1. **Reporting of Death Benefit.** A registrant sponsors a death benefit-only ("DBO") plan for its executive officers. The DBO plan results in payment of a death benefit to designated beneficiaries equal to a multiple of an executive officer’s final salary in the event of termination of employment due to death. Unlike a non-equity split-dollar life insurance arrangement, in which the designated beneficiaries directly receive life insurance proceeds, all DBO plan benefits are paid directly by the registrant from its general assets. The registrant may, but is not required to, purchase a life insurance policy to hedge against this future DBO liability; indeed, some individuals may not be insurable.

How should this arrangement be reported under Item 402 of Regulation S-K?

While Item 402(c)(2)(ix)(F) states that “[t]he dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer” is reportable in the All Other Compensation column of the Summary Compensation Table, this arrangement does not necessarily involve a life insurance arrangement.

**Suggested Answer:** A possible payment under a DBO plan from the registrant’s general assets should be disclosed as a potential payment upon termination of employment or a change-in-control of the registrant under Item 402(j) and not in the Summary Compensation Table under Item 402(c). As there is no current cost associated with providing the benefit, and any insurance that may be purchased to hedge against liabilities under the DBO plan are for the benefit of the registrant and not the executive officer, no amount is reportable annually in the All Other Compensation column of the Summary Compensation Table.

**SEC RESPONSE:** As noted in the Suggested Answer, this arrangement is clearly subject to disclosure under Item 402(j). In addition, where there is no life insurance involved, in the event of an actual termination of employment due to death, any payment or accrual under the DBO plan is reportable in the All Other Compensation column of the Summary Compensation Table pursuant to Item 402(c)(2)(ix)(D) for the fiscal year in which the named executive officer dies.

In a situation where the registrant has purchased a life insurance policy on the named executive officer to help fund the future DBO liability, whether disclosure of the ongoing arrangement is required in the Summary Compensation Table will depend upon the particular facts and circumstances. For example, if there is a direct relationship between the life insurance policy and the required death benefit payment, such that the registrant is simply serving as a conduit for the payment of the insurance policy proceeds, then the arrangement should be reported as a current benefit to the named executive officer (presumably on the basis of the
dollar value of the associated premium payments). In any event, the substance rather than the form of the arrangement will control the disclosure requirement. The SEC Staff indicated that it was receptive to receiving more information from the ABA about these arrangements in order to provide a more refined response.

In addition, the SEC Staff noted that, given investor concerns about the use of so-called “golden coffin” benefits, an analysis of a registrant-sponsored DBO plan, including the reasons for the arrangement, should be included in the registrant’s Compensation Discussion and Analysis.

2. Reporting of Equity Appreciation Units. A parent company contributes assets from a line of business into a subsidiary (“Newco”). Less than 20% of Newco’s equity securities are then sold to the public in an initial public offering pursuant to which Newco becomes subject to the reporting requirements of the Securities Exchange Act of 1934. Newco is one of several lines of businesses held by the parent company. The parent company does not have publicly-traded stock and is not subject to reporting obligations under Item 402.

Newco’s executive officers hold phantom stock units in the parent company. These units may only be redeemed for cash. In determining the parent company’s value, only Newco’s operating results are considered – fluctuations in Newco’s stock price do not affect unit values.

Should these phantom stock units (the value of which is based only in part on the value of Newco) be reported by Newco’s named executive officers in the registrant’s Summary Compensation Table and, if so, how? Or does Item 402 only require the reporting in the Summary Compensation Table of stock and option awards the value of which are based solely on the registrant’s securities?

SEC RESPONSE: Assuming the phantom stock units in the parent company granted to Newco’s named executive officers are within the scope of FASB ASC Topic 718, they must be reported as stock awards in the registrant’s Summary Compensation Table. The fact that the value of the phantom stock units is not based solely on the registrant’s equity securities does not change this result. As stated in Item 402(a)(2) of Regulation S-K, Item 402 requires clear, concise, and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to a registrant’s named executive officers and directors. See also Compliance and Disclosure Interpretations 217.13. This will always be the case where the companies are part of a consolidated group.

