non-deductible to the Company if it determines that it would be in the best interests of the Company.

- (xi) Ownership Guidelines. Stock ownership guidelines.

- (xii) Benchmarking. Benchmarking of compensation, and if applicable, the component companies. See further below.
- (xiii) Decisions of Officers. Role of executive officers in determining compensation.

Item 402(b)(2) [pg. 331].

3. Instructions to Item 402(b)

- a. Purpose of CD&A. Purpose of CD&A is to provide material info about compensation policies and decisions. Instruction 1 to Item 402(b) [pg. 333].
- b. Actions After End of Year. CD&A should also cover actions regarding executive compensation that were after the end of fiscal year. Instruction 2. See also Adopting Release pg. 53166 [pg. 34] and Staff Guidance §§ 118.02 & 118.03.
- c. Not Boilerplate. CD&A should avoid boilerplate or repetition of charts. Instruction 3.
- d. Backdating. Adopting Release notes that if granting options to coordinate with non-public information, or determining exercise price of option on value of date other than grant date, that should go into CD&A. Adopting Release pgs. 53163-53164 [pg. 23-27]. The same is true for other awards. Staff Guidance § 118.01.
- e. Filed. CD&A is considered "filed" (not just furnished), and is therefore considered soliciting material subject to review by the SEC, subject to the same liability standards as other disclosure and in the scope of CEO/CFO certifications. Adopting Release pg. 53167 [pg. 39].
- f. Negative Disclosure of Items Not Considered. Not required according to Borges (Ali-Aba 6/20/08).

4. Whether Can Omit Confidential Targets.

- a. Not Required to Disclose if Result in Competitive Harm. Not required to disclose target levels for performance factors considered to involve confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm to company. Instruction 4 to Item 402(b) [pg. 334]. "Competitive harm" uses standard under 17 CFR § 230.06 or 17 CFR § 240.24b-2 for FOIA. Id. One need not specifically make the confidentiality request. Id. A company that withholds confidential information must disclose how difficult it will be for the executive and how likely it will be for company to achieve undisclosed target level or other factors. Instruction 4 to Item 402b-2 [pg. 334].

See Staff Guidance § 118.04 (as amended 7/3/08) that the company must address the materiality of the performance targets based on materiality if the

context of the company's executive compensation policies or decisions. A company may distinguish between quantitative / subjective guidance (e.g., individual performance) and to quantitative / objective performance goals (company performance, e.g., revenue or earnings targets). Staff Guidance § 118.04. To reach a decision the disclosure would result in a competitive harm the company must analyze whether a competitor could use the information to the company's detriment. Id.

- b. Samples of Disclosing Difficulty – From 2007. Some samples of disclosing difficulty when not including targets (but see below re SEC comments): 1) "The plan provides that targets for 100% achievement should be challenging and ambitious, but also realistic and attainable such that it is possible to achieve and exceed them." 2) "The targets are intended to be realistic enough to be reasonably attainable given a maximum effort on the part of the Company's named executive officers in consideration of conditions and trends." 3) "The annual corporate and business unit targets for performance reflect the Company's confidential operating plan and, thus, the Company does not disclose the targets publicly for competitive reasons. The operating plan is reviewed and approved in principle by the Board of Directors. When establishing the operating plan, management and the Board of Directors consider the historical performance of the Company, external elements such as economic conditions and competitive factors, Company capabilities, performance objectives as well as the Company's strategic plan. Three levels of performance were established for 2006, with the levels structured to be moderately challenging (threshold level, or 85% of the operating plan amounts), challenging (target level, or 100% of the operating plan amounts) and significantly challenging (extraordinary level, or 110% of the operating plan amounts) to achieve. " 4) "The annual performance goals reflect the Company's confidential operating plan and information and, accordingly, the Company does not disclose these goals publicly for competitive reasons. These performance goals are intended to be challenging and ambitious but also realistic enough to be reasonably attainable given a concerted effort on the part of the Company's named executive officers in consideration of conditions and trends such that it is possible to achieve or exceed them."
- c. SEC in 2008 Pushing for Disclosure of Targets Unless Compelling Argument for Competitive Harm.

John White director of SEC Div'n of Corp. Finance stated in 5/3/07 speech that he was not impressed with disclosures that targets "are difficult but possible to achieve." <http://sec.gov/news/speech/2007/spch050307jww.htm>

As discussed below, the SEC is pushing for disclosure of performance targets, unless there is a compelling argument for competitive harm. (Must show why it is competitive and how it will be used by competitor to hurt the company.) Staff Observations in the Review of Executive Compensation Disclosure Oct, 2007, www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm state that if targets are omitted the SEC may require a company to demonstrate that disclosure of performance targets will cause competitive harm. If

performance levels not discussed need to discuss the difficulty or likelihood of achievement (real analysis). Companies are resigned to disclosure.

For prior bonuses that have been paid it will be very hard to justify not disclosing the targets. However, for future bonuses unless there is some shift in benefit structure to be discussed in the CD&A, there may be justification in not disclosing future targets. The same is true for long term incentive plans where the performance cycle has not yet completed (even though FAS 123R values are being disclosed). Also if the targets are operational that can be viewed more as confidential than where targets are purely financed (particularly where company has given guidance on finances). If arguing competitive harm the SEC has to see why there would be competitive harm from the disclosure. (The SEC will, in rare circumstances require resending the proxy or may just ask for comments. IPOs, though, are often held up for the executive compensation disclosure.)

5. Principles-Based Requirements - Total Comp & Tally Sheets & Internal Pay Equity

- a. Principles-Based Requirements - Staff Observations in the Review of Executive Compensation Disclosure Oct, 2007, www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm and SEC comment letters to 350 random companies as part of the 2007 Staff Disclosure Review Project discussed that CD&A is principal-based requirements to give material information about compensation objectives and policies for NEOs. SEC looking for substantive analysis with objectives and rationales, such as "tally sheets," wealth accumulation data (how much CEO is worth including equity and pension, etc.) and internal pay equity data. Staff Observations. (Tally sheets are internal comp committee calculation of total comp.)

6. Benchmarking and Disclosing Peer Companies

- a. Disclose Peer (Component) Companies. Benchmarks (comparable companies) when used should disclose the names of the compared companies. Staff Observations. The SEC requires disclosing the peer group if known even if it is a large group (perhaps as an exhibit to the proxy). If don't know names don't have to disclose them. Staff Observations in the Review of Executive Compensation Disclosure. Oct, 2007, www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm

One should explain the rationale for the peer group selection. If not benchmarking, then should state so explicitly.

- b. What Benchmarking Entails According to Staff Guidance. Staff Guidance § 118.05 provides that benchmarking (which must be disclosed in the CD&A if used) generally entails using compensation data about other companies to help decide compensation, and does not include broad-based survey that are open to the public. Staff Guidance § 118.05.

7. Other SEC Comments on First Year
- a. Staff Observations in the Review of Executive Compensation Disclosure. Oct, 2007.
www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm
 - b. SEC Comments. In first year the SEC issued letters to 350 companies, not asking for amendments, but for their specific responses, with changes to be included in the next year's disclosure.
 - c. Principles-Based Requirements. See above.
 - d. Too Much Discussion, Not Enough Analysis. Companies listed components and mechanics of compensation program, but missed "analysis" of why. The key analytic tools were missing. Need to show "how & why" compensation levels were paid, why material differences between NEOs. Shorten or deemphasize lengthy discussions of compensation program mechanics. Staff Observations.
 - e. Performance Targets. See above.
 - f. Pay Decisions. Describe how performance data was translated to objective pay decisions. Staff Observations.
 - g. Affect Other Components. Discuss how amounts paid affect other components of pay. Staff Observations.
 - h. Avoid Boilerplate. Avoid boilerplate such as "levels of pay intended to be competitive and to align interest of management with shareholder". Staff Observations.
 - i. Plain English. Make presentation clear and concise . Plain English requirements apply to executive compensation disclosure. Staff Observations.
 - j. Heightened Expectations. John White says SEC will have heightened expectations, so will get significant comments. Take good minutes of comp. committee meeting.
 - k. Extra Tables. Extra tables are helpful. Staff Observations.
 - l. Change of Control Table-Include Vested Options. Potential payments or change of control table are useful and total amounts required to pay (even options already vested) should be disclosed. Staff Observations.
 - m. Individual Performance. Boilerplate discussion of individuals performance should be replaced with how comp. committee considered individual performance and determined executive compensation. Staff Observations.
 - n. Benchmarking - Disclose Peer (Component) Companies. See above

- o. Message of SEC Comments. CD&A needs to be better than last year. (Make sure client does first draft.) Avoid boilerplate. If performance goals discussed are they identified? How is individual performance goals analyzed? Show how qualitative inputs resulted in the pay shown in tables.
- p. Compensation Consultants. Staff Guidance § 118.06 provides that compensation consultant role should be discussed in the CD&A section to the extent the consultant plays a material role in compensation-setting process. However, the role a compensation consultant plays in performing any type of compensation shall be discussed in the corporate governance section - Item 407.

c. Summary Compensation Table – Item 402(c) [pg. 335]

