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THE NEWSLETTER FOR THOSE THAT ADVISE PUBLIC COMPANIES

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Timely "Best Practice" Disclosures for Your Compensation Discussion and Analysis

The 2009 proxy season promises to be a turning point for Compensation Discussion and Analysis and for executive pay practices in general, as rising public anger over compensation practices will focus all eyes on what companies are doing to address the growing list of concerns. In many cases, companies are grappling with unprecedented financial and economic pressures while, at the same time, their "pay for performance" programs are being fully tested. This confluence of forces occurs against a backdrop of regulatory changes in Washington, as Congress enacts legislation targeting executive compensation at companies accepting bailout funds and will likely soon take up legislation mandating an advisory vote on executive compensation.

In our January-February 2008 issue, we provided examples of "best practice" disclosures that addressed areas of concern raised by the Staff in its review of executive compensation disclosures. We are revisiting some of those examples in light of the credit crisis and economic concerns, as well as recent and expected regulatory efforts. We are also now addressing areas that have become critical concerns in the past few months and must be addressed in upcoming CD&A disclosures. While there is no "one size fits all" approach that can work for your CD&A, we hope that these examples provide critical guidance on analyses that will be expected this proxy season—and beyond.

Implementing "Hold Through Retirement" for Equity Awards

Our September-October and November-December 2008 issues described why companies should be implementing a hold-through-retirement policy for senior executives as a means for not only addressing shareholders' valid concerns about executive compensation, but also for avoiding the creation of incentives that lead to unnecessary and excessive risks. [For a discussion of implementing a hold-through-retirement policy in the context of conducting a risk analysis of compensation programs, see the model disclosure included in the Winter 2009 issue of our *Proxy Disclosure Updates* newsletter.]

Best Practice Disclosure:

Our Hold-Through-Retirement Policy

We have long recognized the importance of stock ownership as an important means of closely aligning the interests of our senior executive officers with the interests of the company's shareholders. As discussed on page __ of this Compensation Discussion and Analysis under the heading "Stock Ownership Requirements" we have required that our senior executives maintain "skin in the game" with the substantial stock ownership guideline ratios of 12 times salary for our CEO and six times salary for our other named executive officers.

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This substantial stock ownership guideline alone, however, does not ensure that the interests of our senior executives are fully aligned with our shareholders' interests. While stock ownership—through both compliance with the stock ownership guidelines and through accumulation of equity awards under our compensation programs—encourages a focus on returns to shareholders through the company's stock price, that focus may, in some instances, overemphasize short-term rather than long-term returns. Without a countervailing influence, [illegible] The risks attendant to a short-term focus on stock price may be particularly acute in times when share prices are substantially depressed, such as we have experienced in recent months.

In 2008, the Compensation Committee considered alternatives for addressing these concerns, in particular focusing on ways to better align our executives' interests with the interests of [illegible]

The Compensation Committee considered implementing a policy to require that our senior executive officers (including the CEO and all of the named executive officers) hold a substantial portion of their earned equity awards until the executives retire from service with the company. The Compensation Committee recognized that this policy would address many of the concerns discussed above, however [illegible] This potential risk may be particularly acute in periods such as we are facing today, where stock prices are depressed and executives may feel pressure to maximize the value of their retirement holdings by seek- [illegible]

After performing the foregoing analysis and recognizing the potential limitations [illegible]

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[illegible]

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> equity compensation for the subject executives will remain a motivational force throughout their careers to promote the long term value of the company.
>
> We are pleased to announce that our CEO and our named executive officers have also agreed to subject their already-owned, previously granted option stock and restricted stock to this new hold-through-retirement policy, thereby demonstrating their long-term commitment to the company and its shareholders.