In the event that a named executive officer receives a stock award or stock option involving the equity securities of an unrelated entity, this award must be reported in the registrant’s Summary Compensation Table (and discussed in the registrant’s Compensation Discussion and Analysis). In this situation, the SEC Staff suggests calling the Office of the Chief Counsel of the Division of
3. Reporting for NEOs. An individual who, at all times is an executive officer of the registrant, is a named executive officer for Year 1 and Year 4, but not Years 2 or 3. In preparing its Summary Compensation Table for Year 4, must the registrant include compensation information for this individual for Years 2 and 3 (in addition to the compensation information required for Year 4)?

If the answer is yes, would the response be different if:

- assuming the individual served as the registrant’s principal executive officer or principal financial officer during Year 4, he or she did not serve in that capacity during any part of Years 2 and 3; or

- assuming the individual was one of the registrant’s three most highly-compensated executive officers (other than the PEO or PFO) at the end of Year 4, he or she did not serve as an executive officer of the registrant (whether or not in the same position) during any part of Years 2 and 3?

Suggested Answer: Compliance and Disclosure Interpretation 119.01 makes clear that, if a person who was not a named executive officer in fiscal years 1 and 2 becomes a named executive officer in fiscal year 3, compensation information only for fiscal year 3 need be provided in the Summary Compensation Table. In addition, Compliance and Disclosure Interpretation 119.18 states that if a person who was a named executive officer in year 1, but not in year 2, will again be a named executive officer in year 3, compensation information for this person must be disclosed in the Summary Compensation Table for all three fiscal years.

It is not clear whether C&DI 119.01 is only applicable to an individual when they become a named executive officer for the very first time, or whether it also applies to situations, such as those set forth in the question, where there is a two-year gap between an individual’s named executive officer status. It is our understanding that C&DI 119.18 is intended to address only the particular facts presented – that is, reporting where there is a one-year gap between named executive officer status. Should it also be interpreted as standing for the broader principle that, once an individual is a named executive officer, the registrant is always required to report his or her prior fiscal year’s compensation when he or she once again becomes a named executive officer (assuming that he or she has served as the PEO, PFO, or an executive officer, as applicable, during the intervening period)? In other words, is the length of the gap between named executive officer status irrelevant from a reporting standpoint?

On its face, it does not appear that the result set forth in C&DI 119.18 supersedes the principle set forth in C&DI 119.01. Accordingly, under the facts presented, the registrant is not required to report the compensation information for Years 2
and 3 for an individual who once again becomes a named executive officer in Year 4. There is no policy reason for treating an individual who may have been a named executive officer during a period not covered by the Summary Compensation Table (that is, more than two years from the last completed fiscal year) differently from a new named executive officer.

SEC RESPONSE: Compliance and Disclosure Interpretation 119.01 was intended to be just a transitional interpretation. In the scenario presented by this question, the registrant must provide the disclosure required by Item 402(c)(2) in the Summary Compensation Table for all three years (years, 2, 3, and 4). In view of the fact that the transition to the full three-year Summary Compensation Table has been completed, the SEC Staff is re-evaluating the need for Question 119.01.

4. Reporting of Nonqualified Deferred Compensation. Compensation and Disclosure Interpretation 125.04 describes an excess plan related to a qualified plan where the contributions earned in 2008, which are reportable in the All Other Compensation column of the 2008 Summary Compensation Table, are not credited to the executive’s account until January 2009. Under these facts, the SEC Staff takes the position that these contributions should be considered registrant contributions “during” 2008 and reported in the “Registrant Contributions in Last Fiscal Year” column (column (c)) of the 2008 Nonqualified Deferred Compensation Table. This suggests that the reporting in the Nonqualified Deferred Compensation Table is to be made on an “accrual,” rather than a “cash,” basis.

Such an interpretation has at least two possible consequences:

- First, some registrants do not credit their matching contributions to an executive officer deferral arrangement until the fiscal year following the year in which the deferral election is made. Accordingly, these matching contributions may not appear in the Summary Compensation Table until the fiscal year in which made. This “cash-based” reporting approach would appear to lead to potentially inconsistent reporting results between the Summary Compensation Table and the Nonqualified Deferred Compensation Table.