1. Generally; Three Fiscal Years if was Reporting Co. Various components of compensation (whether or not paid out) for NEOs for the last three fiscal years (provided registrant was a reporting company in those prior years) all in dollars and with sum total. Only one year compensation data is required in 2007, two years in 2008 and three years thereafter. Adopting Release pg. [52310].
2. Specify Year in Each Table Heading. Instruction to Item 402 (Adopting Release pg. 53252 [pg. 368]) states to specify the applicable fiscal year in the title to each table required under this Item which calls for disclosure as of or for a completed fiscal year (probably not needed for multiple year table like SCT).
3. NEOs Only for Part of 3 Fiscal Years. If person was not an NEO in fiscal years 1 and 2 and became an NEO in fiscal year 3, compensation only for fiscal year 3 is required (even if the person was an executive officer in prior years). Staff Guidance § 119.01; JCEB 2007 Q&A 3. If an executive officer becomes a non-executive employee, use full NEO salary to see if was an NEO. Staff Guidance § 119.01.
4. SUMMARY COMPENSATION TABLE

E.g., The following Summary Compensation Table sets forth, the cash and non-cash compensation paid to or earned by our Chief Executive Officer, Chief Financial Officer and the other three most highly compensated executive officers of the Company (collectively, the "Named Executive Officers") for the fiscal years ending [December 31,] [2007 and 2006]:

Name and Principal Position	Year	Salary (\$)	[Discretionary] 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)
CEO	2007 2006								
CFO	2007 2006								
A	2007								

	2006								
B	2007 2006								
C	2007 2006								

5. Elements of Summary Comp Table:

- a. Name - Column (a). Name and principal position.
- b. FY - Column (b). Fiscal year.
- c. Base Salary **Earned** – Column (c). Dollar value of base salary (cash and noncash) earned during the fiscal year ("FY"). Include for NEO any comp received as director, if any, and footnote it. Instruction 3 to Item 402(c)[pg. 344] Salary foregone in exchange for equity comp is disclosed as salary. Instruction 3 to Item 402(c).
- d. Report for Year Earned Even if Deferred. Base and bonus are reported in year earned even if deferred under a 401(k) plan or otherwise. (Rule 402(c)(2) and Instruction 4 to 402(c) [pg. [336] and 344]).
- e. Discretionary Bonus **Earned** – Column (d). Dollar value of discretionary bonus (cash and noncash) earned during FY. So reported in year earned rather than in year paid. Meant for discretionary bonus, not formula performance bonus (which is disclosed in column g.)

A retention bonus should be reported in the bonus column. See Kailer pg. B-3.

Borges 5/8/08 – If a company enters into a retention agreement with an executives to pay a cash retention bonus if the executive remains employed with the company until a specified date in 2010 (for example, December 31, 2010). We then asked the Staff what, if anything, is to be reported in the company's executive compensation disclosure for 2008 with respect to this arrangement? The SEC Staff in 2008 JCEB Q&As indicated that the bonus will be reportable in the Summary Compensation Table in which the executive's performance necessary to earn the bonus is complete

- f. Where Can't Calculate Salary or Bonus Then 8-K It Later. If can't calculate salary or bonus earned through latest practicable date then indicate in footnote and then disclose in 8-K.
- g. Salary/Bonus Foregone for Equity Compensation. As amended in Dec. '06, one should include any salary or bonus foregone in exchange for equity compensation, and should also explain in footnote. Instruction 2 to Item 402(c)(2)(iii) & (v), as amended 12/29/06 [pg. 336]. If, however, the equity compensation is greater than the value of the compensation foregone, the value over the foregone compensation is reported in the stock award or options columns. Staff Guidance § 119.03.

- h. Stock Awards (Restricted Stock and RSUs) – Column (e); Refer to 10-K Discussion of Assumption. For stock-related amounts (such as restricted stock, RSUs, etc.), as amended in Dec. '06 one reports the aggregate dollar amount recognized for financial reporting purposes for the fiscal year in accordance with FAS 123R for all their outstanding awards, not just what was granted during the year, (which would be the incremental value for the year, e.g., if it vests over several years, even if granted in a prior year), but disregarding estimates of forfeitures for service-based vesting (i.e., disregarding the effect of any forfeitures). Item 402(c)(2)(v) as amended (12/22/06) and Instructions to Item 402(c)(2)(v) [pg. 337]. Footnote should disclose the assumptions used or refer to the 10-K discussion of assumptions, and should also describe all forfeitures. Instructions to Item 402(c)(2)(v) [pg. 337].

From Borges 5/7/08 - The Instruction to Item 402(c)(2)(v) and (vi) requires that a company disclose any assumptions that were made in valuing the reported equity awards by reference to a discussion of those assumptions in the company's financial statements, footnotes to the financial statements, or the discussion in the company's MD&A. JCEBs stated have to cite each prior year's financial statements (or associated footnotes) in which a grant or award was made that resulted in the recognition of compensation expense during the last completed fiscal year. So if a company's disclosure includes equity awards that were granted in two or more prior fiscal years, the assumption disclosure must cross-reference to each year's financial statements, financial statement footnotes, or MD&A. Borges that this will tend to make this disclosure somewhat unwieldy. Companies may want to simply include the relevant assumptions in the footnote itself as a way of complying with this requirement. See, e.g. Intel <http://www.sec.gov/Archives/edgar/data/50863/000089161808000201/f37043dedef14a.htm#115> proxy statement. [Maybe just write “and in corresponding notes to consolidated financial statements contained in earlier Annual Reports”.]

"Stock" includes common stock, restricted stock, restricted stock units, phantom stock, phantom stock units, or any similar instrument. Item 402(a)(5)(i) [pg. 273].

Staff Guidance provides that previously expensed portions of awards that were previously reported in the SCT may be reversed when expense is reversed, e.g., on forfeiture of the award. See Staff Guidance §§ 119.12 & 119.13.

In terms of how performance share units (PSUs) that are settleable only in cash are treated for proxy rules, have the client check to see if the PSUs are accounted for under FAS 123R, which is the determining factor. If the PSUs are not subject to 123R, can reported them in the All Other Compensation column in the case in which the amounts had not otherwise been reflected in the salary column. When the PSUs were really just deferrals of plain vanilla bonus awards, can footnote to the bonus column. [Koppel]

- i. **Dividends on Stock Awards.** Dividends for stock or option generally need not be counted since they are taken into account in grant date value under FAS 123R (reported in the Grants of Plan-Based Award Table). See Adopting Release, pg. 53173, text accompanying notes 163-165 [pg. 60]. Dividends on RSUs that are not paid till vested are reported as year credited rather than year paid. Staff Guidance § 119.09.

If an NEO forfeits a stock or option award, the amount of compensation cost previously disclosed in the SCT will be deducted from amount shown in column, which could yield a negative number. Amending Release, pg. 78341-2, text accompany note 28.

- j. **Options and SARs – Column (f).** For options and SARs as amended in Dec. '06 one reports the aggregate dollar amount recognized for financial reporting purposes for the fiscal year in accordance with FAS 123R, but disregarding estimates of forfeitures for service-based vesting (i.e., disregarding the effect of any forfeitures). Under this change one would no longer report grant date value (except in Grants of Plan-Based Awards table) and this allows reporting option grants as they vest (as under FAS 123R) rather than grant date value. (Footnote should disclose the assumptions used by reference to the financial report, [and any forfeitures].) Item 402(c)(2)(v) and (vi) and Instructions [pg. 337].

Dividends on options are not included. See Kailer pg. B-4.

If option is forfeited the amount of compensation previously disclosed would be deducted. Amending Release pg. 78342, text accompanying note 34.

"Option" includes stock options, stock appreciation rights and similar instruments. Item 402(a)(5)(i) [pg. 273].

- k. **Formulaic Bonus–Non-Equity Incentive Compensation – Column (g).** Dollar value of nonequity (i.e., cash) incentive compensation for year during which performance measured, i.e., **when earned** (even if paid at later date). No need to report again when executive receives payment. Earnings must be separately identified, quantified and footnoted. This is for formulaic nondiscretionary bonus that is tied to performance targets. Also if reported in year earned, not reported again in year paid. Earnings should be identified in footnote. See Staff Guidance § 119.02 that discretionary cash bonuses appear in the Bonus column but performance based bonuses (even annual bonuses) that are not share-based within the meaning of FAS 123R appear in the Non-equity Incentive Plan Compensation column, and amounts paid beyond what was to be earned upon performance achievement are reported as a bonus. Forfeitures are not recorded in Non-Equity Incentive Plan Compensation column although the Adopting Release (text accompanying footnote 175 [pg. 64]) states that companies are encouraged to disclose in footnote.

Note that if there are formulaic nondiscretionary bonuses, the Grant of Plan Based Awards Table will need the 3 columns regarding Estimated Future Payouts Under Non-Equity Incentive Plan Awards.

- l. Change in Pension Value of DB-Type Plans and Above-Market Earnings on NQDC – Column (h). Aggregate change in actuarial present value of executive's accumulated benefit under all defined benefit plans (including DB SERPs) during the fiscal year. Item 402(c)(2)(viii)(A) [pg. 338]. If change in pension benefit is negative, disclose nothing in column and note in footnote (Instruction 3), but in aggregating can count negative number (Staff Guidance § 119.06). (Amounts paid from DB plan are generally not reported in Summary Comp Table.)

