THE CORPORATE EXECUTIVE

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THE NEWSLETTER FOR THOSE THAT ADVISE PUBLIC COMPANIES

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The Latest Proxy Disclosure Guidance

Note: Because of the heightened need for proxy disclosure guidance during the critical days and months ahead, David Lynn, former SEC Chief Counsel, will be writing the lead piece in each issue of *The Corporate Executive* this coming year, providing the latest compensation disclosure guidance and pitfalls.

—JMB

"Best Practice" Disclosures for Your Compensation Discussion and Analysis

In response to requests from so many of our readers, we are providing examples of "best practice" disclosures that seek to address areas of concern raised by the Staff in its review of executive compensation disclosures. These hypothetical examples are based on the latest Staff guidance, including the guidance provided in the Staff's "Observations in the Review of Executive Compensation Disclosure" and John White's "Where's the Analysis?" speech at our "2nd Annual Executive Compensation Disclosure Conference." (For detailed analysis and guidance on the Staff's comment letters, see our September-October 2007 issue; for a discussion of John White's speech and other notable takeaways from the Conferences, see our November-December 2007 issue and see the Fall-Winter 2007 Supplement to *Compensation Standards*.)

While there is no "one-size-fits-all" approach to providing the required level of analysis in your CD&A, the following examples should provide the necessary framework for improving your disclosure in order to address the Staff's concerns and to provide more useful disclosure for your shareholders. As we have noted in the past (and as John White referred to in his speech), these disclosures may be best highlighted in a separately-captioned "Analysis" section of the CD&A.

The key to providing the analytic disclosure that the SEC expects is to have the appropriate analytic tools in place when compensation decisions are made. Without the necessary analytic tools, an issuer does not have (1) a framework for providing a complete discussion of the factors relevant to the analysis, (2) the findings that emerge from the analysis, or (3) the resulting actions that the company has taken in light of the analysis. (Note that these three aspects of the analysis that the Staff will be looking for were the bulleted items that John White listed in the closing of his speech.) Also critical to the development of better analytic disclosure is the establishment of disclosure controls and procedures which ensure that the compensation committee's deliberations and internal analyses are captured in a way that will facilitate the "analysis" disclosure that is expected in the CD&A.

[Note that the examples provided below address aspects of compensation (such as severance) where a growing consensus of consultants and defenders of CEO pay are calling on companies to perform the critical analysis—and deal with unanticipated amounts and outcomes that may no longer be appropriate.]

Focus on Total Compensation and Use of Tally Sheets

The foundation for any analysis in the CD&A needs to be a focus on the named executive officers' total compensation. For this purpose, the total compensation figure is typically not going to be the one reported in the Summary Compensation Table—rather, it is going to be based on internal assessments of executive pay (typically using a "tally sheet") that give the compensation committee a complete picture of the total compensation awarded, the target compensation that could be awarded, realized, unrealized

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and projected equity gains and total accrued equity gains and wealth accumulation under termination and change-in-control scenarios.

The SEC expects a company to describe its compensation committee's analysis of this information and how it influences the committee's pay decisions.

Best Practice Disclosure:

Tally Sheets:
Our Focus on Total Compensation

When making compensation decisions, the Compensation Committee analyzes tally sheets prepared for each of the named executive officers. These tally sheets were prepared by our human resources department and our compensation consultant. Each of these tally sheets presents the dollar amount of each component of the named executive officers' compensation, including current cash compensation (base salary and bonus), accumulated deferred compensation balances, outstanding equity awards, retirement benefits, perquisites and any other compensation.

These tally sheets reflect the annual compensation for the named executive officers (both target and actual), as well as the potential payments under selected performance scenarios and termination of employment and change-in-control scenarios. With regard to the performance scenarios, the [illegible] be payable under [illegible] ive compensation plans. [illegible] payments, the amounts the [illegible] control scenarios that are [illegible] and under our equity comp[illegible]

The overall [illegible] the elements of [illegible], as well as information [illegible] Review and analysis of the Need for Termination and Change-in-Control Arrangements" section of this Compensation Discussion & Analysis), so that the Compensation Committee may analyze both the individual elements of compensation (including the compensation mix) as well as the aggregate total amount of actual and projected compensation.