- In addition, Item 402(i)(2)(vi) provides for the reporting in the “Aggregate Balance at Last Fiscal Year-End” column (column (f)) of the Nonqualified Deferred Compensation Table of the dollar amount of the total balance of the executive officer's account as of the end of the registrant’s last fiscal year. This would appear to a “cash-based” amount, creating a potential internal inconsistency between column (b), the dollar amount of aggregate executive contributions during the registrant’s last fiscal year (which would be reported on an “accrual” basis) and column (f).
Would it be permissible for a registrant to report amounts in the Nonqualified Deferred Compensation Table on a “cash” basis to align the reporting in this table with the Summary Compensation Table and to maintain internal consistency within the Nonqualified Deferred Compensation Table itself?

**Suggested Answer:** Yes. Since there is a disconnect between the basis of reporting in the Summary Compensation Table and the Nonqualified Deferred Compensation Table regardless of which approach is used, it should be permissible for a registrant to report amounts in the Nonqualified Deferred Compensation Table on either a “cash” or “accrual” basis as long as (i) the selected methodology is applied consistently from fiscal year to fiscal year and (ii) it discloses by means of a footnote to the Nonqualified Deferred Compensation Table the methodology that it has chosen to employ.

**SEC RESPONSE:** The information reported in the Nonqualified Deferred Compensation Table should be consistent with what is reported in the Summary Compensation Table for the last completed fiscal year. Since the “All Other Compensation” column (column (i)) of the Summary Compensation Table is to include registrant contributions or other allocations to vested and unvested defined contribution plans (see Item 402(c)(2)(ix)(E)), the Nonqualified Deferred Compensation Table should also include this information. Consequently, a registrant matching contribution or other allocation to a named executive officer’s deferral account should be reflected in both the “Registrant Contributions in Last Fiscal Year” column (column (c)) and “Aggregate Balance at Last Fiscal Year-End” column (column (f)) of the Nonqualified Deferred Compensation Table where the contribution or other allocation is ministerial in nature (that is, the registrant is obligated to make the contribution or other allocation). In addition, the registrant should provide a footnote to the relevant columns of the Nonqualified Deferred Compensation Table disclosing that the amounts reported include contributions or other allocations that will be made after the end of the last completed fiscal year.

5. **Reporting of Non-Equity Incentive Plan Awards Received in Stock.**

Compliance and Disclosure Interpretation 119.22 states that, in the case of a non-equity incentive plan award as defined in Rule 402(a)(6)(iii) where a named executive officer elects to receive the award in stock, Instruction 2 to Item 402(c)(2)(iii) and (iv) does not apply because the award is an incentive plan award rather than a bonus. C&DI 119.22 goes on to provide that the company should:

- report the award in the non-equity incentive plan award column (column (g)) of the Summary Compensation Table, reflecting the compensation the company awarded, with footnote disclosure of the stock settlement as elected by the named executive officer (which is consistent with the reporting treatment of a cash bonus foregone at the election of an NEO under which stock or equity-based compensation instead has been received by the NEO, as
provided by Instruction 2 to Item 402(c)(2)(iii) and (iv)); and

- report the award in the estimated future payouts under non-equity incentive plan awards columns (columns (c)-(e)) of the Grants of Plan-Based Awards Table (which differs from the reporting treatment of a cash bonus foregone at the election of an NEO under which stock or equity-based compensation instead has been received by the NEO, as provided by Instruction 2 to Item 402(c)(2)(iii) and (iv)).

In this latter case, the reason given for the differing treatment of a cash bonus and non-equity incentive plan compensation is that the stock received upon settlement should not also be reported in the Grants of Plan-Based Awards Table because that would double count the award. This is the case, even though, in the case of a cash bonus foregone at the election of an NEO under which stock or equity-based compensation instead has been received by the NEO, Instruction 2 to Item 402(c)(2)(iii) and (iv)) provides that the stock, option, or non-equity incentive plan award elected by the NEO should be reported as such in the Grants of Plan-Based Awards Table.

It is believed that the basis for this differing treatment between cash awards which are otherwise similar (except for the fact that the non-equity incentive plan award is structured to measure performance by reference to the financial performance of the company or an affiliate, the company’s stock price, or any other performance measure) is that the Grant of Plan-Based Awards Table does not provide for the disclosure of amounts that are reportable in column (d) of the Summary Compensation Table, while it does provide for the reporting of non-equity incentive plan compensation (in columns (c)-(e).

