

Client Briefing

Checklist of Executive Compensation Issues for the 2008 Proxy Season

The following questions should assist in the preparation of your executive compensation disclosures for your 2008 proxy statement. The questions are not intended to be an exhaustive list of all possible issues or considerations in preparing your disclosures. Instead, they are designed to assist you in identifying those issues which are either recent requirements or are likely to be hot buttons with shareholders during the 2008 proxy season. This checklist also assumes that all the securities laws regarding executive compensation disclosures apply. Specific questions and a proposed outline for the Compensation Discussion and Analysis (CD&A) section are also included, as are a list of best practices under the new rules and details of the SEC Comments some companies received regarding their 2007 proxy disclosures.

General Issues

- What is your company's compensation philosophy and strategy?
- During the past year, did your company's compensation philosophy or strategy undergo any change or refinement?
- During the past year, what actual compensation was earned and how does that compare to your company's compensation philosophy and strategy?
- What is your company's philosophy regarding executive compensation disclosure, e.g., compliance with securities laws or disclosure that goes beyond what the securities laws require?
- How does the compensation paid to executives compare to the company's performance? Is there a relationship? If so, do your shareholders know how company performance played into the determination of the compensation that was paid to executives?

Named Executive Officers Compensation Issues

- Did your company have more than one Principal Executive Officer (PEO) or Principal Financial Officer (PFO) during the past year?
 - If so, the compensation for all individuals who served as PEO and PFO will need to be disclosed in your company's proxy statement.
- Did any top executive retire or terminate employment during the past year?

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- If so, but for the fact that your company did not employ him or her on the last day of the fiscal year, would he or she been among the three most highly compensated executive officers other than the PEO and PFO and had total annual salary and bonus in excess of \$100,000?
 - If so, you must include these individuals, up to a maximum of two individuals, in the tabular disclosures in your company’s proxy statement, e.g., Summary Compensation Table, Grants of Plan-Based Awards table, etc.
- Did any executive officer voluntarily defer receipt of all or any portion of his or her compensation?
 - If so, the voluntarily deferred amount(s) must be considered when determining which executive officers qualify as Named Executive Officers (NEOs) for purposes of your company’s proxy statement.
- Does any NEO have an employment agreement, termination of employment (severance) agreement or change-in-control agreement that was effective during the past year?
 - If so, has the agreement been disclosed as an exhibit to one of your company’s securities filings, e.g., Forms 10-Q, or 10-K?
 - Also, if so, have the terms and conditions of such agreement been disclosed in narrative form in your company’s proxy statement?
 - Have the potential payments and benefits to the NEOs been detailed and quantified? Consider using a table to provide this disclosure.
- How did your company’s shareholders fare during the past one- and three-year periods; in other words, what was your company’s total shareholder return (TSR – change in stock price plus any dividends paid) for these periods?
- How does your company’s TSR compare to the compensation that was earned by the NEOs during the past year? Is there a link between TSR and the compensation earned by the NEOs that can be shown to shareholders? Does a link exist if TSR is looked at over a longer period of time?
- For your company’s NEOs’ compensation, does your company’s proxy disclose all compensation, earned or paid, from all sources, for all services and with no material omissions that would make the disclosure misleading?

Equity Compensation Plan Issues

Disclosure of Equity Compensation Plans

- Has your company detailed in the required Equity Compensation Plan Information table, the shares to be issued upon exercise of outstanding options, warrants and rights,

and shares available for grant under shareholder-approved and nonshareholder-approved equity compensation plans?

- Has your company filed all such disclosed plans as exhibits to your company's securities filings?
- Has your company considered footnote disclosure of additional information about its equity compensation plans in order to assist shareholders gain a better understanding of all the different types of equity awards your company has granted, the shares available for grant from all plans, and the remaining amount under any stated plan limits, e.g., amount of shares remaining available for grant under a limit on the number of shares that can be granted in a form other than stock options or stock appreciation rights?
- If your company's Equity Compensation Plan Information table includes plans that were not approved by shareholders, was a narrative description of the material features of each such plan included following the table?
- Is your company asking shareholders to approve an equity compensation plan (new plan or amendment of an existing plan) or a cash-based compensation plan (for Section 162(m) qualification, etc.) in 2008?
 - If so, the Equity Compensation Plan Information table must be included in your company's proxy statement.
 - If not, the Equity Compensation Plan Information table can be included in your company's Form 10-K.

Sarbanes-Oxley Act of 2002 Issues

- Did your company have to undertake a financial restatement due to material noncompliance as a result of misconduct during the past year?
 - If so, did the PEO and PFO reimburse your company for (1) any bonus or other incentive-based or equity-based compensation received during the 12-month period following the first to occur of the first public issuance or filing with the SEC of the financial document embodying such financial reporting requirements, and (2) any profits realized from the sale of company securities during such 12-month period?
 - Also, if so, did your company require any other individuals to reimburse the company for all or some portion of their previous compensation?
 - If not, does your company have any policy with regard to the repayment of compensation received within 1 year following the issuance of financial statements that are later restated? If so, consider detailing this in your compensation disclosures.

Shareholder Approval of Equity Compensation Plans

- If any of your company's compensation plans is Section 162(m) qualified by using a list of performance measures from which your company's Compensation Committee

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can choose a performance goal, when was the last time the list of performance measures was approved by shareholders?

— A list of performance measures must be re-approved by shareholders at least every five years.

- Generally, shareholder approval of your company's equity compensation plan or an amendment thereto will be required if you answer "yes" to any of the following questions:

— Do any of your company's equity compensation plans have a formula to increase the number of shares available under them and do not have a stated term of ten years or less (and your company wants to continue making grants from such plan)?

— Does your company want to expand the types of awards under any equity compensation plan?

— Does your company want to make grants of awards under any of its equity compensation plans to individuals who are not currently eligible to receive awards under such plan, e.g., grants to directors or independent contractors when only employees are eligible to receive awards under the terms of the plan, etc.?

— Does your company want to materially extend the term of any of its equity compensation plans?

— Does your company want to materially change the method of determining the exercise price of stock options under any of its equity compensation plans?

