Proxy Rules (including Executive Compensation Disclosure)

1. Disability Plans. Item 402(a)(6)(ii) of Regulation S-K provides that registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, term or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees. Please confirm that broad-based nondiscriminatory disability plans are treated in the same manner.

SEC RESPONSE: Yes. To the extent that the disability plan provides benefits not related to termination of employment, a registrant may rely on Item 402(a)(6)(ii) to omit information regarding the disability plan. To the extent that the disability plan provides benefits related to termination of employment, a registrant may rely on Instruction 5 to Item 402(j) to omit information regarding the disability plan. See Compliance and Disclosure Interpretation 117.07 (July 8, 2011).

2. Use of Non-GAAP Measures in Executive Summary to Compensation Discussion and Analysis. Instruction 5 to Item 402(b) of Regulation S-K provides that the disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e) of Regulation S-K (although disclosure must be provided as to how the number is calculated from the registrant's audited financial statements).

We note that, in response to new Section 14A(a)(1) of the Exchange Act, many registrants are providing an Executive Summary to their Compensation Discussion and Analysis highlighting their business results and executive compensation actions and decisions for the last completed fiscal year. Occasionally, these Executive Summaries may contain non-GAAP financial information that is not related to the financial measure target levels used in their incentive compensation plans.

Is it permissible to read Instruction 5 to Item 402(b) as extending to the inclusion of such non-GAAP financial information in their Compensation Discussion and Analysis, even though such information may not relate to the disclosure of target levels?

SEC RESPONSE: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K. See Compliance and Disclosure Interpretation 118.08 (July 8, 2011). See also the response to Question 3 below.
3. Related Question under Exchange Act Rule 14a-21: Use of Non-GAAP Measures in Supporting Statement to Shareholder Advisory Vote on Executive Compensation. Below Instruction 5 to Item 402(b) of Regulation S-K provides that the disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e) of Regulation S-K (although disclosure must be provided as to how the number is calculated from the registrant’s audited financial statements).

We note that, in response to new Section 14A(a)(1) of the Exchange Act, many registrants are providing a supporting statement to the required separate resolution providing for a shareholder advisory vote to approve the compensation of their named executive officers, as disclosed pursuant to Item 402 of Regulation S-K. Occasionally, these supporting statements may contain non-GAAP financial information that is not related to the financial measure target levels used in their incentive compensation plans.

Is it permissible to read Instruction 5 to Item 402(b) as extending to the inclusion of such non-GAAP financial information in such supporting statements, even though such information may not relate to the disclosure of target levels? Or, must registrants that elect to use non-GAAP financial information in such supporting statements also include the reconciliation required under Regulation G and Item 10(e) of Regulation S-K?

SEC RESPONSE: See the response to Question 2 above and Compliance and Disclosure Interpretation 118.08 (July 8, 2011). In the pay-related circumstances described in these two questions only, the SEC Staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the SEC Staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information.

4. Reporting of Equity Incentive Award. A registrant’s performance-based equity incentive plan measures performance annually over a multi-year period. At the beginning of Year 1, the Compensation Committee sets threshold, target, and maximum levels for the number of shares that may be earned for that year based on the registrant’s performance in Year 1. Incentive awards are paid in the form of restricted shares, which are issued early in Year 2 after the Compensation Committee has certified the Year 1 performance results. These restricted stock awards vest ratably over three years, starting at the beginning of the Year 1 performance period (in other words, one-third of any earned award is considered vested when issued). How should this award type be reported in the Summary Compensation Table, the Grants of Plan Based Awards Table, and the Outstanding Equity Awards at Fiscal Year-End Table?

Suggested Answer: For Year 1:
The threshold, target, and maximum number of shares that may be earned for Year 1 based on the registrant’s performance in that year should be reported in the Estimated Future Payouts Under Equity Incentive Plan Awards (columns (f) through (h)) of the Grants of Plan-Based Awards Table.

Since the number of shares of restricted stock issued based on the registrant’s Year 1 performance is known early in Year 2, the grant date fair value of those shares should be reported in the Stock Awards column (column (e)) of the Summary Compensation Table.