Must also include above market earnings in deferred compensation and nonqualified defined contribution (DC SERP) plans. Item 402(c)(2)(viii)(B) [pg. 339]. Above market earnings [for interest] is over 120% of AFR (with compounding) on nonqualified deferred compensation, including such earnings on nonqualified defined contribution plans. Instruction 2. (All earnings are reflected in the deferred comp table.) [For other investments it is the difference between what regular investors could earn in a fund and what the plan participants can earn under such fund.] The rationale for not including the "not in excess of market" earnings in the summary comp table is because that is where the SEC drew the line as to what is earnings and what is additional comp for disclosure purposes. Earnings on nonqualified deferred compensation need not be reported as above marked earnings where the earnings are calculated in the same manner as externally managed investments available in a broad-based qualified plan. AFR reference is presumably to the applicable AFR (depending on length of deferral). Also, the full earnings go into nonqualified deferred comp table. The contributions are not earnings and are reflected in All Other Comp table.

Should in footnote identify and quantify the separate amounts for changes in pension value and above market earnings on NQDC. Instruction 3 to Item 402(c)(2)(viii) [pg. 340].

- m. All Other Comp – Column (i) - (Perks, Gross-Ups, Severance Paid or Accrued, DC Contributions, etc.). All other compensation not properly recorded in any other column, e.g.:
- **Perks aggregating \$10,000 or more** (with footnoted description),
 - **Gross-ups**, discount on purchase of employer securities,
 - Stock purchased at discount (unless, e.g., nondiscriminatory 423 plan). This apparently does not include exercises of stock options.
 - Amounts paid or accrued under a plan or arrangement for severance or change of control payments (see also Preamble pg. 53178). Gross up for severance must also be disclosed.

- **Employer contributions to defined contribution or deferred compensation plan.** This includes employer contributions to qualified 401(k) and other defined contribution plans, nonqualified defined contribution SERPs and nonqualified deferred compensation plans.
- Executive life insurance premiums,
- **Dividends on stock or option awards if not counted in grant date value** of column (l) of Grants of Plan-Based Awards Table. As noted above, dividends for stock or option generally need not be counted since they are taken into account in grant date value under FAS 123R. Stand-alone dividend equivalent rights are not counted in FAS 123R and should therefore go in all other comp [to extent of cash paid out].
- Relocation payments (even if not discriminatory)

Preamble notes that may want to use a supplemental table. (pg. 53209).

- n. Non-Perks Reported Even if Under \$10,000. Under Instruction 3 to 402(c)(2)(ix) **non-perks such as 401(k) employer contributions, gross-ups, severance, etc. must be reported even if below \$10,000**, but only have to be separately quantified in footnote if exceed \$10,000. If amount exceeds \$10,000 for any NEO then must report for all NEOs. Perks, however, can be excluded if total of perks is less than \$10,000 as discussed below.
- o. Perks Must be Reported And Itemized if Aggregate is \$10,000 or More. Perks can be excluded if total value of all perks for that NEO is less than \$10,000. Instruction 4 to Item 402(c)(2)(ix) (pg. 342). Perks are valued on the basis of aggregate incremental cost to the company. Instruction 4 to Item 402(c)(2)(ix). If any NEO has perks of \$10,000 or more, then must include all his or her perks. . Instruction 4 to Item 402(c)(2)(ix). If total is \$10,000 or more must separately identify the type of all perks, even those under \$10,000, in a footnote. . Instruction 4 to Item 402(c)(2)(ix) Preamble notes that can do as a separate sub-chart. If perks are required to be reported then each perk that exceeds the greater of \$25,000 or 10% of total perks must be quantified and disclosed.
- p. Aggregate Incremental Cost. Although perks are valued based on the "aggregate incremental cost" to the company, Staff Guidance § 119.07 notes that do not have to list perks for which executive reimburses the company for the total cost since there is no aggregate incremental cost. (Aggregate Incremental Cost vs. Total Cost - Unused season tickets have no "aggregate incremental cost," but face value of ticket is "total cost." 2007 JCEB Q&A 6.) The Staff Guidance § 119.07 also provides that if the company pays for meals and incidentals and executive reimburse cost of meals and incidentals there is no aggregate incremental cost and no perk. Id. If they are for country clubs dues, they would still have be reported. Id.
- q. What is a Perk – Not Related to Executive Duties and Confers Personal Benefits. In terms of classifying what is a perk or personal benefit, to be a

perk: (i) the item must NOT be integrally and directly related to the performance of the executive's duties, and (ii) the benefit must confer a direct or indirect benefit that has a personal aspect. (See Adopting Release pg. 53177, text accompanying footnote 209 [pg. 75].)

Specifically, the Adopting Release pg. 53176-7, text accompanying notes 208-209 [pg. 74-75], states: "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 company, unless it is generally available on a non-discriminatory basis to all employees . . . [E]xamples of . . . perquisites or personal benefits . . . include . . . club memberships not used exclusively for business entertainment purposes, personal, financial or tax advice, personal travel using [company] vehicles. . . personal use of [company] property . . . housing . . . security . . . at personal residence . . . commuting expenses . . ."

Gross ups on perks must be separately identified and quantified in All-Other Comp columns, assuming they meet the \$10,000 threshold. Instruction 3 and 4 to Item 402(c)(2)(v) [pg. 337].

- r. **Company Plane as Perk.** Personal use of company airplane is a perk even if the Board determines that it is desirable for the executive to use the company plane for security reasons. Adopting Release pg. 53177, at text following note 209 [pg. 75]; 2003 JCEB, Q&A 19(b).

As noted above, perks must be disclosed based on aggregate incremental costs to the company. Instruction 4 to Item 402(c)(2)(ix).

Aggregate incremental cost for aircraft is generally understood to require disclosure of variable costs such as fuel, landing fees, catering costs, etc. But fixed costs such as rent, insurance, taxes, etc. are fixed. Items such as maintenance are less clear.

Borges (9/19/06): It is not clear if one must allocate a portion of fixed costs (maintenance, etc.) to flights. Variable costs such as fuel, maintenance, etc. must be disclosed. Loss of tax deduction generally not disclosed.

To the extent the Standard Industry Fare Level (SIFL) rate prescribed by federal income tax rules [Reg. 1.61-21(g)] is different than the incremental cost of the use it is not permissible to use SIFL rather than the incremental cost. Adopting Release pg. 53177, note 213 [pg. 78]; and JCEB 2003, Q&A 19(a).

Also, note that as a result of recent tax law changes, companies can deduct airplane expenses only to the extent reported as income to the executive, which is typically the Standard Industry Fare Level (SIFL), and therefore a lot is not deducted, but these nondeductions are typically not disclosed.

Note that can't avoid disclosure by having executive reimburse company the cost for aircraft flying b/c under FAA rules the company cannot be in the

business of renting aircraft. However, fractional ownership of aircraft is permitted. (See Borges & Kneiriem, What's In and What's Out: Disclosing Perquisites Under the New Executive Compensation Proxy Disclosure Rules, 14 BNA Pensn. Ben. (Jan 23, 2007).) E.g., DRS footnotes reimbursement of CEO for aircraft use under 17 CFR Part 135, and does not report it.

- s. More on Auto. For All Other Comp table the personal use of auto cannot be the IRS cost, but must be the actual incremental cost to the company, which would include e.g. auto lease, fuel, maintenance, insurance, etc.
- t. Relocation Payments. Relocation benefits are perks and must be included even if nondiscriminatory. Adopting Release pgs. 53177 and 53190, text accompany notes 210 and 340 [pgs. 77 and 121].
- u. Severance. Severance and change of control provisions go into All Other Comp column. Item 402(c)(2)(ix)(D) [pg. 341]. If conditions for payment have been met, amounts should be disclosed even if payment is delayed. Staff Guidance § 119.13. Gross-ups for severance must be included in the total. Item 402(c)(2)(ix)(B) [pg. 340].
- v. Employer Contributions to Defined Contribution Plans and Deferred Compensation Plans. These must be included in other comp for both qualified and nonqualified plans. Item 402(c)(2)(ix)(E) [pg. 341].
- w. Can Exclude Nondiscriminatory Welfare Plans From All Other Comp. As noted above, in the definition of "Plan" in Item 402(a)(6) [pg. 329] rules note that registrants can omit information regarding group life, health, hospitalization and medical reimbursement plans that do not discriminate in favor of executives and are available generally to all salaried employees. (Relocation costs are not excluded.)
- x. Total. Total of all compensation (all columns) [column (j)]. (Subtract out change in pension value and NQDC earnings to yield the top-paid executives for NEO status).
- y. No Past Comp Prior to Being NEO. See Staff Guidance that need not disclose past compensation for years prior to being on NEO. (See also I.a.4 above re info for full fiscal year.)
- z. No Footnote Required For Prior Years. From mborges@compensia.com WWW.compensationstandards.com 5/7/08 - Instructions 3 and 4 to Item 402(c)(2)(ix) expressly provide that the footnotes to the All Other Compensation column of the Summary Compensation Table need only cover the last fiscal year. However, the rules are otherwise silent with respect to the remaining columns in the SCT. JCEB asked the SEC whether the required footnote disclosure for these other columns was similarly limited only to amounts reported for the last completed fiscal year. In response, the Staff indicated that footnote information for the other fiscal years reported in the Summary Compensation Table (that is, any year other than the last completed fiscal year) should be provided if necessary to an investor's understanding of the information being reported for the most

recent fiscal year. Likewise, Staff Guidance provides that footnote disclosure for years prior to years reported in the SCT is only needed to the extent necessary to understand the compensation reported in the SCT for its last fiscal year (and unless otherwise specified, one need not footnote for all 3 years.). Staff Guidance § 119.14. Regarding stock or option awards expensed in the year if they are expensed over sever years the footnote must disclose the financial assumption not just for year of exercise but also for the year of grant. Staff Guidance § 119.15.