— Does your company want to conduct a repricing or any type of exchange of equity awards for underwater stock options and your company's equity compensation plan does not specifically permit such action?

- Does the equity compensation plan your company is asking shareholders to approve comply with your company's key institutional shareholders' guidelines?

— How does the plan fare under RiskMetrics Group's (formerly known as Institutional Shareholder Services or "ISS") ISSue Compass model and its policies (including ISS' cost policy, pay for performance policy, repricing policy, and burn rate policy)? Will ISS recommend a vote for the plan?

– ISS Cost Policy—The ISS calculated cost for the plan and all other shares must be less than the company's individually calculated ISS allowable cap.

– ISS Repricing Policy—Requires that:

- Option repricing is **not** expressly permitted without shareholder approval; and

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- If the company has repriced options in the past, the company's listing standards and the plan document prohibit any future repricings without shareholder approval.
- ISS CEO Pay for Performance Policy—The ISS CEO pay for performance policy must not be violated. This policy is violated where:
 - The company's one- and three-year TSR are **both** less than 0 percent; **and**
 - There was an increase in the CEO's total direct compensation (TDC) in the past year; **and**
 - More than 50 percent of the increase in TDC is attributable to equity-based awards; **and**
 - The CEO is eligible to participate in the plan under consideration.

Note that the CEO pay for performance policy will not be applied if a company has been publicly traded for less than three years or the individual serving as CEO has not served as CEO for at least two years.

- ISS Burn Rate Policy—The ISS burn rate policy must not be violated. The ISS burn rate policy is violated where the company's three-year average burn rate (as calculated by ISS, see below):
 - Exceeds its industry mean plus one standard deviation (as calculated by ISS for the 2008 proxy season); **and**
 - Exceeds 2 percent of the company's fiscal year-end common shares outstanding.

Note that if a company violates the ISS burn rate policy and wants to avoid ISS recommending a vote against its proposed plan, it must publicly commit to maintain a three-year average burn rate over the next three years equal to its ISS-calculated (for the 2008 proxy season) industry group mean three-year average burn rate plus one standard deviation. In calculating the ISS burn rate, ISS converts all awards granted into stock option equivalents (SOE). Stock options and SARs count as one SOE, while the SOEs for full-value awards depend on a company's volatility and range from 1.5 to 4.0 SOEs for every one full-value award granted.

- Does the proposed equity compensation plan comply with your company's major institutional shareholders' guidelines as to equity compensation plan provisions and dilution (overhang) caused by the proposed plan?
- How does your company's dilution (overhang) compare to that of its peer/comparator companies?

- How do the vote projections look for your company's proposed equity compensation plan? Does the plan need to be revised in order to comply with any key shareholders' proxy voting guidelines in order to help secure shareholder approval of the plan?

Compensation Committee Issues

Compensation Committee Report Issues

- Is the Compensation Committee Report separately captioned in your company's proxy statement to identify it?
- Does the Report state whether:
 - The Compensation Committee has reviewed and discussed the CD&A with management; **and**
 - Based on this review and discussion(s), the Compensation Committee recommended to the Board of Directors that the CD&A be included in the company's annual report, proxy statement or information statement.
- Does the name of each member of the Compensation Committee appear below the Report?

Compensation Committee – Corporate Governance Requirements

- All public companies must now comply with new Item 407(e) of Regulation S-K, which collects a myriad of corporate governance disclosure requirements related to the Compensation Committee into a single place. These requirements include:
 - If the company doesn't have a Compensation Committee, state the basis for the view of the Board of Directors that it is appropriate for the company not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.
 - State whether or not the Compensation Committee has a charter, and, if so, indicate whether a copy is available on the company's web site (providing the web site address). If the charter is not available on the company's web site, a copy must be included with the proxy or information statement at least once every three fiscal years or if the charter has been materially amended since the beginning of the last fiscal year.
 - Provide a narrative description of the company's processes and procedures for the consideration and determination of executive and director compensation, including:
 - The scope of authority of the Compensation Committee;
 - The extent to which the Compensation Committee may delegate any of its authority to other persons, specifying what authority may be so delegated and to whom;

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- Any role of executive officers in determining or recommending the amount or form of executive and director compensation; and
 - Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the Compensation Committee or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.
- Disclosing Compensation Committee interlocks and insider participation.
- Generally, this will require the company to indicate those members of the Compensation Committee during the last fiscal year who: (a) was an officer or employee of the company, (b) was formerly an officer of the company, or (c) had any relationship requiring company disclosure pursuant to Item 404.
 - The company must describe any of the following relationships that existed during the last fiscal year: (a) an executive officer served as a member of the compensation committee of another entity, one of whose executive officers served on the company’s Compensation Committee; (b) an executive officer served as a director of another entity, one of whose executive officers served on the company’s Compensation Committee; and (c) an executive officer served as a member of the compensation committee of another entity, one of whose executive officers served as a director of the company.
- If your company is listed on the New York Stock Exchange, does its Compensation Committee’s written charter address:
 - The Committee’s purpose and responsibilities—which, *at minimum*, must be to have direct responsibility to:
 - Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO’s performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO’s compensation level based on this evaluation; and
 - Make recommendations to the board with respect to non-CEO executive officer compensation, incentive compensation, and equity-based plans that are subject to board approval; and
 - Produce a Compensation Committee report on executive officer compensation as required by the SEC to be included in the listed company’s annual proxy statement or annual report on Form 10-K filed with the SEC;
 - An annual performance evaluation of the Compensation Committee.

- Is the Compensation Committee charter posted on your company’s website?
 - Does your company’s annual report on Form 10-K state that the Compensation Committee charter is available on the company’s website and is available in print to any shareholder who requests it?
- If your company is traded on the Nasdaq market, its Compensation Committee is not required to have a written charter, although it might be advisable to consider adopting one.