In its most recent review of tally sheets, the Compensation Committee determined that annual compensation amounts for our CEO and the other named executive officers remained consistent with the Compensation Committee's expectations, however it also decided that the compensation mix for our CEO needs to be adjusted on a going-forward basis.

With respect to our CEO's compensation, the Compensation Committee noted that approximately 65 percent of his overall annual compensation was derived from base salary and cash incentive payments under our annual and long-term cash incentive plans. The Committee decided that the appropriate target for cash compensation [illegible] in particular the unrealized appreciation in his outstanding equity awards [illegible] 45 percent of overall annual compensation. As a result, the Committee [illegible] the number of performance-based restricted stock unit grants [illegible] and the target award opportunity for the long-term cash incentive plan.

The Compensation Committee utilizes the tally sheet information in all other aspects of its analysis and compensation decision-making process. As described throughout this Compensation Discussion & Analysis, the Committee bases its analysis on the tally sheet information in consideration of the management team's internal pay equity and in decisions regarding termination of employment and change-in-control arrangements. In fact, after factoring in

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wealth accumulation as part of our tally sheet analyses, the Committee concluded that adjustments were needed to termination of employment and other post-employment provisions. See our discussion below under "Our Review and Analysis of the Need for Termination and Change-in-Control Arrangements."

Compensation for Individual NEOs and Internal Pay Equity

One of the most common Staff comments was a request that the issuer make the CD&A sufficiently precise so as to identify material differences in compensation policies and decisions for individual named executive officers. These comments focused on the relative levels of compensation and how their internal pay relationship is evaluated in setting those levels of compensation.

Note that when analyzing internal pay equity, it is important that compensation committees factor in those areas where there has been the greatest divergence in internal pay equity over the last several years—equity awards and post-employment benefits. If the analysis reveals that equity awards and post-employment benefits have gotten out of line, then action is needed to adjust the compensation going forward. The Best Practice Disclosure set forth at the end of this section (on page 5, below) provides an example of how this situation could be handled.

Best Practice Disclosure:

Internal Pay Equity At Our Company

Our core compensation philosophy is to pay our executive officers competitive levels of compensation that best reflect their individual responsibilities and contributions to the Company, while providing incentives to achieve our business and financial objectives. While comparisons to compensation levels at companies in our peer group (discussed below) is helpful in assessing the overall competitiveness of our compensation program, we believe that our executive compensation program also must be internally consistent and equitable in order for the Company to achieve our corporate objectives as outlined at the beginning of this Compensation Discussion and Analysis.

In implementing [illegible] d a study of the relationship bet[illegible] ion of the other executive officer[illegible] al compensation includes not on[illegible] value of equity awards (as well [illegible] holdings one-time awards, [illegible] conclusions

Our human resources department conducted the internal pay equity study under the direction of the Compensation Committee. This study demonstrated that while there have been variations in the level of CEO compensation relative to the compensation of other executive officers over the past 20 years, the CEO's compensation was on average two times greater than the median compensation of the named executive officers and four times the median total compensation level for the next lower tier of management. In addition, the study demonstrated that _____ percent of the aggregate compensation to all of our named executive officers was paid to the CEO.

The Compensation Committee evaluated the mix of the individual elements of compensation paid to the CEO and the other executive officers over the course of the period covered by the internal pay equity study, as well as the changes in the overall composition of the management team and the overall accountabilities of the individual executive officers and the CEO. The study findings and the Compensation Committee considered and factored in the special annual

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equity awards made to the CEO in his first three years of employment with the Company, as well as his potential post-employment payments, benefits and perquisites. The Committee also analyzed the change in the responsibilities of the management team over the measurement period, including the increase in the number of executive officers and the CEO's efforts to flatten the [illegible] manage- ment layers [illegible] ive officers, who are [illegible].