The number of shares of restricted stock issued based on the registrant’s Year 1 performance that are unvested as of the end of Year 1, as well as the market value of such shares, should be reported in the appropriate Stock Awards columns (columns (g) and (h)) of the Outstanding Equity Awards at Fiscal Year-End Table.

For Year 2:

The restricted stock award for Year 1 performance is not reportable in the Summary Compensation Table or the Grants of Plan Based Awards Table.

The number of shares of restricted stock issued based on the registrant’s Year 1 performance that are unvested as of the end of Year 2, as well as the market value of such shares, should be reported in the appropriate Stock Awards columns (columns (g) and (h)) of the Outstanding Equity Awards at Fiscal Year-End Table.

This result appears to be consistent with Compliance and Disclosure Interpretation 119.24, but a different result may be inferred by the language of Compliance and Disclosure Interpretation 122.03.

**SEC RESPONSE:** The SEC Staff did not agree with the suggested response for the reporting of the grant date fair value of the restricted stock award in the Stock Awards column (column (e)) of the Summary Compensation Table for Year 1. The grant date fair value for stock and option awards subject to performance conditions must be reported based on the probable outcome of the performance conditions as of the grant date, even if the actual outcome of the performance conditions - and therefore, the number of restricted shares actually awarded for Year 1 - is known by the time of the filing of the proxy statement. See Compliance and Disclosure Interpretation 119.28 (July 8, 2011).

5. Reporting of Stock and Option Awards Subject to Performance Conditions.

Instruction 3 to Item 402(c)(2)(v) and (vi) of Regulation S-K provides that for any awards that are subject to performance conditions, a registrant is to report in the Stock Awards and Option Awards columns (columns (e) and (f)) of the Summary Compensation Table the value at the grant date based upon the probable outcome of such conditions. This
amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of the grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures.

Assume that a registrant grants its executive officers performance-based equity award in the second fiscal quarter of Year 1, and determines at that time that, for financial reporting purposes, it is not probable that the performance condition will be satisfied. As a result, the registrant records no accounting cost for these awards in the second fiscal quarter of Year 1.

By the fourth fiscal quarter of Year 1, the registrant determines that satisfaction of the awards’ performance condition is now probable and, accordingly, records a “catch-up” compensation charge for the fourth fiscal quarter to reflect the fact that no cost was recorded for the second and third fiscal quarters.

Based on Instruction 3, it appears that the registrant, in preparing its executive compensation disclosure for Year 1, may report:

- a zero value for the performance-based equity awards in the Stock Awards column (column (e)) of the Summary Compensation Table, subject only to footnote disclosure of the value of the awards at the grant date assuming that the highest level of performance conditions will be achieved;
- a zero value for the performance-based equity awards in the Grant Date Fair Value of Stock and Option Awards column (column (l)) of the Grants of Plan-Based Awards Table; and
- the number of unearned shares and the market or payout value of such shares in the Equity Incentive Plan Awards columns (columns (i) and (j)) of the Outstanding Equity Awards at Fiscal Year-End Table.

While this result appears incongruous, it appears to be possible since a registrant’s management decides whether an event is probable during the first three quarters of the fiscal year. How should this scenario be handled for reporting purposes?

**SEC RESPONSE:** The SEC Staff questioned whether this situation would actually occur given the guidance of the registrant’s auditors. If the situation did occur, the Staff indicated that it would expect a thorough analysis of the award in the Compensation Discussion and Analysis, including an explanation of why the award was structured so that, as of the time of grant, it was not probable that the performance condition would not be satisfied, and the basis for the subsequent determination that satisfaction of the performance condition was now probable.

The Staff also noted that the fact that the performance condition became probable by fiscal year-end may raise questions as to the *bona fide* nature of the initial determination at the time of grant that it was not probable that the performance condition would be
satisfied, and, perhaps more importantly, raise potential issues about the registrant’s disclosure controls and procedures. In the event of a Staff review, this scenario could trigger an inquiry into the basis for the registrant’s initial grant date determination.