Section 16 Disclosure Issues

- Did all of your company’s Section 16 officers, directors, and other individuals file their required Section 16 filings (e.g., Forms 3, 4 or 5) with the SEC in a timely manner during the past year?
 - If so, then be sure to check the box on the front of your company’s Form 10-K that indicates that your company had no delinquent filers.
 - If not, then do not check the box on the front of your company’s Form 10-K and be sure to disclose under the “Section 16(a) Beneficial Ownership Reporting Compliance Section” the names of the individuals who failed to timely file their Section 16 reports, and for each such person the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form.

Accounting Disclosure Issues

- Do your company’s financial disclosures for share-based payment arrangements disclose information that enables users of the financial statements to understand:
 - The nature and terms of such arrangements that existed during the period and the potential effects of those arrangements on shareholders
 - The effect of compensation cost arising from share-based payment arrangements on the income statement
 - The method of estimating the fair value of the goods or services received, or the fair value of the equity instruments granted (or offered to grant), during the period, and
 - The cash flow effects resulting from share-based payment arrangements¹?
- The minimum information necessary to comply with the above accounting disclosure requirements is set out in paragraph A240 of FAS 123R.

¹ Statement of Financial Accounting Standards No. 123 (revised 2004), *Share-Based Payment*, December 2004 (FAS 123R), paragraph 64.

Director Issues

Director Compensation Disclosure

- Does your company's proxy statement include the Director Compensation Table that details the compensation earned during the last fiscal year by each director?
- Does the Director Compensation Table in the proxy statement include footnotes that detail for each director the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end?
- Did any director receive perquisites that had an aggregate incremental value greater than \$10,000? If not, will you still disclose the perquisites for the director (not required by the rules, but would be permitted)?
- Does your company's proxy statement detail the standard arrangements for director compensation, stating the amounts directors receive as compensation for any services provided as director, including any additional amounts payable for committee participation or special assignments, e.g., chief executive officer search committee or serving as chair of or on a board committee?
- Does your company have any other arrangements pursuant to which its directors were compensated during the past year?
 - If so, these must be disclosed in the proxy statement and include the amount paid and the name of the director in the Director Compensation Table.
- Did your company increase all or any portion of the compensation it pays to directors during the past year, e.g., committee fees, meeting fees, chair fees, etc.?
 - If so, will your company explain why the director compensation was changed?
- Does your company maintain director stock ownership guidelines? If so, consider discussing these ownership guidelines as part of the Director Compensation Disclosure or the CD&A in the proxy statement.
- Does your company impose any required holding period on stock directors receive from the company? If so, consider disclosing this holding period requirement as part of the Director Compensation Disclosure or the CD&A in the proxy statement.

Director Interlocks and Insider Participation

- Did any director, nominee for director, executive officer, 5 percent or more beneficial security holder, or any immediate family member of any of these individuals ("related person", *see* Instructions to Item 404(a) for full definition of related person) participate in any transaction, since the beginning of your company's last fiscal year, or any currently proposed transaction, to which your company or any of its subsidiaries was or is to be a party, in which the amount involved exceeds \$120,000?

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- If so, your company must disclose the following information regarding such transaction(s):
 - The name of the related person and the basis on which the person is a related person.
 - The related person’s interest in the transaction, including the related person’s position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.
 - The approximate dollar value of the amount involved in the transaction.
 - The approximate dollar value of the amount of the related person’s interest in the transaction, computed without regard to the amount of profit or loss.
 - In the case of indebtedness, the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.
 - Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.
- The proxy statement must briefly describe the company’s policies and procedures for the review, approval, or ratification of any transaction with a related person required to be reported. While the material features of such policies and procedures will vary, examples include:
 - The types of transactions that are covered by such policies and procedures;
 - The standards to be applied pursuant to such policies and procedures;
 - The persons or groups of persons on the board of directors or otherwise who are responsible for applying such policies and procedures; and
 - A statement whether such policies and procedures are in writing, and, if not, how such policies and procedures are evidenced.

Security Ownership Disclosure Issues

- Does your company grant phantom stock units or restricted stock units to NEOs and/or directors?
 - If so, are these only to be paid out in company stock?

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- If so, then it is appropriate to supplement the security ownership disclosure in your company’s proxy by including a footnote that clearly indicates the number of such securities held by NEOs and directors. Alternatively, some companies add a column to the beneficial ownership table to disclose units held by executives and directors.
- If not, then it would not be appropriate to include these units in the security ownership disclosure.

Shareholder Activist Issues

Shareholder activists were busy once again during the 2007 proxy season. For a quick look at the main issues being pursued by these activists, review the ISS Governance Services 2007 Proxy Season Scorecard at http://www.isscorporateservices.com/knowledge/proxy_season_scorecard/index.html that includes a “scorecard” covering the key issues and their voting records, as well as a comparison to votes on these issues in 2006.

- Does your Company allow for majority voting for directors?
 - If not, you can expect shareholder proposals asking that the company adopt majority voting for directors.
- Does your company have an independent Chairman or a lead director?
 - If not, you can expect shareholder proposals asking your company to split the roles of CEO and Chairman.
- Does your company provide shareholders with an advisory vote on compensation, *i.e.*, the “Say On Pay” Proposal?
 - Since as of the end of September 2007 the only large public company that has agreed to introduce such a vote is Aflac, your company probably has not, but should expect such a proposal.
- Does your company link pay-to-performance?
 - Shareholders generally view performance-based compensation as having objective performance criteria, rather than simply stock price, so time-based stock options and restricted stock would not satisfy shareholders on their own.
 - If your company does not link pay-to-performance, you can expect shareholder asking you to introduce this into your compensation mix. This issue, at least from the company’s perspective, could be explained in the CD&A, where the company can explain why the compensation elements it already uses capture a pay-for-performance.
- Does your company grant stock options and not require shares obtained upon exercise of a stock option to be held for some required period?

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— If so, you can expect shareholder proposals asking your company to adopt mandatory holding periods for shares obtained upon stock option exercise, especially if your company has received any negative attention from institutional shareholders during the past year.

- Has your company adopted golden parachute (change-in-control) agreements that were met with negative publicity or shareholder attention?

— If so, your company can expect shareholder proposals asking that all future parachute agreements and arrangements be put to a shareholder vote.