To minimize the potential trap for the unwary that the differing reporting treatment in the Grants of Plan-Based Awards Table otherwise creates, should C&DI 119.22 be modified to provide that, in the case of a non-equity incentive plan award as defined in Rule 402(a)(6)(iii) where a named executive officer elects to receive the award in stock, the award should be reported in the Grants of Plan-Based Awards Table as either a stock award (column (i)) or an option award (columns (j)-(k))?

**SEC RESPONSE:** The reporting of an award should be consistent with its character. The character doesn’t change simply because a named executive officer elected to receive payment of the award in the form of stock or equity-based compensation. Thus, a registrant should report what the Compensation Committee awarded, including, in the case of a non-equity incentive plan award, the threshold, target, and maximum payout levels. It would be insufficient to provide information about the Compensation Committee’s decision if the registrant simply reports the amount of the actual award payout.
The “non-embedded” concept is based on the situation where the named executive officer has no right to receive stock or equity-based compensation at the time of the award, but he or she later obtains the right to make such an election. It is different where the named executive officer has the right to make a choice because this right, when embedded in the award at the time of grant, are within the scope of FASB ASC Topic 718.

In the SEC Staff’s view, there is no reason that the disclosure with respect to non-equity incentive plan awards should be symmetrical with the disclosure of bonuses. The Grants of Plan-Based Awards Table focuses on what the Compensation Committee decided, as a complement to the Summary Compensation Table, rather than what the named executive officer received.

When a named executive officer elects to take a bonus in the form of stock, the award is reportable in the Grants of Plan-Based Awards Table. But this different than a non-equity incentive plan award because the form of the award is discretionary; otherwise the award would not have been reported in this table.

6. Reporting of Performance Share Award. Item 402(c)(2)(v) of Regulation S-K requires that a registrant report the aggregate grant date fair value of stock awards in the Summary Compensation Table. Instruction 1 to Item 402(c)(2)(v) and (vi) provides that, for awards reported in columns (e) and (f) of the Summary Compensation Table, the registrant must include a footnote disclosing all assumptions made in the valuation by reference to a discussion of those assumptions in the registrant’s financial statements, footnotes to the financial statements, or discussion in the Management’s Discussion and Analysis. Further, Instruction 3 to Item 402(c)(2)(v) and (vi) provides that, for any awards that are subject to performance conditions, the registrant is to report the value at the grant date based on the probable outcome of such conditions.

a) In 2010, a company grants an executive officer a performance share award with a three-year performance period that begins in 2010 and ends in 2012. As required by Instruction 3 to Item 402(c)(2)(v) and (vi), the company reports the grant date fair value of this award in its Summary Compensation Table for 2010 based on the probable outcome of the award’s performance conditions. The award provides for threshold, target, and maximum payout amounts depending on the level of achievement of the award’s performance conditions as determined at the conclusion of the performance period. Following the completion of the performance period, the compensation committee determines that the executive officer has earned a number of shares that exceeds the target payout amount. The grant date fair value of these earned shares also exceeds the amount originally reported in the Summary Compensation Table for 2010 based on the company’s estimate of the probable outcome of the award’s performance conditions at that time. Must the company report the value of the additional shares earned in excess of the amount originally reported in the Summary Compensation Table and the Grants of Plan-Based Awards Table in either (or both) of these tables for 2012?
Suggested Answer. No. Neither the grant date fair value of (or any other amount related to) the shares earned in excess of the amount originally reported in the Summary Compensation Table and the Grants of Plan-Based Awards Table for the year in which the performance share award was granted needs to be reported in either of those tables once the actual number of shares earned has been determined. Instruction 3 to Item 402(c)(2)(v) and (vi) provides that, in addition to reporting the value of the award at the grant date based on the probable outcome of its performance conditions, the company must also disclose in a footnote to the Summary Compensation Table the value of the award at the grant date assuming that the highest level of the performance conditions will be achieved if an amount less than the maximum value was included in the table. Thus, investors have already been apprised of the maximum potential value of the award and the reporting of the actual outcome of the award in the Summary Compensation Table or the Grants of Plan-Based Awards Table is not required.