Based on th[illegible] level of total compensatio[illegible] the named execu[illegible] except for [illegible] times the [illegible] system. The Compensatio[illegible] internal pay equity study reflected an appropriate target differential for executive compensation, given the different accountabilities for the CEO and the other named executive officers. [This analysis also contributed to the Compensation Committee's decision regarding the executive officers' termi- nation of employment, change in control and retirement provisions, discussed at page 19 below.]

To implement this decision, in 2007, the Compensation Committee determined that the CEO's base salary should remain fixed at $800,000 and exercised its discretion (see "Negative Discretion" [illegible] in this Compensation Discussion and Analysis) to reduce the CEO's payout under our annual cash incentive plan from $2.1 million to $1.8 million [illegible] as a means of maintaining the CEO's compensation in line with our internal pay equity policy, while considering the other elements of the CEO's 2007 compensation discussed elsewhere in this Compensation Discussion and Analysis.

Under this policy, the Committee also considers the internal pay equity among the other executive officers—and in relation to the next lower tier of management—in order to maintain compensation levels that are consistent with the individual contributions and responsibilities of those executive officers. At the same time, the Committee increased the COO's base salary from $600,000 to $700,000, based on her individual contributions in reducing costs under the Company's previously announced program and her recent assumption of responsibility for European operations. [*Editor's Note:* Include additional discussion of the individual consider- ation of the other named executive officers, if material.]

Best Practice Disclosure if Internal Pay Equity Needs to be Adjusted:

Our Internal Pay Equity Analysis—Resulting Changes

Based on its analysis of results derived from the internal pay equity study and an analysis of the total value of wealth accumulated—particularly the amount of realized, unrealized and projected equity gains—by the CEO and the other named executive officers, the Compensation Committee has decided to reassess the need for continued annual equity awards, as well as whether the CEO's and some of the named executive officers' post-retirement and severance benefits should be scaled back. As a result of this reassessment, the Committee believes that the current "vested interest" of our top most senior executive officers provides a major incentive and that there would be little incremental incentive value to continue to provide further annual restricted stock awards. In addition, the CEO volunteered not to receive further stock options or restricted stock awards, since his current stock ownership could be worth over $25-[illegible] million based on the Company's and the CEO's expected performance over the next five years.

The Committee will also limit awards of restricted stock and restricted stock units for other purposes, except as they are used as a retention device by converting cash bonuses into

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restricted stock and restricted stock unit awards. Further, as described in more detail in the section entitled “Our Review and Analysis of the Need for Termination and Change in-Control Arrangements,” the Committee has decided to phase out termination of employment and change-in-control arrangements. The Committee will also offset and phase out the overall benefits under supplemental executive retirement arrangements, given the substantial amounts available to the named executive officers for post-retirement purposes with their accumulated equity awards and deferred compensation account balances.

The Compensation Committee believes that these adjustments, made in recognition of the individual named executive officers’ circumstances, will reduce the divergence in internal pay equity and thereby restore the proper balance in the compensation for our senior management team.

[*Editor’s Note:* These Best Practice Disclosures represent one approach for an internal pay equity analysis. Another valid approach would be to focus on determining internal pay differentials that are only supported by differential work and value–added contributions to the management structure at each pay level. This analysis goes hand-in-hand with overall organizational analysis that examines whether there is wasteful and unnecessary over-layering of management. For more information on this approach, see our “Internal Pay Equity Methodologies” Practice Area on CompensationStandards.com.]

Benchmarking

The Staff’s comments on benchmarking disclosure focus on how issuers used comparative compensation information when making executive compensation decisions and how that information affected compensation decisions. The Staff has raised questions about the composition of peer groups, the nature and extent of any discretion used in the benchmarking process, and the targeted percentiles (collectively and for individual compensation) that were used in the benchmarking analysis.