- aa. Not NQDC or 401(k) Distributions. Staff Guidance § 119.09 notes that NQDC payouts do not go in the SCT but rather in the NQDC table column (e). Lump sum distributions from 401(k) plans do not go in the SCT because compensation that was deferred (or matched) into plan was already disclosed, and earnings on 401(k) need not be disclosed, since not preferential earnings. See Staff Guidance § 119.09.
- bb. Life, Health, or Medical Reimbursement Plans. Registrants may omit information about life, health hospitalization plans if the plans do not discriminate in scope, terms or operation, in favor of executive officers or directors and are generally available to all salaried employees. Item 402(a)(6)(ii) [pg. 329]; Adopting Release pg. 53175, and note 198 [pg. 70]. If plans discriminate in favor of executives or directors, then report as perquisites or life insurance under All Other Compensation. See Kailer pg. B-8.

d. Grants of Plan-Based Awards Table – Item 402(d) [pg. 344]

1. Info about Grants of Cash and Non-cash Awards to NEOs. For awards to NEOs in fiscal year under any plan (including awards that have been subsequently transferred). Table supplements Summary Comp Table by giving share # and other info about plan-based award.
2. Modification of Awards. Modification of cash award need not be reported, but repricing or material modification of equity awards needs be reported in this table. Adopting Release pg. 53180 and text accompanying note 241 [pg. 87].
3. GRANTS OF PLAN-BASED AWARDS TABLE FOR FISCAL 2007

E.g.: The following Grants of Plan-Based Awards Table summarizes awards made to the Named Executive Officers under any plan during the fiscal 2007 year:

Name	Grant Date	[Date of Comp. Comm. Action]	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated [Future] [Possible] Payouts Under [Performance Based] 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)	[Closing Market Price on Date of Grant]	Grant Date Fair Value of Stock and Option Awards (even if not vested) (\$)
			Threshold (\$)	Target (\$)	Max (\$)	Threshold (#)	Target (#)	Max (#)					
(a)	(b)		(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)		(l)
CEO													
CFO													
A													
B													
C													

4. Contents of Table

- a) Name - Column (a).
- b) Grant date; (and Committee Action Date) (Column (b))(and Adjoining Column). Each separate award granted to NEO should be reported on a different line. (Inst. 1 to Item 402(d) [pg. 346].) Identify plan if there are multiple plans. (Inst. 1 to Item 402(d).) Adopting Release pg. 53163 [pg. 22] notes that grant date is generally considered the day the decision is made to award the option, as long as the grantees are notified promptly. If grant date (as determined for financial reporting purposes under FAS 123R) is different than committee action need to put in adjoining column for "Committee Action Date."
- c) Estimate of Future Payout from Cash Incentive Plan Where Granted in FY - Columns (c)-(e). For grants made under nondiscretionary cash incentive plan. Dollar value of estimated future payouts of cash incentive plan granted in the FY or list range of payouts in \$ (threshold, target and max). If plan doesn't have threshold or maximum, these columns can be omitted. Note that amount earned under this plan is reported in Non-Equity Incentive Plan Awards column of SCT.

Regarding the Grants of Plan-Based Awards table, the Estimated Future Payouts Under Non-Equity Incentive Plan (with dollar amount for threshold, target and max) needs to be calculated based on info at end of fiscal year, and cannot merely give the dollar amount of actual award, even if that amount is already known. Nevertheless, depending on the bonus plan, not

all plans have threshold, target and max and a nonapplicable columns can be taken out.

If award provides only for a single actual or estimated payout amount, that amount is to be reported as the Target amount. Instruction 2 to Item 402(d) [pg. 346]. If the Target amount is not determinable, registrant must provide a "representative" amount based on performance during the last fiscal year (e.g., amount of EPS increase experienced in prior year). Instruction 2 to Item 402(d) [pg. 346]. If plans do not include thresholds or maximums (or equivalent items), the registrant need not include arbitrary sample threshold and maximum amounts and threshold and maximum columns may be omitted. Threshold and maximum levels need not be shown as "0" and "N/A" because the payouts theoretically may range from nothing to infinity. Rather, an appropriate footnote should state that there are no thresholds or maximums (or equivalent items). See Staff Guidance § 120.02.

Even if award was vested during the year, still need to include threshold target and maximum. Kailer pg. B-11. If all of a registrant's non-equity incentive plan awards during a year were made for annual plans, and were earned in the same year as the awards and the earned amounts therefore disclosed in the SCT, the heading over columns (c), (d) and (e) may be changed to "Estimated **Possible** Payouts under Non-equity incentive plan awards." Staff Guidance § 120.02.

If cash incentive plan awards are denominated in units or other rights, a separate column with number of units must be added.

- d) Estimate of Future Payout of Performance-Based Equity Awards Granted in FY - Columns (f)-(h). Estimated future payout under equity incentive plan awards in # of shares (to be paid out or vested once conditions satisfied) for grants made in fiscal year (or, if performance based, the threshold #, target # and maximum #). If award only has single actual or anticipated payout amount, this amount is reported as target amount. Instruction 2 to Item 402(d) [pg. 346]. If target amount is not determinable, provide representative amount based on performance during last fiscal year. Instruction 2 to Item 402(d) [pg. 346].

An equity award that is denominated in dollars and payable in stock is reported in the equity columns of the Grants of Plan-Based Awards table with appropriate footnote disclosure and, if all awards are so denominated, the column heading may be changed from "#" to "\$." Staff Guidance § 120.01.

Stock and option awards as deferred form of salary and bonus are included in table. Staff Guidance § 119.02. Material modification of stock awards are not represented in this table. Adopting Release pg. 53180, text accompanying note 241 [pg. 87].

- i) Other Shares-Column (i). # of shares granted in fiscal year that not required to be in columns (f)-(h), i.e., they are not performance-based.

- j) Other Options-Column (j). # of all other options granted not required to be disclosed in (f)-(h), i.e. they are not performance-based.

Repricings of stock options are reported in this table. [Instruction 7 to Item 402(d).]

- k) Exercise Price of Options Granted in FY - Column (h). Per share exercise or base price of options granted in fiscal year. If they are discounted options (based on closing price on date of grant in the principal U.S. market or other formula if not public market) then need to show FMV in a separate column. Item 402(d)(2)(vii) [pg. 346].

If the exercise price is not based on close of market on date of grant, a Closing Price on Date of Grant column is needed. Also need to footnote methodology for determining exercise price. Inst. 3 to 402(d). To avoid extra column, some companies are amending plans to say FMV is based on closing on date of grant, not on earlier date (and generally no shareholder approval would be required for such amendment).

- l) Grant-Date Fair Value of Stock and Option Awards Under FAS 123R, Even if Unvested - New Column (l). New column (l) added in Dec. '06 for grant date fair value of each equity award computed in accordance with FAS 123R (even if not yet vested), for grants made in the current year. So if, e.g., an option vests over 4 years, option value for each year reported on the SCT is only ¼ of grant date value, this column includes full grant date value.

If repriced use repriced value unless done with preexisting formula. (May be difficult to value profits interest for this column.)

Where the number of shares or options that will vest is tied to performance goals, the amount to be reported in the grant date fair value column should be the grant date fair value of the maximum number of shares or options that could be earned. See Kailer pg. B-12.