- Has your company approved any extra benefits for NEOs under a SERP, such as granting of extra years of service, or enhanced benefits in relation to the retirement benefits offered to rank and file employees?

— If so, your company can expect shareholder proposals asking that all such extra SERP benefits be put to a shareholder vote.

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The Compensation Discussion and Analysis

The new proxy disclosure rules² require public companies (that are not small business issuers) to include a CD&A section in their proxy statements. Unlike the old Board Compensation Committee Report, the CD&A is a filed document, and is prepared by management, with significant input and guidance from a company's Compensation Committee. One of the most striking changes is that the CD&A requires a company to provide *analysis* regarding its compensation programs, policies and actions.

According to Professor Jeffrey N. Gordon, on whose article the U.S. Securities and Exchange Commission (SEC) relied in proposing the CD&A, the “CD&A should provide a bottom line assessment of the different compensation elements... and then provide a justification for the compensation in light of the demands of the job, the particular industry, the actual performance, and other factors deemed relevant – in short, an explanation of why the Compensation Committee thinks the compensation is warranted.”³

What the SEC Requires

The following sections detail the requirements for the new CD&A section of the proxy statement.

Six Core Questions

The SEC intends the CD&A to be an overview to the compensation disclosure in a company's proxy statement, *i.e.*, a narrative disclosure that puts into context the

² *Executive Compensation and Related Person Disclosure*, SEC Release Nos. 33-8732; 34-54302; IC-27444; File No. S7-03-06, issued August 11, 2006 and published in the Federal Register, 17 CFR Parts 228, 229, 232, 239, 240, 245, 249 and 274, September 8, 2006 [71 FR 53158].

³ Jeffrey N. Gordon, *Executive Compensation: If There's a Problem, What's The Remedy? The Case for "Compensation Discussion and Analysis,"* Journal of Corporation Law, Summer 2006. Available at SSRN: <http://ssrn.com/abstract=686464>.

compensation disclosure provided elsewhere in the proxy. The CD&A needs to explain the material elements of the company's Named Executive Officers' (NEOs) (the executives required to be included in the compensation disclosure tables) compensation by answering the following questions:

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?
- How do each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

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Purpose of the CD&A

The CD&A is intended to:

- Provide material information about the compensation objectives and policies for the NEOs without resorting to boilerplate disclosure
- Put into perspective for investors the numbers and narrative that follow it in the compensation disclosure tables
- Be comprehensive, so it will call for discussion of material compensation policies the company applies, even if not included among the examples set out in the rules.

Principles-Based Disclosure

The CD&A disclosure requirement is principles-based. The proxy disclosure rules identify the disclosure concept for the CD&A and provide several illustrative examples. A company must assess the materiality to investors of the information that is identified by each example in light of the particular situation of the company. In some cases an example may not be material to a particular company, and therefore no disclosure would be required. However, we note that the SEC's comment letters on 2007 disclosures used the examples as a checklist, so companies might consider whether they should add a statement that a particular example was not material so as to avoid having to respond to SEC comments. Additionally, there may be items of a company's compensation programs and policies that are not mentioned in the examples detailed in the new rules. If these items are material, companies must disclose them in the CD&A, even though it does not fall within the rules' examples.

In two speeches⁴ shortly after the final proxy disclosure rules were issued, John White, Director of the SEC's Division of Corporation Finance, explained what a principles-

⁴ *Speech by SEC Staff: Principles Matter*, by John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, Practising Law Institute Conference, New York, NY, September 6, 2006 [<http://www.sec.gov/news/speech/2006/spch090606jww.htm>] (hereafter the *Principles Matter Speech*), and *Speech by SEC Staff: The Principles Matter: Options Disclosure*, by John W. White, Division of

based disclosure means. Director White referenced the description used by Robert Herz, chairman of the Financial Accounting Standards Board, in 2002:

Under a principles-based approach, one starts with laying out the key objectives of good reporting in the subject area, and then provides guidance explaining the objective and relating it to some common examples. While rules are sometimes unavoidable, the intent is not to try to provide specific guidance, or rules, for every possible situation. Rather, if in doubt, the reader is directed back to the principles.⁵

Director White went on to say that when his predecessors studied principles-based accounting a few years ago, they noted the difficulties of a pure principles-based – or “principles only” – system and concluded that some structure is useful.⁶ Thus, the new rules include both a disclosure principle as well as examples of disclosures.

Examples of Material Disclosures

The final proxy disclosure rules detail the following examples of matters that could be appropriate (if material for the company) for the CD&A to address:

- Policies for allocating between long-term and currently paid out compensation;
- Policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation;
- For long-term compensation, the basis for allocating compensation to each different form of award;
- How the determination is made as to when awards are granted, including awards of equity-based compensation such as options;
- What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
- How specific elements of compensation are structured and implemented to reflect these items of the company’s performance and the executive’s individual performance;
- The factors considered in decisions to increase or decrease compensation materially;
- How compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (*e.g.*, how gains from prior option or stock awards are considered in setting retirement benefits);
- The impact of accounting and tax treatments of a particular form of compensation;
- The company’s equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership;

Corporation Finance, U.S. Securities and Exchange Commission, Corporate Counsel Conference, Washington, D.C., September 11, 2006 [<http://www.sec.gov/news/speech/2006/spch091106jww.htm>].

⁵ *Ibid.*

⁶ *Principles Matter Speech.*

- Whether the company engaged in any benchmarking of total compensation or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies); and
- The role of executive officers in the compensation process.

These are the examples mentioned in the final proxy disclosure rules. They are not intended to be an exhaustive list. Consequently, the fact that an item is not dealt with in these examples is not dispositive of whether it must be disclosed. Instead, the proper inquiry for any item or fact related to a company's compensation in determining if disclosure is required is to determine whether the item is material. If it is, then the principles of disclosure underlying the new rules will require that it be disclosed in the CD&A.