SEC RESPONSE: As set forth in Item 402(c)(2)(v), a registrant is to report the grant date fair value of the performance share award in the Summary Compensation Table based on the probable outcome of the award as of such grant date. As provided in Instruction 3 to Item 402(c)(2)(v) and (vi), the registrant must also disclose in a footnote to the Summary Compensation Table the value of the award at the grant date assuming that the highest level of the performance conditions will be achieved if an amount less than the maximum value was included in the Summary Compensation Table. Accordingly, nothing more need be reported in the Summary Compensation Table at the completion of the performance period, if the maximum value was properly reported in the footnotes to the table. Any additional shares that are received at the completion of the performance period are to be reported in the Option Exercises and Stock Vested Table. Also, the payout will need to be discussed in the Compensation Discussion and Analysis.

b) If the performance share award is subject to two separate performance conditions – one involving a “performance condition” (for example, cumulative earnings per share) and the other involving a “market condition” (for example, relative total shareholder return), for purposes of Instruction 3 to Item 402(c)(2)(v) and (vi), how should the company determine the maximum value of the award for purposes of making the footnote disclosure required by this Instruction? How should the company analyze the award to determine the probable outcome of the “performance condition”?

SEC RESPONSE: If the “performance condition” is a “market condition,” it is factored into the calculation of the award’s grant date fair value; in other words, its impact is embedded in the fair value calculation. Consequently, unlike the performance condition referenced in Instruction 3 to Item 402(c)(2)(v) and (vi), it does not require footnote disclosure of the award’s potential maximum value.
7. **Related Person Transaction Disclosure.** For purposes of Item 404(a) of Regulation S-K, in determining the compensation of an immediate family member who shares the same household of a director, executive officer, or nominee for director for purposes of determining whether the amount involved in a potentially disclosable transaction exceeds $120,000, should the $120,000 amount be calculated solely on the basis of the compensation paid during the registrant’s last completed fiscal year or should it be calculated from the start of the registrant’s last completed fiscal year through the time of the filing of the proxy statement? It appears that the Item may be read to require a calculation of more than a single fiscal year.

**Suggested answer:** The calculation should be based only on the compensation paid during the registrant’s last completed fiscal year. Because employees may be terminated at any time, there is no certainty that the employee will have a sufficient amount of compensation for the coming year, and compensation should not be treated as a transaction providing for periodic payments or installments.

**SEC RESPONSE:** The calculation should run from the start of the registrant’s last completed fiscal year through the time of filing of the proxy statement; in other words, the calculation is not limited to the last completed fiscal year. The Staff noted that Item 404(a) does not limit “immediate family member” to individuals who live in your household and that the definition of “transaction” is very broad. The Staff further noted that registrant’s should use a “principles-based” analysis when determining whether disclosure is necessary.

8. **Filing of Management Contract.** For purposes of Instruction 1 to Item 601(b)(10), please confirm that the term “management contract” does not include a form of agreement under a compensatory plan that is used exclusively for directors and executive officers (i) as long as that form of agreement has been previously filed and (ii) the director or executive officer’s individual personal agreement does not contain provisions whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.

**SEC RESPONSE:** The Staff agrees with this interpretation.

9. **Compensation and Risk.** We would like to discuss and better understand, with the goal of being able to explain to clients, the objective of the comment that the Staff has been issuing under new Item 402(s) of Regulation S-K requesting a description of the process that a registrant undertook to reach the conclusion that no disclosure was necessary in response to Item 402(s), or that the registrant does not have compensation programs that are reasonably likely to have a material adverse effect on the registrant as a whole.

a) Comment letters typically state that the purpose of the review process is to assist a registrant in its compliance with the applicable disclosure requirements and to enhance the overall disclosure in the registrant’s filings. We understand that the comment is only looking for supplemental disclosure,
but is the comment also intended to help “enhance the overall disclosure in the registrant’s filings”? In other words, is the Staff seeking a different type of disclosure than what is currently being provided with respect to compensation-related risk?

b) Is the Staff planning to assist registrants in complying with the applicable disclosure requirements by providing a reaction to or recommendations on the process that a registrant undertook to conclude that no disclosure was necessary in response to Item 402(s)? That is, does the Staff plan to provide follow-up comments on the adequacy of a registrant’s disclosure controls and procedures?

c) Does the Staff plan to issue a report commenting on the processes disclosed or summarizing “best practices” for assessing compensation-related risk based on responses that it receives?