- m) Profits Interests. It would appear that one should have the accountants advise whether it is accounted for under FAS 123R (which it generally is) and treat the profits interests as equity, so it would show up in stock awards column of SCT, and stock awards columns of outstanding equity awards. The difficulty is determining a full value to disclose in the grants of plan based awards table. If full value cannot be determined, may need a footnote explaining what this is and why amount can't be determined.
- n) Tandem Grants. For tandem grants, e.g., options & SARs, only one is reported.
- o) Reload Options. Where exercise reload options and receive additional options the additional options are reported as grants in the Grants of Plan Based Awards Table, and the dollar amount recouped for financial statements is the SCT in Staff Guidance § 220.1.

e. **Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table – Item 402(e) [pg. 348]**

Narrative descriptions of material factors necessary to understand info in summary comp table and grants of plan-based awards table, including, e.g.:

1. **Narrative For Summary Comp Table. Material terms of employment agreement** (written or not), description of repricing or other material modification (e.g. extension, change vesting, change performance criteria or change in bases upon which returns are determined) of option or other award (unless automatic) and explanation of amount of salary and bonus in proportion to total compensation; and
2. **Narrative For Grants Table. Material terms of plan-based award grants** (including formula to be applied in determining amounts payable, vesting schedule, performance based conditions, if any dividends are paid on stock, and other material conditions), and any material modification of the award during the year. (See also Adopting Release pgs. 53180-1 [pg. 89].) (There is no longer a 10-year option repricing table.)

f. **Outstanding Equity Awards at Fiscal Year-End Table – Item 402(f) [pg. 349]**

1. Outstanding unexercised options, unvested stock and other unvested awards at fiscal year end. These are potential amounts NEO might realize. (No requirement to disclose outstanding cash awards.)
2. OUTSTANDING EQUITY AWARDS AT FISCAL 2007 YEAR-END TABLE

E.g.: The following Outstanding Equity Awards Table summarizes the number of securities underlying outstanding equity awards for the Named Executive Officers at fiscal year end December 31, 2007:

Name [Also include column for option award dates if more than one option award date in year]	Option Awards					Stock Awards			
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	[Performance-Based] 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 (\$)	[Performance-Based] 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)
CEO									
CFO									
A									
B									

Name [Also include column for option award dates if more than one option award date in year]	Option Awards					Stock Awards			
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	[Performance-Based] 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 (\$)	[Performance-Based] 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)
C									

3. Contents of table:

- a. Name - Column (a). Name of NEO
- b. Vested Options - Column (b). Number of securities underlying unexercised options exercisable at year-end on award-by-award basis.
- c. Nonvested Options on award by award basis - Column (c). Number of securities underlying unexercised options unexercisable on an "award-by-award" basis. It may be advisable to put in a column for grant date of options, though not specifically required by rules. (?)
- d. Unearned Performance-Based Options - Column (d). Number of securities underlying unexercised options awarded under any equity incentive plan that have not been earned (which are vested based on performance) based on payout value. (See Instruction 3). Number is based on achieving target.

If the performance conditions for the awards are achieved, the awards are then moved to the unexercised options column. Instructions to Item 402(f)(2) [pg. 351].
- e. Option Exercise Price - Column (e). For each award in columns b-d, the exercise or base price.
- f. Expiration - Column (f). For each award, the expiration date.
- g. Nonvested Shares or Units Not Exercised at Fiscal Year End - Column (g). Number of shares (or units) of stock that have not vested at year end. Note that the rules do not require award by award listing for stock awards (in contrast to options).
- h. Value of Nonvested Shares - Column (h). Aggregate market value of shares (or units) of stock that have not vested.

- i. Unearned Shares - Column (i). Shares of stock, units or other rights under an equity incentive plan that have not vested and have not been earned (performance vesting).

Shares or other rights under performance-based equity incentive plan is based on achieving threshold performance goals. Staff Guidance § 120.04.

- j. Value of Unearned Performance-Based Shares - Column (j). Aggregate market value of the unearned shares or other awards in (i) [pg. 351].
- k. Gifts of Awards in Footnote. Notes state that one should footnote any non-arm's length transfer of awards (e.g. gifts). Instruction 1 to Item 402(f)(2) [pg. 351]
- l. Vesting Dates in Footnote (or Give Grant Date and Exercise Schedule in Table). Vesting dates of awards held at year end must be disclosed in footnotes to the columns in which the awards are reported. Instruction 2 to Item 402(f)(2)

Borges 5/8/08 - Instruction 2 to the Outstanding Equity Awards at Fiscal Year-End Table requires footnote disclosure of the vesting dates of the stock options, shares of stock, and equity incentive awards. We asked the Staff whether, if the table included a column showing the grant date of each reported award, is would be permissible to then use a general statement of the vesting schedule for such awards (for example, "all awards vest 25% per year beginning on the first anniversary of the date of grant")? The Staff in 2008 JCEB Q&As indicated that such an approach is permissible, which should significantly shorten the required disclosure in this area (particularly given the number of outstanding awards that named executive officers hold) and make this information easier for investors to understand. Where an award has a vesting schedule that differs from the standard schedule, separate disclosure of the applicable vesting dates must be provided. At the end of the day, Borges believes that the Staff wants companies to either provide the specific vesting dates for reported awards or make it possible for investors to determine the specific vesting dates for themselves, which is why a general statement that is linked to a specific grant date will work where just a general vesting description (such as, "The awards vest 25% per year over four years") won't. This approach also finesses the question about whether it's necessary to describe the vesting dates for the portion of outstanding awards that has already vested. Consequently, Borges expects that we will begin to see more companies shift towards this approach next year.

Likewise Staff Guidance § 122.02 provides that a company can comply with the requirement of Instruction 2 of giving vesting dates in footnote, by instead including a column in the table showing the grant date of each award and include the vesting schedule(s) that apply to such awards.

Mercer commented that on the Grant Table, you still need to fill in a column that shows the grant date for every outstanding award if you want to

describe the vesting schedule in the footnotes as relating to an anniversary of the grant date.

- m. Unearned Column for Performance Vesting. Notes state how to determine market value, and states that number of shares in (d) or (i) or payout in (j) is based on achieving threshold performance goals.
- n. Multiple Awards. Multiple awards may be aggregated if the expiration date and exercise price are identical. Instruction 4 to Rule 402(f). So option awards on different date typically get their own line (but share awards are different. See Kailer pg. B-13 & B-14.
- o. In-kind Earnings Like Dividend Equivalents. See Staff Guidance § 120.03 that in-kind earnings like dividend equivalents are reported in the Outstanding Equity Awards at Fiscal Year-End table if not yet vested and in the Option Exercises and Stock Vested table if vested.
- p. Re Equity Awards. Awards under an equity incentive plan are to be reported in the column for equity incentive plan awards only until the relevant performance condition has been satisfied; thereafter, stock awards are to be reported in column for stock awards until they vest, even if the award is subject to forfeiture conditions. 402(f)(2), Instruction 5. Unlike Option Awards, it is not required to report each separate stock award on a separate line. 402(f)(2)(vii)-(x).

g. Option Exercise and Stock Vested Table – Item 402(g) [pg. 353]

1. For exercise of options or SARs and vesting of stock or RSUs during the fiscal year, to show what has been exercised during fiscal year.
2. OPTION EXERCISES AND STOCK VESTED TABLE FOR FISCAL 2007

E.g.: The following Option Exercise and Stock Vested Table summarizes any exercises of stock options or vesting of restricted shares by the Named Executive Officers during the 2007 fiscal year:

Name	Option Awards		Stock Awards	
	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise (\$)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting (\$)
	(a)	(c)	(d)	(e)
CEO				
CFO				
A				
B				
C				

3. Table includes the Following:

- a. Name - Column (a). Name of executive officer.
- b. Exercised Options - Column (b). Number of shares for which options were exercised (or transferred for value) during the fiscal year. Includes exercise of performance based options. Do not report forfeitures. Dividend equivalent, that have vested must be reported.

Shares acquired on exercise all should include from SARs. See Kailer pg. B-16.

If amount received and deferred, provide footnote quantifying the amount and disclosing the terms of deferral.

- c. Value Realized or Exercise - Column (c). Aggregate dollar value realized on exercise of options. Value realized is the difference between market price of underlying securities at exercise and exercise price, without including any related payment by the registrant to the NEO such as gross-up payments. 402(g)(2), Instruction. For any amount realized upon exercise for which receipt has been deferred, a footnote must be provided quantifying the amount and disclosing the terms of the deferral. 402(g)(2), Instructions.

Regarding options on reload exercise, see Kailer pg. B-15. If on option exercise shares are subject to company's right of repurchase, then the shares are shown only as stock awards in Outstanding Equity Awards table. Staff Guidance § 219.04.

Value realized is difference between market price unsecured gross-up. See Item 402(g)(2) [pg. 353].

- d. Vested Shares. Number of shares that have vested. (Includes vesting of performance awards.) Do not include stock awards that have been forfeited.
- e. Dollar Value of Vested Shares. Aggregate dollar value realized on vesting of stock. Value realized on vesting is the market price of underlying securities at vesting date; presumably without including any related payment by the registrant to the NEO such as gross-up payments. 402(g)(2), Instruction [pg. 354].

For any amount realized upon vesting for which receipt has been deferred, a footnote quantifying the amount and disclosing the terms of the deferral must be provided. 402(g)(2), Instruction.

Where tables do not disclose material features, including subsequent forfeiture, use narrative to disclose this. Adopting Release, text accompany note 178 [pg. 64]; Staff Observations.

- f. Related Payments. Notes say don't include value of related payment by company and instead goes in "All Other Comp" column in Summary Comp Table.
- g. Receipt Deferred. If receipt of amounts have been vested but deferred, the deferral should be disclosed in footnote.
- h. Cashless Expense. Report the gross number of shares underlying the options not just net amount after cashless exercise for tax withholding. Staff Guidance § 123.01.
- i. Post Fiscal Year Forfeitures. Post fiscal-year forfeitures in options exercised and shares that were reported on table should be footnoted [pg. 64]. Adopting Release in text accompanying note 175.

h. Pension Benefits – Item 402(h) [pg. 355]

- 1. For DB-Type Plans. For plans that provide payment of benefits following retirement. Applies to DB plans and DB SERPs. Instruction 1 to Item 402(h)(2) [pg. 356].
- 2. PENSION BENEFITS TABLE FOR FISCAL 2007

E.g.: The following table provides information concerning pension benefits for each of the Named Executive Officers as of the end of the 2007 fiscal year.