As we noted in our September-October issue of *The Corporate Counsel* (at pg 2), the real issue is too much reliance on benchmarking and not enough attention to meaningful analysis. If an issuer only (or mostly) relies on benchmarking in setting executive compensation, then the Best Practice Disclosure that follows is not possible—rather, for a company that benchmarks externally but does not also do an internal pay equity comparison and analysis, this material analytic fact should be disclosed in the benchmarking discussion and analysis.

Best Practice Disclosure:

Benchmarking Against Peer Companies

When making compensation decisions, we also look at the compensation of our CEO and the other named executive officers relative to the compensation paid to similarly-situated executives at companies that we consider to be our peers—this is often referred to as “benchmarking.” We believe, however, that a benchmark should be just that—a point of reference for measurement—but not the determinative factor for our executives’ compensation. The purpose of the comparison is not to supplant the analyses of internal pay equity, wealth accumulation and the individual performance of the executive officers that we consider when making compensation decisions.

Because the comp [illegible] analytic tools that
are used in sett [illegible] a discretion in
determining the [illegible] associated with
comparative pay [illegible], including the
difficulty of acc [illegible] gain, and peer
employment an [illegible] e compensation
information at [illegible] in the course of making compensation decisions.

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The Compensation Committee established our current peer group of companies in 2005. With the assistance of our compensation consultant, the Committee reviews the composition of the peer group annually to ensure that companies are relevant for comparative purposes. The Committee replaced two of the companies comprising the peer group in 2007. We believe that the group of companies is representative of the sector in which we operate, and the group was chosen because of each of the companies' relative leadership position in our sector, their relative size as measured by market capitalization and the relative complexity of the business and the CEO's role and responsibilities. Our peer group consists of the following companies:

[*Editor's Note:* Include a specific list of the peer group companies, identified by name, as well as an analysis of the comparison between the CEO's and named executive officers' total compensation and the total compensation figures—with performance comparisons—for the peer group, listing all elements included as well as all elements that were not included.]

Performance-Based Compensation

With the bulk of executive compensation typically oriented toward performance-based pay, it is certainly no surprise that much of the Staff's focus has been on disclosure concerning performance-based compensation and the disclosure of performance target levels used to determine performance-based pay. Currently, the Staff is considering issuers' arguments as to why the disclosure of performance target levels may cause competitive harm, so it remains to be seen what arguments will support the withholding of these target levels [illegible] analysis justifying the decision to omit [illegible] the disclosure of performance metrics [illegible] material performance target levels should [illegible] Checks this past year were woefully [illegible] the likelihood of meeting the ta[illegible]

The Staff also [illegible] how they consider individual performance [illegible]

Because this disclosure is so specific to the issuer, we are not, at this time, providing an example of best practice disclosure, but instead we refer readers to the following examples: [illegible], DuPont, Intel [illegible] and see Mark Borges's invaluable, ongoing proxy disclosure blogs on CompensationStandards.com.

Use of Discretion for the Annual Incentive Plan

The Staff has raised comments requesting more detail (and, in particular, analysis) concerning the scope and actual use of discretion in setting performance-based compensation. The following only covers "negative discretion," which many companies will need to address this year.

Best Practice Disclosure:

Negative Discretion

The Compensation Committee exercises "negative discretion" in setting payouts under the annual incentive plan. By setting a high amount which can then be reduced, we are advised by legal counsel that our annual incentive plan meets the requirements of Section 162(m) of the Internal Revenue Code. In 2007, the Compensation Committee exercised its negative discretion to reduce the payout to the CEO from $2.0 million to $1.5 million.

This reduction was not a negative reflection on the CEO's performance—she, in fact, performed beyond our actual target expectations. If the Compensation Committee were to have discretion over the bonus amounts, those amounts would not qualify for the Section 162(m) tax deduction.