Revisiting Perquisites

Recent economic and financial pressures are driving most companies to review every aspect of their budget—and layoffs and significant cutbacks are being experienced across the board. When a company is laying off a substantial portion of its work force or is cutting back on research and development, it becomes increasingly more difficult to justify [illegible]

Best Practices Disclosure:

> **Reassessment of Our Perquisites**
>
> We have provided our CEO and the other named executive officers with several perquisites, including the personal use of company aircraft and automobiles, company-paid financial planning services and country club memberships. These perquisites have [illegible]
>
> As described in our "Management's Discussion and Analysis of Results of Operations and Financial Condition" in our annual report on Form 10-K, we have faced an increasingly difficult business environment as economic conditions have deteriorated while, [illegible] These measures have included [illegible]
>
> In light of these ongoing cost concerns, the Compensation Committee has determined [illegible] While the Compensation Committee considered providing
>
> *continued ...*

for reimbursement of the costs of perquisites instead of eliminating perquisites all together, it was determined that the continued maintenance of perquisites in light of the overall cost cutting efforts of the company would not be appropriate from the perspective of various stakeholders, including employees and shareholders.

In determining [illegible] perquisites, the Compensation Committee considered the negative consequences from an incentive standpoint, given the perquisites' status as a component of our executive compensation program, but determined that the overall compensatory impact of eliminating perquisites is not substantial. The Compensation Committee does not believe that the elimination of perquisites will put the Company at a competitive disadvantage for the purposes of attracting or retaining executive talent, when considered in the context of the overall compensation program.

Making the Most of Clawback Provisions

Clawback policies (and such provisions in executive compensation arrangements) are being adopted with increasing frequency, as companies seek to ensure that executives are not in a position to keep compensation that was awarded based on what later turns out to be erroneous financial results. Section 304 of the Sarbanes-Oxley Act originally focused significant attention on clawback policies, and now the presence of broader clawback provisions as part of the TARP has reignited interest in clawbacks as an effective means for discouraging inappropriate conduct. In the current climate, even those companies that have already adopted clawback policies and provisions need to re-evaluate those measures, because the triggering events may be too narrow and fail to deal with circumstances where it turns out—after compensation decisions have been made—that the executive has engaged in conduct which ultimately harms the company and shareholders.

Revisiting our Compensation Recovery Policy

In 2006, the Board of Directors adopted a Compensation Recovery Policy, pursuant to which members of management (including the CEO, the CFO and the NEOs) may be required to return compensation paid based on financial results that were later restated. This policy applied only if the executive officers engaged in misconduct that contributed to the need for a restatement, or contributed to the use of inaccurate metrics in the calculation of incentive compensation. Under this policy, when the Board determined in its sole discretion that recovery of compensation was appropriate, the Company could require reimbursement of all or a portion of any bonus, incentive payment, commission, equity-based award or other compensation, to the fullest extent permitted by law.

In addition to this Compensation Recovery Policy, the company's executive officers and other key employees [illegible] forfeiture of proceeds from some or all of their [illegible] years prior to their termination of employment [illegible] in conduct that is detrimental to the Co[illegible] solicitations, soliciting the Company's customers [illegible] disclosing the Company's confidential information [illegible]

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The Corporate Executive
for the critical days ahead.

In light of the risk assessment undertaken by the Compensation Committee discussed on page __ of this Compensation Discussion and Analysis, the Compensation Committee has

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reconsidered the [illegible]

Based on the Compensation Committee's recommendation, the Board of Directors has adopted a revised Compensation Recovery Policy that provides for the recovery [illegible] (1) [illegible] (2) [illegible] interests or other reputational harm to the Company. This revised policy requires [illegible], in its sole discretion, to address situations where executives pursued strategies and took actions that (*e.g.,* as a result of excessive risk-taking or poor performance or what, in hindsight, were bad or flawed strategies) should not have been rewarded.

In order to ensure the enforceability of the revised Compensation Recovery Policy, [illegible] notwithstanding any current employment agreements, the board and the CEO and our management team view this as so fundamental that we are pleased to report that our CEO and NEOs have agreed to the application of these new provisions retroactively.