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

- 3. Contents of table:
 - a. Name.
 - b. Plan name.
 - c. Number of years of credited service for NEO.
 - d. Actuarial present value of NEOs accumulated benefits (even if plan doesn't provide a lump sum option). Use same assumptions as on GAAP financial

reporting, but assume retirement date is earliest date can get unreduced retirement benefit. (Use current comp assumptions according to Adopting Release.)

- e. Payments made to NEO during last fiscal year.

The years of service, present value etc. are reported as of plan measurement date, i.e., the last date of the fiscal year in the company's latest audited financial statements. Put separate entry for each plan. If number of years of credited service for NEO different than actual years of service, disclose this in footnote. Instruction 4 to Item 402(h)(2) [pg. 357].

Item 402(h)(2) Inst. 2 [pg. 356]states that in calculating the actuarial present value of an NEO's accumulated pension benefits, the assumed retirement age is to be the NRA in the plan, or, if not defined, the earliest time at which the named executive officer may retire without any benefit reduction. Instruction 2 to Item 402(h)(3). However, Staff Guidance § 124.02 states that when a plan has a stated "normal" retirement age and also a younger age at which retirement benefits may be received without any reduction in benefits, the younger age should be used for determining pension benefits. The older age may be included as an additional column.

For cash balance plan also need to show the actual present value of the benefit (though may want to disclose actual account balance in footnote). Staff Guidance § 124.05.

- 4. Pension Narrative. Narrative description of material factors necessary to understand each plan in table. Material factors will include, e.g. (i) material terms and conditions of payments and benefits (including normal retirement payment (at NRA), benefit formula, eligibility, and effect of form of benefit eligibility standards period on amount of annual benefits), (ii) any early retirement option that an NEO is currently eligible for, (iii) elements of compensation included (e.g. salary, bonus, etc.), (iv) purpose of multiple plans for NEOs, and (v) policy re granting extra years of service. Notes to Item 402(h) state that narrative should disclose valuation method and all material assumptions applied in quantifying the present value of accrued benefit. Assumption based on NEO continuing to work until retirement, but at current compensation level. Staff Guidance § 124.03; Adopting Release at text accompanying note 297 [pg. 108]. Pension measurement date to the same of fiscal year. Staff Guidance § 219.03.

i. Nonqualified Defined Contribution and Other Deferred Compensation Plans – Item 402(i) [pg. 358]

- 1. For Defined Contribution SERP and other Deferred Compensation Plans. Chart for each nonqualified defined contribution (DC SERP) and other deferred compensation. Staff Guidance § 125.03 requires that it provide disclosure on a plan by plan basis.

2. NONQUALIFIED DEFERRED COMPENSATION TABLE FOR FISCAL YEAR 2007

E.g.: The following Nonqualified Deferred Compensation Table provides information concerning the non-qualified deferred compensation of each of the Named Executive Officers in the 2007 fiscal year:

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)
CEO					
CFO					
A					
B					
C					

3. Contents of table:

- a. Name.
- b. Employee Contributions. Aggregate executive contributions during last fiscal year (\$).
- c. Registrant Contributions. Aggregate company contributions to executive during last fiscal year (\$).
- d. Earnings; Not Merely Above Market Earnings. Aggregate interest or other earnings accrued in last fiscal year (\$). Not merely above market earnings. Adopting Release discusses listing various index funds. See below re narrative disclosure. Earnings should include dividends, stock price increase, etc.
- e. Withdrawals. Aggregate withdrawals and distributions to executive in last fiscal year (\$).
- f. Balance. Total balance of executive's account at end of fiscal year (\$).

4. Notes- Footnote must quantify the extent to which amounts reported in contributions and earnings column were also reported as compensation in Summary Comp. Table Instruction to Item 402(h)(2) [pg. 356]. Also, for aggregate balance column (f) must footnote amounts that were previously reported in the Summary Comp Table for previous years. Presumably the footnote would disclose the sum of amounts included in SCT under new rules for the prior and current years without adjusting for earnings and withdrawals. See Kailer pg. B-19.

5. Disclosing Plans in the Nonqualified Deferred Compensation Table. Borges 5/8/08 - Instruction 1 to Item 402(h)(2) states that, in the Pension Benefits Table, a company must provide a separate row for each retirement and actuarial plan being reported. There isn't a similar express requirement for the Nonqualified Deferred Compensation Table and, companies have reported the required information on both an aggregated and a plan-by-plan basis. SEC Staff was asked whether companies are required to provide the Nonqualified Deferred Compensation Table disclosure on a plan-by-plan or an aggregated basis. Perhaps not surprisingly, the Staff in JCEB 2008 Q&As expressed a preference for plan-by-plan disclosure. While this position is not supported by the language of the rule itself, it should not be too great a burden for companies to separate out this information in their NQDC tables (if they are not doing it already). These plans and arrangements are often administered separately and, therefore, the information won't have to be disaggregated for reporting purposes. Where a company uses a master account structure to manage nonqualified deferred compensation that is drawn from multiple sources, there will be more work involved; however, in some instances, companies may be able to conclude that their arrangements constitute a single plan. In addition, where we've seen plan-by-plan disclosure already, we've only seen a handful of arrangements for each named executive officer (typically, two or three). Consequently, Borges not sure that this position will turn out to be burdensome to affected companies.
6. Narrative for DC SERP and DCP. Narrative of material factors to understand each plan in table, including type of comp permitted to be deferred, any limit on percentage that can be deferred, measures to calculate earnings (including who selects measures and frequency of change of measures, etc.), and material terms about distributions. Item 402(i)(3) [pg. 358].
7. Not 401(k). There is no requirement to disclose earnings of distributions from qualified defined contribution (401(k)) plans.

j. Potential Payments Upon Termination or Change of Control – Item 402(j) [pg. 359]

For each agreement or plan (written or not) that provides payments to a NEO in connection with: any termination, including w/o limitation resignation, severance, retirement, or a constructive termination or a change in control or change in NEO's responsibilities, must:

1. Triggers. Describe and explain the specific "circumstances" that would trigger payments or benefits (including perks and health benefits),
2. Estimate of Payments. Describe and quantify estimate of payments and benefits that would be provided in each of above circumstances, and whether in lump sum or annual payments, and who would be providing payments,
3. How Determined. Describe and explain how appropriate payments and benefit levels are determined under each of the above circumstances,
4. Conditions. Describe and explain material conditions or obligations for receipt of payments and benefits, such as noncompetes, nonsolicitation, nondisparagement, or confidentiality, and waiver of breach of such agreements, and

5. Other Material Factors. Describe any other "material" factors regarding each such agreement.

Notes – Company must give the quantitative disclosure as if triggering events took place on last **business** day of fiscal year (so if 12/31 on a Sunday, use 12/29).

Perks can be excluded only if aggregate amount will be less than \$10,000.

Can cross-reference pension and deferred comp table, but must specify any vesting or acceleration in this section.

The method to measure the value of the vesting of options and restricted stock is not specified in the rules. Many show the option spread and the full value of the vesting option, since that is what would be recognized as income. Others use Black-Scholes and other valuation methods that may yield smaller result.

Based on SEC comments, the SEC may want total walk-away figure including value of vested equity. Rule says payment triggered by termination, but at least footnote the vested equity. May also want to cross-reference pension numbers.

For person who is NEO but wasn't an NEO in last fiscal year, need only disclose if triggering event has actually happened.

Need not disclose company-wide benefits to all salaried employees (e.g., general severance plan) (since such plans are not limited to executive officers).

Can be described in tables or in narrative. If table, start with e.g., The following tables show the potential payments upon termination or change of control to the Named Executive Officers, determined as if such event(s) took place on December 31, 2006.

k. Compensation of Directors – Item 402(k) [pg. 359]

1. Compensation Received by Directors. For compensation paid, earned or accrued. Only if not NEOs. Includes annual fees, retainer fees, meeting fees, equity awards, incentive bonuses, change in pension and NQDC and perks and in other comp.

Director compensation received by NEO goes in Summary Comp. Table Instruction 3 to Item 402(c) [pg. 344].

If was director for part of year must be included in Director Table even if no longer director at year end. Staff Guidance § 227.01. If director is not on NEO but is an employee and does not receive director comp., this should be noted in footnote or narrative. Staff Guidance § 227.02.

2. DIRECTOR COMPENSATION TABLE FOR FISCAL YEAR 2007

E.g., The following Director Compensation Table sets forth fees, awards and other compensation paid to or earned by our directors (other than Named Executive Officers) for the fiscal year ended December 31, 2007:

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)
A							
B							
C							
D							
E							

3. Contents of table:

Rules are similar to SCT. Instructions to Item 402(k) [pg. 368].