Sample Outline for the CD&A

What follows is a possible outline of the different sections that could make-up the CD&A:

- ❖ Introduction/Corporate Governance Section
 - Compensation Committee Members and the Compensation Committee Charter – corporate governance information about the committee
 - Compensation Consultant – name of firm, duties and assignment
 - Role of Executives in Establishing Compensation
 - Compensation Committee Activity – meetings, decisions, plan approvals, etc.
- ❖ Objectives of Compensation Programs Section
 - Compensation Philosophy
 - Benchmarking of Compensation (total compensation or any element of compensation)
 - Company Compensation Policies
- ❖ Compensation Programs Design Section
 - Narrative addresses the following questions:
 - What are the compensation programs intended to accomplish, *i.e.*, attract, motivate, retain employees, etc.?
 - Why does the company provide each element?
 - How does the company determine the amount for each element (and disclose any applicable formulas)?
 - How does each element of compensation and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?
 - Impact of Performance on Compensation
 - Disclosure of performance goals, or

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- Nondisclosure of performance goals – discussion of how difficult it would be to achieve the non-disclosed targets/goals
- Actual performance versus compensation paid
- Performance relative to that of any peer/comparator group

❖ Elements of Compensation

➤ Elements of In-Service Compensation and Benefits

- Base Salary
- Annual Bonus / Short Term Incentive
- Long-Term Incentives
- Personal Benefits and Perquisites
- Other Elements

➤ Elements of Post-Termination Compensation and Benefits

- The various termination events that trigger post-termination payments and benefits, including:
 - Retirement
 - Change-in-Control
 - Severance
 - For Cause
 - Other Terminations (death, disability, voluntary, etc.)
- Does a written agreement apply?
- Impact on Current Cash Compensation
- Impact on Deferred Compensation
- Impact on Equity Compensation
- Impact on Non-equity incentive compensation
- Impact on Personal benefits and perquisites
- Required restrictive covenants and agreements (non-solicit, non-disparagement, non-compete, etc.) from NEOs

❖ Stock Ownership/Retention Guidelines

❖ Impact of Regulatory Requirements on Compensation

❖ Conclusion

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CD&A Checklist

Following is a checklist for the CD&A that includes key questions for each section that was detailed above in the sample CD&A outline.

Introduction/Corporate Governance Section

This section provides the lead-in to the CD&A. Companies should start with the facts about their Compensation Committee (those required under the newly-codified corporate governance requirements⁷), the role of any Compensation Consultant, and the role of executives in the company's compensation design, process and decisions.

Compensation Committee Members and the Compensation Committee Charter

This section identifies the members of the Compensation Committee during the year and their responsibilities.

Key Questions

- What is the composition of the Compensation Committee?
- If a Compensation Committee or similar committee does not exist, why not?
- If no such committee exists, which directors participate in the consideration of executive officer and director compensation?
- Are members of the Compensation Committee independent? Under which definition(s)? Who determined this?
- What are the qualifications for directors to serve on the Compensation Committee? Is any special knowledge about compensation matters required? What knowledge of compensation matters does each director possess?
- What are the Compensation Committee's primary responsibilities?
- Does the Compensation Committee have a charter? Where can it be found (give web address if available online)? If not available online, has the charter been filed with the proxy as required (every three fiscal years or if materially revised since the beginning of the last fiscal year)?
- How can the charter be revised? When was the charter last reviewed? What was the result of this review?
- Does the Compensation Committee have the authority to secure the services of advisers both inside and outside the company? Does it have budgetary authority for outside advisers it retains?
- Who is in charge of the Compensation Committee's meeting agendas?
- Who sets the Compensation Committee's meetings and calendar?
- What is the Compensation Committee's scope of authority?
- To what extent may the Compensation Committee delegate its authority to other persons? What authority may be delegated? To whom?
- What authority has been delegated by the Compensation Committee? To whom?

Compensation Consultant

The proxy disclosure rules require companies to identify any compensation consultants that had a role in determining or recommending the amount or form of executive and director compensation and provide related information.

⁷ Item 407(e) of Regulation S-K.

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- Does the Compensation Committee engage an outside compensation consultant to advise the Committee? Is that consultant and the consultant's firm considered independent? Factors the Committee might consider in evaluating this are:
 - The ability to hire and fire the consultant;
 - The amount of work outside of executive compensation services that are performed by the consultant for the company;
 - The portion of the consultant's work that is commissioned by the Committee as opposed to management;
 - Whether the Committee is copied on final work product prepared for management; and
 - Whether the Committee receives copies of all of the consultant's bills to the company.
- Does the company's management retain a compensation consultant? Is it the same as the Compensation Committee's consultant?
- Who acted as a compensation consultant to the Compensation Committee since the beginning of the last fiscal year?
- If either the Compensation Committee or management retains the services of a compensation consultant, what is the nature and scope of the compensation consultant's assignments? Who determines the compensation consultant's assignments?
- What role does the compensation consultant have in determining compensation programs, *e.g.*, the compensation consultant provides competitive data and business and technical considerations and does/does not recommend pay program and pay level changes?

Role of Executives in Establishing Compensation

This section should detail the role of executives in the company's process for setting compensation, especially the role of the CEO in setting the compensation of his/her direct reports. For example, are certain executives required to attend the Compensation Committee's meetings, act as secretary for the Committee, prepare materials and agendas for committee meetings, etc.

Key Questions

- Which executive(s) play a role in the assessment, design and/or recommendation of compensation programs, plans and awards for executives and directors?
- Who are these executives?
- What do these executives actually do in relation to the company's compensation programs, policies, actions and/or decisions?
- Do the executives attend meetings of the Compensation Committee? General meetings? Executive sessions?
- What tasks does the Compensation Committee delegate to executive(s)?

Compensation Committee Activity

This section should discuss the administrative details concerning the compensation committee activities during the past fiscal year, and before or after the last fiscal year if material to a complete understanding of the compensation disclosures.