Evaluating the Need for Pensions and SERPs

In our January-February 2008 issue, we addressed the importance of a wealth accumulation analysis and walk-away numbers in analyzing termination and change-in-control arrangements, in particular when [illegible]

Our Review and Analysis of Pensions and SERPs

We provide retirement benefits to the named executive officers through both qualified and non-qualified defined-benefit and defined-contribution retirement plans. We have historically viewed our retirement benefits as a means of providing financial security to all of our salaried employees after they have spent a substantial portion of their careers with the Company. While many companies today do not provide retirement benefits in the form of a pension or

continued …

These retirement plans create significant ongoing obligations for the Company in terms of funding and administration costs. As our workforce ages, the Company could face increasing costs in the future in order to satisfy obligations under these programs. With respect to our senior executives, the Compensation Committee has, in light of these cost concerns and in reconsidering the elements of compensation, undertaken

[*Editor's Note:*

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Committee decided to

Tax Implications

In our January-February 2008 issue, we provided "best practice" disclosure for addressing compliance with Internal Revenue Code Section 162(m). The Emergency Economic Stabilization Act of 2008 (the "EESA") and the US Treasury's Capital Purchase Program (the "CPP") brought Section 162(m) guidance to the forefront again, with a requirement that any participating institution agree, as a condition to participate in the CPP, that it will be subject to the $500,000 annual deduction limit under Section 162(m)(5). Section 162(m)(5), which was added by Section 302 of the EESA, reduces the deduction threshold for the remuneration paid to senior executive officers during any taxable year from $1 million to $500,000, and it also eliminates the exception to the deduction limit for "performance-based compensation" as well as deferred compensation.

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[illegible] (Readers should be reminded that the SEC in the adopting release for the 2006 amendments stated that the new approach "should not be construed to eliminate this [162(m)] discussion" as well as other "tax consequences to the named executive officers as well as tax consequences to the company.") Given the [illegible] that chooses, nevertheless, to pay more, may (incorrectly) conclude that it does not have to disclose [illegible]. We believe that this information is material for all companies, especially given the current economic climate—and needs to be disclosed in the CD&A—otherwise shareholders will have no idea [illegible]. Companies should provide [illegible]

Deductibility of Compensation for Tax Purposes

[illegible]

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[illegible] There was no increase in qualifying "performance–based compensation" to offset [illegible]

—DL

Publisher: **Jesse M. Brill**, J.D. Yale Law School, is recognized as one of the country's leading authorities on insiders' transactions and executive compensation practices and disclosure. Mr. Brill is also the Publisher of the nationally acclaimed newsletters *The Corporate Counsel, Section 16 Updates* and *Compensation Standards*.

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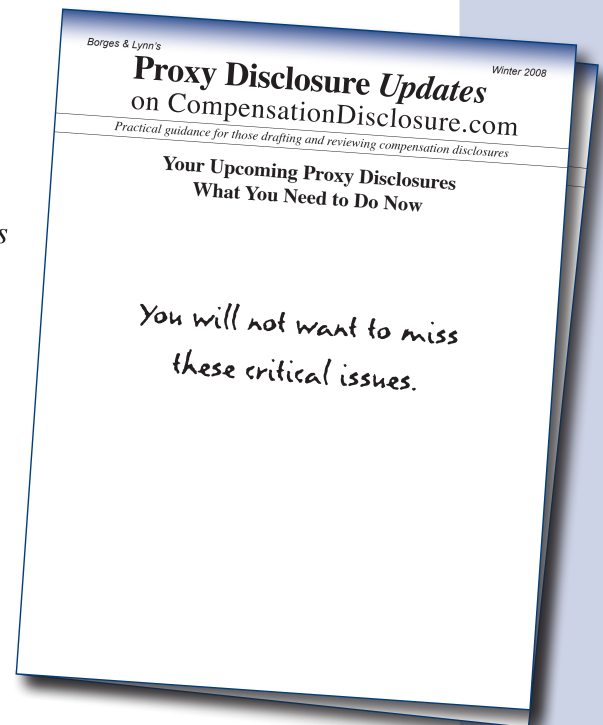

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