Table should include:

- a. Name. Name of each director (other than NEOs). Can group multiple directors in one row if identical.
- b. Fees. Aggregate of fees earned or paid in cash for services as director. (Compensation should be that paid or earned during the year.)
- c. FAS 123R Value of Stock Awards. For awards of stock, as amended in Dec. '06, the dollar amount recognized for financial statement reporting purposes for the FY under FAS 123R (disregarding the effect of any forfeitures). Add grant date fair value (Computed in accordance with FAS 123(R)) in footnote (because directors do not have a grant of plan based awards table), and add outstanding restricted awards (i.e., unvested awards) at year end in footnotes. Assumptions must be disclosed in footnote. Disclose repricing or material modification. Staff Guidance § 227.04.
- d. FAS Value of Options; Grant Date Fair Value and Aggregate Options Per Director in Footnote. For option awards, as amended in Dec. '06, the dollar amount recognized for financial statement reporting purposes for the FY under FAS 123R (disregarding the effect of any forfeitures). Disclosure assumptions made in valuation by reference to financial statements. Add grant date fair value in footnote (whether or not vested). Aggregate number of option awards outstanding at end of fiscal year should be disclosed in footnote. See Staff Guidance § 127.04 that the Instruction to Item 402(k)(2)(iii) and (iv) requirement to provide footnote disclosure, for each director, of the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end does not include exercised options or vested stock awards. Like the corresponding disclosure for named executive officers in the Outstanding Equity Awards at Fiscal Year-End Table, this Director Compensation Table requirement applies only to

- unexercised option awards (whether or not exercisable) and unvested stock awards (including unvested stock units).
- e. Cash Incentive Plan Compensation. Dollar value of all earnings for services performed during year under cash incentive plans.
 - f. Change in Pension. Aggregate change in actuarial present value of director's accumulated benefit under all defined benefit plans (including DB SERPs) for the fiscal year, as well as above market earnings in excess of 120% of the applicable federal rate (with compounding) on compensation that is deferred on a nonqualified basis (including such earnings on nonqualified defined contribution plans) for the fiscal year. Pension that person has not as a director but as a former employee need not be disclosed. Staff Guidance, § 127.04.
 - g. All Other Comp. All other compensation for directors not reported elsewhere including, e.g., perks with aggregate amount not less than \$10,000, gross-ups, discount on stock, amounts paid or accrued for director in connection with termination or change of control, employer contributions, dollar value of key director life insurance, dollar amount of dividends paid director fees. (Same guidelines as for NEOs)
 - h. Total - Dollar Value. Dollar value of total compensation - sum of columns b-g.
4. Narrative. Narrative for director compensation of any material info to understand the table, including, e.g., standard compensation arrangements, whether any director has a different compensation arrangement.

III. Small Business - Scaled Down Disclosure.

As noted above SEC Release 33-8732A (2006) provided that Small business issuers as defined in Item 10(a)(i) of Rule S-B have somewhat less burdensome disclosure but must still provide Summary Comp, Outstanding Equity at Year End, and Director Compensation tables (for last two years and for fewer executives).

73 F.R. 934 (1/4/08) Smaller Reporting Company Scaled Disclosure Requirements - reduced executive compensation disclosure (including no requirement for a CD&A)

<http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E7-24965.pdf>

SEC Release 33-8876 Smaller Reporting Company Regulatory Relief and Simplification. ACTION: Final rule [generally effective 2/4/08] SUMMARY: The Securities and Exchange Commission is adopting amendments to its disclosure and reporting requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 to expand the number of companies that qualify for its scaled disclosure requirements for smaller reporting companies. Companies that have less than \$75 million in public equity float will qualify for the scaled disclosure requirements under the amendments. Companies without a calculable public equity float will qualify if their revenues were below \$50 million in the previous year. To streamline and simplify regulation, the amendments move the scaled disclosure requirements from Regulation S-B into Regulation S-K.

... "Item 402 (Executive Compensation). ... alternative standards for smaller reporting companies for disclosure of compensation of executives and directors that were in Item 402 of Regulation S-B.52 Smaller reporting companies will:

- Provide executive compensation disclosure for only three named executive officers (specifically including the principal executive officer but not the principal financial officer), rather than the five required of larger companies;
- Provide the Summary Compensation Table disclosure for only two years, rather than the three years required of larger companies;
- Not be required to provide a Compensation Discussion and Analysis;
- Provide only three of the seven tables required of larger companies;
- Provide alternative narrative disclosures; and
- Not be required to include footnote disclosure of the grant date fair value of equity awards in the Director Compensation Table."

IV. Item 403 — Beneficial Ownership Disclosure

Requires disclosure of company voting securities beneficially owned by more than 5% holders, and company equity securities beneficially owned by NEOs and directors.

Footnoted disclosure of number of shares pledged as security by NEOs and directors is required.

V. Item 404 — Transactions With Related Persons, Promoters and Certain Control Persons

Used to be called Certain Relationships and Related Transactions Disclosure

- Item 404(a) — Transactions With Related Persons. Disclosure required for (i) any transaction since the beginning of the company's last fiscal year or any currently proposed transaction, (ii) in which the company was or is to be a participant, (iii) in which the amount involved exceeds \$120,000 and (iv) in which any related person had or will have a direct or indirect material interest. This disclosure for related person transactions includes executive loans (even though already covered in most cases by Sarbanes).
- Item 404(b) — Procedures for Approval of Related Person Transactions. Describe the company's policies and procedure for the review, approval or ratification of transactions with related person, reportable under Item 404(a).
- Item 404(c) — Promoters and Control Persons. Disclosure regarding identity of promoters and transactions with the promoters. The same disclosure is required for any person who acquired control (or is part of a group that obtained control) of an issuer that is a related person.

VI. Item 407 — Corporate Governance Disclosure

New Item 407 consolidates existing corporate governance-related disclosure requirements under a single item. Includes disclosure of whether each director and director nominee (and audit, nominating and compensation committee) is independent, information regarding board and committee meetings, committee membership and specific matters relating to nominating and audit committees, and similar disclosure regarding compensation committees and a narrative description of their procedures for determining executive and director compensation.

Staff Guidance § 118.05 provides that the corporate governance section requires disclosure regarding any role of the compensation consultants in determining or recommending the amount or form of executive and director compensation. (If, however, the compensation consultant play in material

role in setting the company's compensation then the company should discuss that role in the compensation committee.

2008 JCEB SEC Q&As - Item 7(d) of Schedule 14A provides that, among other things, a company must disclose as part of the director and executive officer disclosure in its proxy statement the information set forth in Item 407(e)(3) of Regulation S-K, including the information about compensation consultants. However, in some of the comments issued to companies as part of the SEC Staff's focused review project last year, the Staff appeared to suggest that this information should be included as part of the Compensation Discussion and Analysis. Several practitioners found these comments to be confusing and, accordingly, asked the Staff for clarification as to where this information should be provided. The Staff at Q&As is quite clear in stating that information about the role of any compensation consultant in determining or recommending the amount or form of executive and director compensation is to be provided as part of a company's Item 407(e)(3) disclosure (in response to Item 7(d)). In contrast, information about the consultant's involvement in the executive compensation-setting process should be included in the CD&A to the extent that it is material to the explanation of the company's compensation practices and decisions.

VII. Item 201(e) Stock Performance Graph; and Item 201(d) Securities Authorized for Issuance Under Equity Compensation Plans

New performance graph requirement in 201(e) with graph comparing yearly % change in shareholder return with total return of broad equity market index, and cumulative total return of peers (or industry) etc. (From JB memo - Under the new rules, you are required to include a stock performance graph (which was previously required in the proxy statement) in your annual report to security holders that precedes or accompanies your proxy statement or information statement relating to your annual meeting. A stock performance graph is not required in your Form 10-K; however, if you do not prepare a separate annual report to security holders (instead you rely on a "10-K wrap") then you will need to include the stock performance graph in either the 10-K wrap or the 10-K itself.)

Item 201(d) - Securities authorized for issuance under equity compensation plans, which lists the various equity plans should be included in Part III, Item 12 of Form 10-K. (See, e.g., <http://www.law.uc.edu/CCL/regS-B/SB201.html>) An issuer may rely on General Instruction G.3. to Form 10-K to incorporate by reference the Item 201(d) disclosure from its proxy statement or information statement, even if the issuer did not submit a compensation plan for security holder action at its annual meeting of security holders. See interpretive letter to American Bar Association (Jan. 30, 2004). See also [March 13, 2007] Staff Guidance § 119.01.

See also, <http://www.abanet.org/jceb/2003/qa03sec.pdf>

Note that, Item 10 instructions say not to include new plan info in the 201(d) table for a plan as to which you are asking shareholder approval.

Equity Compensation Plan Information

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
Equity compensation plans approved by security holders			

Equity compensation plans not approved by security holders			
Total			

VIII. New Plan Benefits Table

Instructions and samples of new plan benefits tables and equity compensation plan tables

<http://www.law.uc.edu/CCL/34ActRIs/rule14a-101.html>

Item 10. Compensation Plans.