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Termination and Change-in-Control Arrangements: The Importance of a Wealth Accumulation Analysis and Walk-Away Numbers

In many instances, the Staff has requested a more thorough discussion and analysis of termination of employment and change-in-control arrangements. In particular, the Staff expects an analysis of whether—and how—the company factored in other elements of compensation in determining such provisions. In essence, the Staff expects the CD&A to include a complete analysis of the "why" behind the termination and change-in-control arrangements.

A critical aspect of the compensation committee's analysis of these arrangements is a consideration of the wealth accumulation of the CEO and the named executive officers. The wealth accumulation numbers are necessary so that the compensation committee can truly analyze whether the CEO or the named executive officers need the protection afforded by these arrangements. In many instances, upon critically examining the level of wealth accumulated by an executive officer, the compensation committee may determine that the level of post-employment payments and benefits are unnecessary and not consistent with the company's overall compensation philosophy or policies.

As noted in some of the Staff's comments and underscored by respected compensation consultants (see the discussion of Ira Kay's and Mike Kesner's remarks in our November-December issue, at pg 3), a total "walk-away" number for each scenario is important disclosure for investors. It also demonstrates that the compensation committee considered and understood the full extent of the numbers—including all realized and unrealized equity gains.

Best Practice Disclosure:

Our Review and Analysis of the Need for Termination and Change-in-Control Arrangements

Under the terms of our equity-based compensation plans and our employment agreements, the CEO and the other named executive officers are entitled to payments and benefits upon the occurrence of specified events including termination of employment (with and without cause) and upon a change-in-control of the Company. The specific terms of these arrangements, as well as an estimate of the compensation that would have been payable had they been triggered as of fiscal year-end, are described in detail in the section entitled "Termination and Change-in-Control Arrangements" on page __, below.

In the case of each employment agreement, the terms of these arrangements were set through the course of arms-length negotiations with each of the named executive officers. As part of these negotiations, the Compensation Committee analyzed the terms of the same or similar arrangements for comparable executives employed by some companies in our peer group. This approach was used by the Compensation Committee in setting the amounts payable and the triggering events under the arrangements.

The termination of employment provisions of the employment agreements were entered into in order to address competitive concerns when the named executive officers were recruited, by providing those individuals with a fixed amount of compensation that would offset the potential risk of leaving their prior employer or foregoing other opportunities in order to join the Company. At the time of entering into these arrangements, the Compensation Committee

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considered the aggregate potential obligations of the Company in the context of the desirability of hiring the individual and the expected compensation upon joining us.

Our 2007 Review. In 2007, the Committee analyzed and reassessed all of the termination and change-in-control arrangements to determine whether they are necessary and appropriate under the Company's current circumstances and given the circumstances of the individual named executive officers. The Committee will continue to review these arrangements annually.

In conducting this analysis, the Committee reviewed the wealth accumulation numbers included in the tally sheets (as described above), as well as the aggregate value of all compensation that would result in the event of each triggering event under the termination and change-in-control arrangements. We refer to these amounts as the total "walk-away" number under the relevant arrangement. The following table shows the "walk-away" number for each of the named executive officers.

[*Editor's Note:* Include a table summarizing "walk-away" amounts under each triggering event under the termination and change-in-control arrangements, as well as any necessary explanatory disclosure regarding underlying assumptions and any potential differences from numbers presented in the termination and change-in-control disclosures required under Item 402(j) of Regulation S-K. See our model walk away tables in the "Severance Arrangements" Practice Area on CompensationStandards.com.]

In analyzing the continued necessity of these payments and their relative cost to us, the Compensation Committee compared the total "walk-away" amounts to the value of the wealth accumulated by each of the named executive officers. The following table summarizes the total accumulated wealth values as of the end of the fiscal year and projected values over the next five years and ten years for each of the named executive officers:

[*Editor's Note:* Include a table summarizing, for each named executive officer, the aggregate vested and unrealized value of previously granted and projected equity awards, deferred compensation balances, pension amounts, supplemental retirement benefits and other accumulated compensation elements, along with disclosure of the relevant assumptions.]