Key Questions

- What actions did the Compensation Committee take since the beginning of the last fiscal year and prior to the time the next proxy will be filed?
- Did the Compensation Committee adopt any new compensation plans or programs or amend any existing compensation plans or programs?
- Did the Compensation Committee institute any new compensation policies or amend any existing compensation policies?
- Why did the Compensation Committee take these actions?
- How many times during the last year did the Compensation Committee meet?
- Did any executives attend these meetings? Who and why?
- How many times did the Compensation Committee meet in executive session during the year?
- Did any executives attend these executive sessions? If so, who? Did any adviser to the Compensation Committee attend these executive sessions? If so, indicate the adviser and relationship to the Compensation Committee.

Objectives of Compensation Programs Section

Companies should lay out the underlying objectives of their compensation programs and policies in this section. In doing so, we believe companies should first set out their compensation philosophy and explain how it impacts the company's compensation decisions and designs. Next, the company should explain if it benchmarks all or any element of compensation for executives. If the company does, it should disclose the companies that are in the peer/comparator group used for benchmarking purposes, why this group was selected, whether and when it is reviewed, by whom, and when it was last reviewed and what actions were taken, if any, as a result. Finally, the company should disclose its standard compensation policies that are material for shareholders to gain an understanding of the company's compensation programs, policies and decisions.

Compensation Philosophy

This section should be designed to detail the company's general compensation philosophy.

Key Questions

- What is your company's compensation philosophy?
- What are the goals of the company's compensation programs?
- What are the company's broad objectives for its compensation programs?
- How does the company establish compensation?
- How does the company judge whether the compensation programs have met their goal(s)?
- When is the compensation philosophy reviewed?
- When was the compensation philosophy last reviewed? What was the result of that review?

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Benchmarking

If a company benchmarks its total compensation or any material element of compensation, then it must identify the benchmark and, if applicable, its components including component companies.

Key Questions

- Does the company benchmark all or any element of compensation?
- If it does, why does it benchmark?
- What companies does it benchmark compensation against?
- How and why were these companies selected for benchmarking?
- How does the company compare to the benchmark companies on general business comparative data (revenues, market capitalization, number of employees, etc.)?
- How does the company compare to the benchmark companies on business performance metrics (total shareholder return and appropriate operational performance metrics) for the past 1-, 3-, and 5-year periods?
- What is the competitive pay objective (*e.g.*, 50th percentile) relative to the benchmark companies and how does actual pay compare to the pay objectives?

Compensation Policies

Adding a section to the CD&A that details a company's material, general compensation policies probably will be necessary given the broad requirements set out for the CD&A. Alternatively, to save space in the proxy, companies may wish to try and include their material, general compensation policies in their Compensation Committee's charter and incorporate them by reference into the CD&A.

Key Questions

- What are the material compensation policies applicable to the company's executives?
- Who developed these compensation policies? Management or the Compensation Committee?
- Why has the company established these compensation policies?
- How were these compensation policies established?
- How does the company evaluate whether these compensation policies are effective?
- When are the compensation policies reviewed? By whom? What happened as a result of the last review?
- Examples of general policies that might be detailed include:
 - Total Compensation Policy
 - Benchmarking of Compensation Policy
 - In-Service Compensation Policy
 - Base Salary Policy
 - Short-Term Incentive Compensation/Annual Bonus Policy
 - Long-Term Incentive Compensation Policy
 - Benefits and Perquisites Policy
 - Deferred Compensation Policy
 - Equity Grant Policy
 - Allocation of Compensation Between Different Elements Policy

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- Mix of Compensation and Relationship between fixed and at-risk compensation Policy
- Cash versus Equity Policy
- Performance-Based Compensation Policy (individual, corporate, business unit/line of business performance)
- Post-Termination Compensation Policy
- Compensation Committee Use and Disclosure of Conclusions Regarding Tally Sheets Policy
- Tax Gross-Up Policy
- Equity Dilution Policy – Annual Run-Rate and Total Overhang
- Stock Option/Stock Appreciation Right Repricing Policy
- Dividends on Equity Awards Policy
- Stock Ownership Policy
- Stock Retention Policy
- Wealth Accumulation Policy
- Internal Pay Equity Policy
- Employment Agreement Policy
- Severance and Change-in-Control Policy
- Tax Deductibility Policy
- Accounting for Compensation Policy
- Shareholder Approval Policy
- Compensation Disclosure Policy
- Impact of Financial Restatements on Compensation Policy
- Executives Serving on Other Boards of Directors Policy

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Compensation Programs Design Section

This section must discuss what the compensation programs are designed to reward. For example, attracting, retaining and motivating employees, or reward achievements that will bring the company success, such as achievement of the company's strategic goals, or perhaps the compensation programs are designed to reward an increase in the company's stock price which benefits shareholders.

The committee may also wish to address what it thinks of the design and level of compensation paid, *i.e.*, are the amounts appropriate, are they furthering the company's compensation philosophy or strategic business goals?

Impact of Performance on Compensation

This section should discuss the impact of the actual performance under the company's material performance measures on compensation to be paid, to be awarded, or how it might factor into future grants.

Key Questions

- What performance metrics are used? Why?
- What performance targets are used? Why?
- If the performance targets are not disclosed, how difficult will it be for the executive or how likely will it be for the company to achieve the undisclosed target levels or performance goals?
- What is the relationship between performance and compensation? If performance increases or decreases by a certain percent, what impact is there on compensation? Is the impact on compensation to the same degree as the

performance? How was the relationship between performance and compensation determined?

- Are the utilized performance metrics appropriate for the company's industry?

Elements of Compensation Section

This section must detail all the elements of compensation for the NEOs, describe why the company chooses to use each element, how the company determines the amount for each element, and how decisions regarding each element fit into the company's overall compensation objectives and affect decisions regarding other elements.

Elements of In-Service Compensation

This subsection should address all the elements of compensation payable to executives during their employment by the company, including:

- Base Salary of the NEOs;
- Annual Bonus / Short-Term Incentive;
- Long-Term Incentives – equity awards and non-equity incentive awards
- Personal benefits and perquisites
- Employee Stock Purchase Plans / Employee Stock Ownership Plans,
- Other material elements of compensation not otherwise specified above, and
- Whether employment agreements are utilized, and, if so, the material details of such agreements (in plain English).