SEC RESPONSE: The Staff has requested supplemental information on the process undertaken by a registrant to reach the conclusion that no disclosure is necessary in response to Item 402(s) to ensure that registrants have, in fact, conducted an assessment of their compensation-related risks and to better understand what constitutes a thorough risk assessment process.

Notwithstanding the information that is circulating in the marketplace, there is not requirement under Item 402(s) to provide disclosure in the proxy statement if there is nothing to report with respect to a risk having a material adverse effect on the registrant. To date, the Staff comments have been focused on simply ensuring that there has been a thorough risk assessment process. Registrants must determine on their own what constitutes an appropriate risk assessment process for their organization. At this time, the Staff has not made any decisions with respect to what, if anything, it intends to do with the information that it has gathered through the comment process.

10. “Embedded” Equity Rights. Compensation and Disclosure Interpretation 119.03 states that the requirements set forth in Instruction 2 to Item 402(c)(2)(iii) and (iv) do not apply in a situation where the agreement pursuant to which the named executive officer had the option to elect settlement in stock or equity-based compensation was within the scope of FAS123R (e.g., the right to stock settlement is embedded in the terms of the award).

Registrants and their counsel have struggled with the concept of when an equity right is “embedded in” a compensation arrangement, as this concept is not expressly reflected (using that terminology) in FAS 123R (now codified as ASC Topic 718). The lack of familiarity with this concept has led to a number of questions, including the following:

a) It is unclear why this concept overrides the express language in Instruction 2 to Item 402(c)(2)(iii) and (iv), which was affirmed and retained by the
Securities and Exchange Commission in its December 2009 rulemaking on the basis that, “disclosing the amounts of salary and bonus that the compensation committee awarded better enables investors to understand the relative weights the company applied to annual incentives and salary.” This same reasoning may be applied to the disclosure of the cash retainers payable to directors.

b) If an executive officer can defer his or her salary or bonus into the stock fund of a Section 401(k) plan, would this be considered an “embedded right” for purposes of C&DI 119.03?

c) If a director may defer his or her cash retainer into a deferred phantom stock unit account (that may be cash-settled), would this be considered an “embedded right” for purposes of C&DI 119.03? Note that, if that is the case, then directors will appear to be receiving different amounts for their retainers even if they all receive the same fixed retainer.

SEC RESPONSE: C&DI 119.03 is intended to explain the application of Item 402(c)(2)(iii) and (iv). The question raised is whether the award includes the right to elect settlement in stock or equity-based compensation. The term “embedded” is simply a shorthand way of referring to Paragraph 4 of FAS 123R (now codified as FASB ASC Topic 718); that is, is the right to payment in the form of stock or equity-based compensation inherent in the award itself?.

The deferral rights described in subsection (b) above are considered separate arrangements which do not bring the executive officer’s salary or bonus within the scope of FASB ASC Topic 718. A similar result applies in the case of subsection (c) above, where Instruction 2 to Item 402(c)(2)(iii) and (iv) applies to director compensation via the general Instruction to Item 402(k).

11. Cash Retention Bonus. The response to Compensation and Disclosure Interpretation 199.17 contains several references to a “performance condition.” Is it correct to interpret these references as referring to the “employment condition” described in the Question itself? If this is correct, please confirm that, generally, an employment condition is not to be considered a performance condition when analyzing the disclosure of stock-based awards.

SEC RESPONSE: The Staff agrees with this interpretation. The reference to a “performance condition” was not intended to mean a performance condition with the scope of FASB ASC Topic 718.

12. Election to Receive Annual Incentive Award in Stock. We would like to discuss and better understand the basis for Compensation and Disclosure Interpretation 119.23 and the scope of its application. Specifically, C&DI 119.23 appears to suggest that an arrangement that is initially within the scope of FASB ASC Topic 718 can cease to be within the scope of FASB ASC Topic 718, and, accordingly, be reported as a non-equity incentive plan award based upon the
subsequent actions of the named executive officer that occur after the date the
arrangement is granted.

a) Is this a correct interpretation of C&DI 119.23?

b) Are there other instances where an arrangement that is initially accounted for
under ASC Topic 718 can cease to be treated as an equity-based arrangement
prior to the time when it must be reported under Item 402?