The Compen[illegible] officer has accumulat[illegible], including severance [illegible] purpose. In addition [illegible] related. The CEO [illegible] of the wealth he has [illegible] executive officers [illegible] first joined the company [illegible]. As a result, effective January 1, 2008, the severance provisions in our employment agreements with the named executive officers were eliminated. The Compensation Committee also adopted a policy that for any new executive hires, to the extent that severance is necessary, such severance provisions will "sunset" after a period of three years of employment.

With respect to the change-in-control provisions, the Compensation Committee examined the relative costs of these arrangements in light of the expected benefit in the event of a change in control transaction, and determined that the benefits that would be derived are not worth the attendant costs in foreseeable merger or acquisition situations. As a result of this analysis, the Compensation Committee decided to take several steps that will be accomplished by the end of the second quarter of 2008:

- Our equity-based compensation plans will be amended to replace the current "single trigger" acceleration of all unvested equity awards at the date of the change of control with a "double trigger" provision whereby awards will not be accelerated unless the executive officer is terminated or in the event that the acquiring company does not assume or replace the outstanding equity awards; and

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- Considering our obligation in the event of a change-in-control to pay gross-ups on excise taxes under Section 280G of the Internal Revenue Code, these provisions will be eliminated from the change-in-control provisions in the executive officers' employment agreements.

Overall, the Compensation Committee determined that these changes to the employment agreements and our equity compensation plans would not adversely affect our shareholders' interests in the event of a change-in-control of the Company—or necessarily increase the potential for an unwanted takeover—while reducing the potential costs and rationalizing the benefits in light of the overall level of wealth collectively accumulated by our named executive officers.

Retirement, Pensions and SERPs

The Compensation Committee is in the process of conducting a similar "need" analysis with respect to the current pension and SERP benefits for the CEO and the other named executive officers.

Perquisites

While the Staff did not focus on perquisites in its review program (although it did raise particular questions about perquisite allowances), this element of compensation continues to raise concerns about the justification for the benefits and the way in which costs are calculated. As with other elements of compensation, the CD&A must address the "why" behind the perquisites—and the "how" with respect to determining the costs of the perquisites. The disclosure needs to demonstrate that the compensation committee has an understanding of what is provided to management and how much it is costing the company.

Best Practice Disclosure:

Reassessment of Our Perquisites

We have provided our CEO and the other named executive officers with several perquisites, including personal use of company aircraft and automobiles and company-paid financial planning services. We also provided our CEO with a country club membership under the terms of his employment agreement, and we have agreed to continue his perquisites for a period of three years following his retirement and certain other termination events.

We have provided perquisites as a means of providing additional compensation to the CEO and the [illegible] unusual circumstances.

The Committee intends to review the Company's policies with respect to perquisites on a regular basis and to consider whether, and to what extent, it may be appropriate for the CEO

continued …

and the other named executive officers to reimburse the Company for perquisites, including personal use of corporate aircraft.

The amounts reported for perquisites represent the incremental cost—and not the total cost—of providing the benefit and not the value of the benefit to the recipient. With respect to the personal use of corporate aircraft, we have computed incremental cost on a per hour basis for each aircraft by including:

- the cost of fue [illegible]
- landing, parki [illegible]
- the cost of ma [illegible]
- "dead head" c [illegible] e, and
- the dollar valu [illegible] amounts reported as income for [illegible]

Since our aircraft is used over 95% for business travel, incremental costs exclude fixed costs such as depreciation, crew compensation, hangar rent, and insurance. Where spouses or other guests accompany an executive on a flight, applicable catering costs are allocated to the executive as well. In 2007, our CEO used corporate aircraft for personal use for an aggregate of 37 hours at an average incremental cost of $4,950 per hour, and our COO used corporate aircraft for personal use for an aggregate of 26 hours at an average incremental cost of $3,800 per hour. The cost of leasing a comparable jet at comparable times would have been approximately $6,450 per hour.