Key Questions

- What is the composition of current compensation packages for executives while employed by the company?
- How and why was this design selected?
- How does each element relate to the other elements, the total compensation package, the company's performance, and the company's compensation policies and programs?
- Why does the company choose to use each such element of compensation?
- Are these elements and the mix of elements appropriate for the company given its performance, industry, current challenges and environment?
- What is the process for review of the various elements of compensation?
- How does performance ultimately impact the compensation that will be paid?
- What performance metrics and weightings are utilized, if any?
- How do individual, business unit, and corporate performance and weightings impact compensation?
- Can the Compensation Committee exercise any positive or negative discretion in relation to compensation? If so, describe.
- What awards are used for annual incentives? Why? Any overlap with long-term incentives' performance goals?
- What awards are used for long-term incentives? Why?
- How are award sizes determined?
- What types of awards are available under the company's compensation plans?
- Were the plans approved by shareholders? If not, why not? If so, when?

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- What is the timing of grants of incentive awards relative to the release of material, non-public information?
- How does the company establish the exercise/base price of stock options/SARs? How does this compare to the closing market price on the date of grant?
- When are actions taken to approve incentive grants relative to their grant date?
- What personal benefits and perquisites are offered to executives? Why and how were these selected? When are they reviewed?
- Does the company utilize employment agreements? If so, which executives have them? Why were employment agreements used?
- Does the company utilize any termination of employment (e.g., severance) or change-in-control agreements with executives? If so, which executives have them? Why were such agreements used?

Elements of Post-Termination Compensation

This subsection should address all the material elements of post-termination payments and benefits for each possible triggering (termination) event, including retirement, change-in-control, severance, for cause, or other (death, disability, voluntary, etc.) event. For each event, the CD&A needs to discuss:

- Whether the event and the payments and benefits payable are covered by a written or verbal agreement
- The impact of the event on current cash compensation
- The impact of the event on deferred compensation
- The impact of the event on outstanding equity compensation
- The impact of the event on benefits and perquisites
- Whether the executives receiving payments and/or benefits upon the triggering event would be subject to any restricted covenants and agreements, which such covenants, and their duration.
- Covenants and Agreements from Executives

Key Questions

- What retirement benefits are provided to executives? Why were these benefits selected?
- Are executives provided with supplemental retirement benefits (SERPs)? If so, why and what do they provide, especially in relation to what is offered to the broad-based employee population?
- If offered, are supplemental benefits funded? If so, how and why was the particular funding mechanism selected?
- Does the company provide change-in-control or severance protection to executives or directors? If so, why?
- Does the company use written agreements to provide change-in-control or severance protection or benefits to executives or directors?
- If the company provides change-in-control or severance benefits/protection to executives or directors, when are these benefits reviewed? By whom? What was the result of the last review?

- Are executives or directors subject to restrictive covenants (non-solicit, non-compete, non-disparagement, etc.)? If so, why? How do these restrictive covenants relate to any compensation or benefits payable or to be payable upon certain triggering events?

Stock Ownership/Retention Guidelines Section

This section would detail any company policies or guidelines related to required executive ownership of company stock and/or stock retention guidelines applicable to equity awards to executives.

Key Questions

- Does the company have stock ownership guidelines? Why or why not?
- If so, to whom do the stock ownership guidelines apply?
- What are the required stock ownership guideline amounts for the NEOs?
- What counts toward the stock ownership guidelines, *e.g.*, restricted stock, RSUs, vested SARs (all underlying shares or just those that represent the appreciation), vested stock options (all underlying shares or just those in excess of the exercise price), performance shares, etc.?
- When are the stock ownership guidelines reviewed? When was the last time the guidelines were reviewed? What happened as a result of the review?
- When is the stock ownership of executives reviewed? When was the executives' stock ownership reviewed? Were the executives in compliance with the guidelines?
- How long do executives have to comply with the stock ownership guidelines?
- What is the consequence if an executive fails to timely comply with the stock ownership guidelines?
- Does the company have a stock retention policy? Why or why not?
- If so, to whom does the stock retention policy apply?
- How does the stock retention policy work? Is there any maximum stock ownership amount after which the retention policy does not apply?
- How long must shares be retained, *e.g.*, fixed number of years, until retirement/termination, etc.?
- When was the last time the shares held by executives were reviewed? Had they retained all the shares they were supposed to have retained? If not, which executives were not in compliance?
- What is the consequence for failing to retain the necessary shares under the share retention policy?
- Does the company have a policy that addresses hedging of company stock ownership by executives? If so, what is the policy?

Impact of Regulatory Requirements Section

This section should detail the impact of accounting rules, securities rules, and tax rules, including the tax code requirements regarding the company's ability to deduct compensation paid in excess of \$1 million paid to a NEO, on the company's compensation policies, programs and actions.

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- In making compensation design and award decisions, what role does the company's ability to deduct compensation in accordance with Internal Revenue Code Section 162(m) play?
- How much compensation paid during the last year was not Internal Revenue Code Section 162(m) qualified? Approximately what value was lost to the company as a result of the inability to deduct this amount for tax purposes?
- Why does the company qualify/not qualify particular elements of compensation under Internal Revenue Code Section 162(m)?
- What role does Internal Revenue Code Section 409A play in compensation design and award decisions?
- What impact does the expensing of equity awards (including stock options) under FAS 123R have on the company's compensation decisions?
- What impact do the accounting rules applicable to non-equity incentive compensation plans (cash plans) have on the company's decisions and design related to such compensation?
- What impact does the determination of the NEOs under the new proxy disclosure rules have on the company's compensation decisions and designs, *e.g.*, payment of bonuses, setting of salaries, etc.?
- What impact do the new proxy disclosure rules have on the company's compensation decisions and designs?
- Do any other regulatory requirements impact the company's compensation programs, designs or decisions (*e.g.*, government contractors are unable to be reimbursed for stock options/SARs used to compensation employees)? If so, how?

SEC Comments on 2007 Proxy Disclosures

The following summary is based on a review of several comment letters the SEC sent to companies concerning their 2007 proxy disclosures as well as a review of several other summaries that were prepared by other organizations when these SEC Comment Letters first appeared in August 2007, generally with a response deadline of September 21, 2007.