SEC RESPONSE: C&DI 119.23 is intended to focus on the actions of the
compensation committee that offer an executive officer a clear choice between the
receipt of cash or equity at the time the award is granted. The Staff analyzed the
fact pattern on the basis of the form of award selected by the executive officer (as
opposed to an award where the choice to receive cash or equity was embedded in
the award itself). The Staff views a situation where, at the beginning of the year,
an executive officer is given a choice between receiving a cash award or an equity
award differently from a situation where, at the end of the year, the executive
officer is permitted to decide whether to receive an earned award in cash or
equity.

13. “Service Inception Date.” We would like to discuss and better understand the
scope of Compensation and Disclosure Interpretation 119.24. Specifically, we
would like to know whether the Staff has identified other situations where the
service inception date precedes the grant date of an equity-based award for
purposes of FASB ASC Topic 718 and the award is to be reported as of the date
of compensation committee action establishing the award (assuming that is the
service inception date).

a) If the grant of an equity-based award is subject to stockholder approval and,
therefore, is not subject to the recognition of compensation expense for
purposes of FASB ASC Topic 718 (and, correspondingly, not reported under
Section 16(a) of the Securities Exchange Act of 1934) until the date
stockholder approval is obtained, should the award nevertheless be reported at
the date of compensation committee action (assuming that is the service
inception date)?

SEC RESPONSE: The application of principles reflected in C&DI 119.24
will depend upon the specific facts and circumstances of each situation.
Where, in practice, a registrant faces a situation where the service inception
date precedes the grant date of an equity-based award for purposes of FASB
ASC Topic 718 and the selection of the grant date as the time for the reporting
of the award would result in reporting in a year other than the year of
compensation committee (or board of director) action, registrants are
encouraged to contact the Staff for assistance.

b) If a cash-based award is subject to the exercise of “negative discretion” by a
compensation committee for purposes of Section 162(m) of the Internal
Revenue Code, can that affect the fiscal year for which the award is reported for purposes of Item 402?

SEC RESPONSE: C&DI 119.24 was intended to achieve a reasonable reporting result in a situation where the treatment of the award under FASB ASC Topic 718 would have led to a reporting result that would have not been in the best interests of shareholders.

In the case of a cash-based award where the number of shares to be received by an executive officer is not determinable until the end of the performance period, the reporting of the award depends on its treatment under the applicable accounting standards. Where the award is considered a “liability” within the scope of FASB ASC Topic 718, then the same principles as those reflected in C&DI 119.24 apply. Where the award is not within the scope of FASB ASC Topic 718, then the concept of a “service inception date” is not relevant to its reporting treatment.

**Form S-8**

14. Exhibit Filing Requirement. We would like to discuss Compensation and Disclosure Interpretation 146.10, which states that a copy of the employee benefit plan under which the registered securities will be issued must be filed as an exhibit to a registration statement on Form S-8.

We believe that, as a general matter, it is often a good practice to include a copy of the plan document as an exhibit to a registration statement on Form S-8, but question the necessity of requiring such a filing. In the context of ERISA-qualified employee benefit plans, under which a registrant is often permitted to delay formally amending an employee benefit plan following a tax law change, as long as the plan is administered in a manner that complies with the new tax law requirements (and not with any inconsistent provision in the plan document), this requirement can present practical problems for the registrant.

SEC RESPONSE: The Staff’s position in Compensation and Disclosure Interpretation 146.10 reflects its belief that the underlying plan document is an important piece of information to be provided to plan participants.

A discussion ensued in which the Staff was informed of the difficulties in maintaining a “current” version of the plan document for many ERISA-qualified employee benefit plans. For example, ERISA plans often are given long periods of time to formally amend a plan document to bring it into compliance with a new or amended tax law (even though the plan itself must be operated in compliance with such new or amended law). In addition, plan documents may be amended on a routine basis in ways that do not have any impact on the registrant stock fund feature of the plan. Based on this information, the Staff agreed to take the request under advisement,
Rule 701
No questions at this time

Form 8-K
No questions at this time

Regulation BTR
No questions at this time

Section 16
No questions at this time