Accounting and Tax Implications

One area where the Staff's expectations were not fully communicated through the comment process or the Staff Report is with respect to disclosure about the accounting and tax implications of compensation policies and decisions. The CD&A needs to address more than just the implications—and the actual outcomes—of complying with Internal Revenue Code Section 162(m); it must describe the actual tax and accounting consequences that were considered and taken into account by the compensation committee when setting and analyzing each aspect of the CEO's and the named executive officers' individual compensation.

Best Practice Disclosure:

Tax and Accounting Impact on Compensation

The financial reporting and income tax consequences to the Company of individual compensation elements are important considerations for the Compensation Committee when it is analyzing the overall level of compensation and the mix of compensation among individual elements. Overall, the Compensation Committee seeks to balance its objective of ensuring an effective compensation package for the named executive officers with the need to maximize the immediate deductibility of compensation—while ensuring an appropriate (and transparent) impact on reported earnings and other closely followed financial measures.

In making its compensation decisions, the Compensation Committee has considered that Internal Revenue Code Section 162(m) limits deductions for compensation paid in excess of $1 million. As a result, the Compensation Committee has designed much of the total compensation packages for the named executive officers to qualify for the exemption of "performance-based" compensation from the deductibility limit. However, the Compensation Committee does have the discretion to design and use compensation elements that may not

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be deductible within Section 162(m), if the Committee considers the tax consequences and determines that nevertheless those elements are in our best interests.

In 2007, $___ ___ paid to the CEO and $___ ___ paid to the CFO, were not deductible. The Compensation Committee reviewed these amounts from a cost/benefit perspective and concluded [illegible]

We also r [illegible] restricted stock plan [illegible], resulting in a deter [illegible] officers. As stated two [illegible] restricted stock grant [illegible]

As stated [illegible] not by our CEO. In 2007, we incurred $___ ___ in [illegible]

In addition, the change-in-control provisions described in the section entitled "Our Review and Analysis of the Need for Termination and Change-in-Control Arrangements" were originally designed to reduce the amounts payable that otherwise would have been subject to an excise tax known as "excess golden parachute payments" as defined under Internal Revenue Code Section 280G. Our arrangements with the named executive officers contemplate that we will gross up the amount of tax due under this provision. As discussed above, the Compensation Committee, after conducting a cost/benefit analysis, has decided to eliminate the gross-up provisions from the named executive officers' change in control arrangements in 2008.

[For those companies that retain gross-up provisions, it will be necessary to show how costly they can be.]

Stock Ownership Requirements

While the Staff did not focus on stock ownership requirements in the course of its executive compensation review project, this remains an area where further analysis is required and disclosure about that analysis is necessary in the CD&A. Compensation consultants are now expressing concerns that companies need to reassess their ownership guidelines because they are now too low, often dating back to a time when the value of equity grants was not as high and most equity awards were in the form of stock options. In addition, there is a growing awareness of the need for adding retention requirements such as hold-until-retirement provisions to top executives' equity awards to ensure that their interests are aligned with stockholders in good times and bad. (To illustrate, executives who ran the subprime lending companies that are now struggling or out of business would not have walked away with the same wealth accumulation if they had been required to retain a significant portion of their equity compensation.)

Best Practice Disclosure:

Stock Ownership and Retention Requirements of our CEO and Named Executive Officers

The purpose of stock ownership requirements is to more closely align our key executives' interests with our shareholders—through good times and bad times. We have reassessed our company's stock ownership guidelines of six times salary for our CEO and one times to three times salary for the senior executives and concluded that they are too low. These guidelines date back to a time when equity grant values were not as high, and when most equity was in stock options that resulted in erratic ownership accumulation. Many companies, like ours, are now granting enough full-value shares—restricted and performance shares—to meet their