Most of the SEC comments were directed at the CD&A. The comments fell into the following areas and were generally as follows:

- Compensation Philosophy
 - Explain and place in context why the company chose to pay each element of compensation.
- Role of Outside Advisors
 - Disclose the material elements of the instructions or directions the compensation committee gave to the consultant(s).
 - If both the compensation committee and management retained their own consultants, clarify the duties of each consultant and their role in establishing compensation for the NEOs, and identify each consultant by name.
- Peer Groups/Comparator Groups/Benchmarking
 - Expand disclosure of targeted percentiles to explain why/how the targets were selected

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- Disclose how actual elements of compensation compare to targeted amounts against the peer group/comparator group
- Provide the names of all peer group/comparator group companies
- If using a pre-established compensation survey, detail the names of the participating companies
- Performance Targets
 - Expand disclosure to include how individual performance of the NEOs was taken into account by the compensation committee and the effect it had on each element of compensation for which individual performance was considered
 - Disclose the performance goals for the current year
 - Note: While the SEC made this request of a number of companies, many companies responded that under Instruction 2 to Item 402(b) of Regulations S-K, this information was unnecessary to provide a material understanding of NEO compensation during the last fiscal year covered by the proxy tables. It will be interesting to see what the counter-response will be from the SEC and how this issue ultimately is resolved.
 - Discuss the weight given to each performance factor or goal and how performance affects the compensation awarded
 - Expand disclosures to include performance targets, and if you believe that the disclosure of the targets would cause harm and be excluded under Instruction 4 to Item 402(b) of Regulation S-K, provide on a supplemental basis a detailed explanation for such conclusion
 - Note any time that the compensation committee used its discretion to adjust compensation paid and note where adjustments affected an individual NEO rather than the group as a whole
- Regulatory Impact on Compensation
 - Explain how tax, accounting and Code Section 162(m) implications impact compensation decisions and programs
- Differences in NEO Compensation
 - Explain why CEO's compensation is so much higher than the other NEOs
 - Disclose the material terms of the CEO's employment agreement and analyze why the agreement was designed and structured to provide what it does
 - Clarify whether the compensation committee considered other factors in setting compensation for the NEOs other than the CEO
- Severance and Change-in-Control
 - Provide additional detail on the Change-in-Control triggers
 - Explain how the severance, termination and/or Change-in-Control terms were the result of negotiations or the result of an evaluation of benefits provided by peer/comparator companies
 - Please add a total for each NEO for your tabular disclosure of the severance, termination and Change-in-Control payments and benefits disclosure
- Director Compensation
 - Disclose all assumptions made in making the valuation of stock and option awards shown in the Director Compensation Table

- Describe why the Chairman’s fees, stock awards and total compensation are so much greater than the other board members

On October 10, 2007, the SEC published its summary of the comment letters it had issued for the compensation disclosures it had reviewed from the first proxy season under the new rules⁸. The two main points raised by the Report were:

- CD&As need to be focused on **how** and **why** a company arrives at specific executive compensation decisions and policies, *e.g.*, they need more **analysis**, and
- The **manner of presentation** matters - in particular, using plain English and organizing tabular and graphical information in a way that helps the reader understand a company’s disclosure.

Best Practices

In reviewing the proxy disclosures in 2007, we found a few methods of disclosure that seemed to work better than others. Following are a list of the methods of disclosures we found and some of the companies that used such methods.

- **Chart/Table in CD&A for Overview of Elements of Compensation** – using such a chart/table makes it possible to quickly detail the elements of compensation for NEOs, the definition/description of each element, and the reason/purpose (the “why”) these elements are used.
 - Used in proxies of: Aflac, Ameriprise Financial, Gannett, General Cable, and Genuine Parts
- **Chart/Table for Performance Goals** – using a chart/table to disclose the company’s performance goals and actual performance achieved for compensation plans in the CD&A make it easier for readers to understand the performance metrics.
 - Used in proxies of: Allstate and Marathon Oil
- **Chart/Table for Stock Ownership Guidelines** – using such a chart/table along with supporting narrative disclosure in the CD&A makes it easier for readers to understand your stock ownership guidelines, especially if the table details the stock ownership guidelines, the number of shares actually owned by each NEO, how much time is given to attain the guideline amount and where each NEO is within such period, and what counts for purposes of the guidelines.
 - A similar table can be used in the Director Compensation section of the proxy to better explain any stock ownership guidelines that apply to directors
 - Used in proxies of: Genworth Financial and Dow Chemical

⁸ *Staff Observations in the Review of Executive Compensation Disclosure*, SEC Staff, October 10, 2007 (available at: <http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm>) (the “Report”).

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- **Sub-Tables to Summary Compensation Table for All Other Compensation** – using one or more sub-tables to detail the various components of All Other Compensation makes it easier for readers to understand your disclosures.
 - Used in proxies of: Aetna, Sprint Nextel, and Target
- **Description of Grant in Grants of Plan-Based Awards Table** – including a column (perhaps titled as “Award Type”) in the Grants of Plan-Based Awards Table that describes the various grants included (*e.g.*, performance share award, restricted stock, stock option, stock appreciation right) makes it easier for readers to understand the disclosures included in that table.
 - Used in proxies of: Allstate and CVS/Caremark
- **Totaling Multiple Lines of Information by NEO** – whenever multiple lines of data are presented for an NEO, if appropriate, also present a total of such lines of data to aid readers in better understanding the whole of the disclosure.
 - Used in proxies of: Allstate and JPMorgan Chase
- **Chart/Table for Termination and Change-in-Control Payments and Benefits** – using a table to disclose such payments and benefits permits readers to more easily comprehend the disclosure, especially if, as SEC Comments suggest, totals for the various termination events are also included.
 - Used in proxies of: Motorola and Weyerhaeuser
- **Better Director Compensation Disclosure** – by expanding the director disclosures, both tabular and narrative, to provide a more complete understanding of the director compensation program at the company, readers will benefit.
 - Used in proxies of: Merrill Lynch and Raytheon



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