If action is to be taken with respect to any plan pursuant to which cash or noncash compensation may be paid or distributed, furnish the following information:

a. *Plans subject to security holder action.*

1. Describe briefly the material features of the plan being acted upon, identify each class of persons who will be eligible to participate therein, indicate the approximate number of persons in each such class, and state the basis of such participation.
2. In the tabular format specified below, disclose the benefits or amounts that will be received by or allocated to each of the following under the plan being acted upon, if such benefits or amounts are determinable:

i. **NEW PLAN BENEFITS**

Plan Name

Name and Position	Dollar Value (\$)	Number of Units
CEO		
#A		
#B		
#C		
#D		
Executive Group		
Non-Executive Director Group		
Non-Executive Officer Employee Group		

The table required by paragraph (a)(2)(i) of this Item shall provide information as to the following persons:

Each person (stating name and position) specified in [paragraph \(a\)\(3\)](#) of Item 402 of Regulation S-K (229.402(a)(3) of this chapter);

Instruction:

In the case of investment companies registered under the Investment Company Act of 1940, furnish the information for Compensated Persons as defined in [Item 22\(b\)\(13\)](#) of this Schedule in lieu of the persons specified in paragraph (a)(3) of Item 402 of Regulation S-K.

- All current executive officers as a group;
- All current directors who are not executive officers as a group; and
- All employees, including all current officers who are not executive officers, as a group.

Instruction to New Plan Benefits Table.

Additional columns should be added for each plan with respect to which security holder action is to be taken.

If the benefits or amounts specified in paragraph (a)(2)(i) of this item are not determinable, state the benefits or amounts which would have been received by or allocated to each of the following for the last completed fiscal year if the plan had been in effect, if such benefits or amounts may be determined, in the table specified in paragraph (a)(2)(i) of this Item:

- Each person (stating name and position) specified in paragraph (a)(3) of Item 402 of Regulation S-K;
- All current executive officers as a group;
- All current directors who are not executive officers as a group; and
- All employees, including all current officers who are not executive officers, as a group.

If the plan to be acted upon can be amended, otherwise than by a vote of security holders, to increase the cost thereof to the registrant or to alter the allocation of the benefits as between the persons and groups specified in paragraph (a)(2) of this item, state the nature of the amendments which can be so made.

IX. Interest of Certain Persons in Matters to Be Acted Upon in Deal Proxy

- Proxy Instructions – "Item 5. Interest of Certain Persons in Matters to Be Acted Upon (a) Solicitations not subject to Rule 14a-12(c). Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:
 - (1) If the solicitation is made on behalf of the registrant, each person who has been a director or executive officer of the registrant at any time since the beginning of the last fiscal year..."

X. Form 8-K

Form 8-K Current Report under §§ 13 or 15(d) of Exchange Act.

Report to be filed within 4 business days after event (unless starts on weekend or holiday). For small business issuer under § 240.12b-2 of Exchange Act, only need 8-K if covers item that would be required in S-B disclosure.

- a. Section 1 — Registrants' Business & Operations

- i Item 1.01 If enter into material definitive agreement not made in ordinary course of business, or an amendment that is material to company, then disclosure terms of the item.

Instructions state that an agreement is deemed not to be in ordinary course if it involves subject matter of 17 CFR 229.601(b)(10)(ii)(A)-(D) (contracts made in ordinary course of business).

According to SEC Form 8-K Staff Interpretations (April 3, 2008), <http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm> , Q&A 102.03, if the agreement is attached, a brief description of agreement must still be included in the body of the 8-K.
- ii Item 1.02 Early termination of material definitive agreement must be disclosed.
- iii Item 1.03 — Bankruptcy or Receivership
- b. Section 2 — Financial Information (including completion of acquisition or disposition of assets— Results of operations and financial condition, direct financial obligation or obligations under an off-balance sheet arrangement of the company, triggering events that accelerate or increase financial obligations etc., costs associated with exit or disposal activity, and material improvements of assets).
- c. Section 3 — Securities and Trading Market (e.g., deregistering, unregistered sales of equity securities, and material modification to Rights of Security Holders)
- d. Section 4 — Matters Related to Accountants and Financial Statements (including changes in company's certifying accountant, non-reliance on previously issued financial statement or related audit report or completed interim review)
- e. Section 5 — Corporate Governance and Management
 - i Item 5.01 — Changes in Control of Company (furnish information regarding change of control of company).
 - ii Item 5.02— 8-K disclosure within 4 business days of departure of directors and executive officers, election of directors and appointment of executive officer, and compensatory arrangement of executive officers.
 - a. Information regarding departure of director, etc. See Staff Interpretations Q&A 117.15 (as added June 26, 2008) that a director resigning due to corporate governance policy must file 8-K w/i 4 bus. days of acceptance of director's resignation.
 - b. If CEO, president, CFO, CAO (accounting), COO or any NEO terminates, it must be disclosed. Notice of decision to resign or retire requires an 8-K from that date. See Staff Interpretations Q&A 117.01. Termination includes demotion to non-officers. Q&A 117.03.
 - c. If new CEO, Pres, CFO, CAO or COO is appointed [even if not an executive officer under Item 401 according to the Staff Interpretations Q&A

117.06], must disclose: name and date of appointment, and information required under 17 C.F.R. 229.401(b), (d) and (e) and 229.404(a) as well as a brief description of any material plan, contract or arrangement (written or oral) to which a covered officer is a party or material amendment of such plan or arrangement in connection with the triggering event or any grant or award under such plan or arrangement to such covered person, or any modification to such grant or award.

If intending to issue press release about appointment, the company can delay filing Form 8-K until day of press release. Instruction 2 to Item 5.02(c). If there was also a board appointment at that time, that could also be delayed. See Staff Interpretations Q&A 117.05.

- d. If company appoints director not at annual meeting, etc., disclose name of director and certain other information.
- e. If company enters into a material compensation plan or arrangement (oral or written) with the CEO, CFO or NEO as a party, or material amendment of such plan or arrangement, or material grant or award under such plan or arrangement to such person (or modification) then company must provide brief description of terms and conditions of plan or agreement and amounts payable to the executive. Item 5.02(e).

Grants or awards materially consistent with previously disclosed terms of the plan need not be disclosed. Instructions 2 to Item 5.02(e).

“Where the registrant’s board adopts a compensation plan subject to shareholder approval, the obligation to file a Form 8-K pursuant to Item 5.02(e) is triggered upon receipt of shareholder approval of the plan.” 8-K Staff Interpretations Q&A 117.08. [Where plan is already disclosed in proxy, that should suffice and shouldn’t need another disclosure of vote outcome on 8-K, notwithstanding the above language re timing.]

If a material cash bonus plan is adopted with a list of possible goals then later specifications of actual goals need not be reported. 8-K Staff Interpretations Q&As 117.10 & 117.11.

If an 8-K is filed to disclose an annual non-equity incentive plan award, the registrant is not required to provide information which would result in competitive harm for the registrant. Note that the standard on “competitive harm” is to be the same as provided under Instruction 4 to Item 402(b) and Instruction 2 to Item 402(e)(1). [This would not typically come up since already disclosed on 8-K the plan with general goals]. 8-K Staff Interpretations Q&A 117.12.

Where a previously disclosed employment agreement provides for a discretionary bonus, 8-K obligation is not triggered when the determination to pay such a bonus is made. 8-K Staff Interpretations Q&A 117.13

Termination of an executive compensation plan to be disclosed on 8-K if it constitutes a material amendment or modification of the plan. 8-K Staff Interpretations Q&A 117.14.

If registrant notifies NEO of his termination, the 8-K filing is triggered as of date of notification, and not as on date employment effectively ends. 8-K Staff Interpretations – Interpretive Responses § 217.05.

If an NEO enters into an employment agreement with an evergreen renewal each 2 years, the automatic renewal of the employment agreement does not trigger an 8-K filing requirement. 8-K Staff Interpretations – Interpretive Responses § 217.08.

- f. Disclosure of salary and bonus for the most recent fiscal year for NEOs if they were not available in S-K disclosure as of the latest practicable date (see Item 402(b)(2) Instruction 1 [pg. 333]) (with a new total comp figure for NEO using new salary and bonus information).

Instructions — These disclosure requirements of Item 5.02 do not apply to registrant that is wholly owned subsidiary of public issuer. If information about plan and certain other items are not available, then indicate 8-K will be amended.

Need not provide info on plans and arrangements that do not discriminate in favor of executive officers or directors, and are available generally to all salaried employees.

NEO means same as under S-K or S-B rules.

- iii Item 5.03 - Amendments to articles of incorporation or by-laws and change in fiscal year.
- iv Item 5.04 - Temporary suspension of trading under company employee benefit plan because of blackout per ERISA § 101(i) within 4 business days of receiving 101(i) notice, etc.
- v. Item 5.05 - Amendments to the registrant's code of ethics or waiver of a provision of code of ethics
- vi Item 5.01 - Change in shell company status
- f. Section 6 — Asset Backed Securities
- g. Section 7 — Regulatory FD Disclosure
- h. Section 8 — Other Events that company deems of importance to shareholders (optional)
- i. Financial Statements and Exhibits (financial statement of business acquired, pro forma financial information, shell company transactions, and exhibits).

XI. Conforming Amendments

- a. Minor cross-reference amendment to Regulation Blackout Trading Restriction (BTR).
- b. Conforming amendments to definition of non-employee director in Rule 16b-3 to delete reference to Item 404(b).

XII. Plain English Disclosure

Plain English required for most of the disclosure in Items 402, 403, 404 and 407, Exchange Act Rules 13a-20 and 15d-20.

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