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guidelines in just a couple of years, with no ongoing stock retention requirements beyond the guidelines once they are met. In addition, the Committee recognizes the importance of attaching retention requirements to our top tier executives' equity grants to ensure alignment with our shareholders' interests in good times and in bad. As a result we are revamping our ownership requirements as follows:

Increased Ownership Requirements. First, we are increasing the stock ownership guideline ratio to [illegible] times salary for our CEO and [illegible] times salary for our other named executive officers.
The Corpor
grant practic
the range of
value were
for our CEO,
on this analy
guidelines to

our historical
averaged in
-tax grant
times salary
officers. Based
ownership

Hold Until
our CEO and our top tier executives must hold 75% of the after-tax portion of all stock option and restricted stock grants until retirement or age [illegible], whichever is later. In addition, we are proud to disclose that our CEO and all of our top tier executives have agreed to apply the same restrictions to all their previously granted outstanding options and restricted stock.

What to Do Now

The types of best practice disclosures that we have outlined above assume that a compensation committee is undertaking the kind of meaningful analysis set forth and the tools referred to. More information about the analytic tools highlighted in these hypothetical disclosures can be found on CompensationStandards.com.

Even if the best practice analytic tools have not yet been implemented, an issuer still needs to provide the level of analysis that the SEC expects—and to say what aspects of compensation or analytic changes that the compensation committee is in the process of reviewing or considering. If there is no underlying analysis on the part of the compensation committee, then the CD&A needs to fully and accurately reflect the company's and the committee's decision-making processes in this regard. Keep in mind that it is never too late to implement the best practices so that the following year's disclosure can be substantially improved—and to protect the board and others from potential exposure. Lastly, we cannot lose sight that along with all this comes the fiduciary obligation of boards and CEOs—and the fundamental responsibility of each of us involved in the process—to face up to and fix any unintended outcomes or amounts or inappropriate practices that may arise from the analysis.

We Welcome Your Input

We would like to thank the various people that gave us comments and feedback as we prepared these disclosures. We encourage our readers to share with us additional examples of best practice disclosures (or suggestions).

—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* and *Section 16 Updates*.

Editors: **David Lynn,** former Chief Counsel, SEC Division of Corporation Finance (dave.lynn@thecorporatecounsel.net).
Michael Gettelman, LL.B. Harvard University, Farella Braun + Martel LLP, San Francisco (mgettelman@fbm.com).
Barbara Baksa, CEP, Executive Director, National Association of Stock Plan Professionals (bbaksa@naspp.com).

Executive Press, Inc. • P.O. Box 21639 • Concord, CA 94521-0639
Tel. (925) 685-5111 • Fax (925) 930-9284 • info@TheCorporateCounsel.net

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Wednesday, January 30, 2008

Why You Should Attend: Now that the SEC has made the most significant changes to the requirements of Rule 144 since its adoption, you – and every public company, every law firm, every broker, every transfer agent—will need to implement new preventive procedures. Pitfalls will abound. Transactions by your most important clients (and your boss) are impacted. You simply can't afford to make mistakes regarding the transactions by your top executives and directors!

It is critical to have the best possible guidance for addressing what you now will need to do. This half-day conference will provide the essential—and practical—implementation guidance that you need going forward. Led by *the* foremost experts—Jesse Brill, Alan Dye and Bob Barron, with well over a century of hands-on Rule 144 experience among them—you will learn how to deal with the new procedures, forms, representation letters—and legends—and how to protect yourself (as well as your directors and executive officers) from costly violations when you tackle the new challenges that you will now face.

Who Should Attend: Every public company, every law firm, every broker, every transfer agent. Any participant in the Rule 144 process—including lawyers (both in-house and law firms), compliance personnel, brokers, transfer agents, corporate secretaries, administrators, consultants, and HR staff. Every person involved in any aspect of the Rule 144 process needs to attend because the stakes are so high (since all of your executives and directors are impacted).

Where: You can attend the Conference via nationwide live, simultaneous video webcast to desktops and conference rooms.

To accommodate the different needs of our community, we offer the following attendance alternatives:

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