Finally, the Staff noted that, if this situation did arise, the award would be reported in the Summary Compensation Table in accordance with Instruction 3, stock-based awards would be reported on a consistent basis in the Summary Compensation Table and the Grants of Plan-Based Awards Table, and the number of unearned shares and the market or payout value of such shares would be reported in the Equity Incentive Plan Awards columns (columns (i) and (j)) of the Outstanding Equity Awards at Fiscal Year-End Table.

**Securities Registration**

*No questions at this time*

**Form S-8**

*No questions at this time*

**Rule 701**

*No questions at this time*

**Form 8-K**

1. **Awards Made Pursuant to Omnibus Plan.** A registrant maintains an omnibus incentive plan under which cash-based and equity-based awards subject to time-based vesting, performance-based vesting and/or no vesting conditions may be granted to the registrant’s named executive officers in the discretion of the compensation committee of the registrant’s board of directors. In February of each of the past three years, the registrant has granted stock-settled performance-vesting restricted stock units to its named executive officers. These awards have been disclosed as part of the registrant’s disclosure under Item 402 of Regulation S-K in each of its previous definitive proxy statements and/or annual reports on Form 10-K, and the forms of award agreements have been publicly-filed.

In February of Year 4, the compensation committee grants awards of stock-settled time-vesting restricted stock units to its named executive officers. The grant of the awards in February of Year 4 will be included in the registrant’s disclosure under Item 402 in its definitive proxy statement and/or annual report on Form 10-K filed in Year 5.

Is the registrant required to disclose the awards made in February of Year 4 in a current report on Form 8-K filed under Item 5.02(e)?
Suggested Answer: No. An Item 5.02(e) Form 8-K would not be required to report the grant of the stock-settled time-vesting restricted stock unit awards. Under Instruction 2 to Item 5.02(e), the registrant is not required to file an Item 5.02(e) Form 8-K to report the grants of the awards if the terms and conditions of the awards are materially consistent with the terms and conditions of awards permitted to be granted under the plan, which was previously disclosed to shareholders.

For this purpose, the grant of an award that is permitted under the terms of an omnibus plan will be considered to be the grant of an award with terms and conditions materially consistent with the terms and conditions of the plan. The fact that the registrant had a practice of granting a type of award at a certain time of year is not relevant as to whether the grant of a different type of award would trigger disclosure under Item 5.02(e) of Form 8-K. Disclosure regarding material information about the awards must be included in the registrant’s Compensation Discussion and Analysis and related disclosures under Item 402 of Regulation S-K.

SEC RESPONSE: Since the grant of the stock-settled time vesting restricted stock unit award is consistent with the type of awards that are authorized to be granted under the omnibus incentive plan (which was previously disclosed to shareholders), an Item 5.02(e) Form 8-K is not required to disclose the grant of this award. The SEC Staff went on to note, however, that the registrant’s decision to grant stock-settled time vesting restricted stock unit awards should be addressed in the Compensation Discussion and Analysis covering the fiscal year in which the award was made.

2. Awards Made Pursuant to an Omnibus Plan. A registrant maintains an omnibus incentive plan under which cash-based and equity-based awards subject to time-based vesting, performance-based vesting and/or no vesting conditions may be granted to the registrant’s named executive officers in the discretion of the compensation committee of the registrant’s board of directors. There is no other plan, contract, or arrangement that contemplates the payment of discretionary bonuses.

In March of each of the past three years, the registrant has paid cash bonuses to its named executive officers pursuant to the omnibus plan based on the achievement of specified pre-established performance goals. These bonuses have been disclosed as part of the registrant’s disclosure under Item 402 of Regulation S-K in each of its previous definitive proxy statements and/or annual reports on Form 10-K, but the registrant has not made Item 5.02(e) disclosures of the grants of the bonus opportunities or the payments of the bonuses on Form 8-K because the terms and conditions of the bonuses were materially consistent with the previously disclosed terms of the omnibus plan.

In March of Year 4, the registrant determines to pay a material discretionary cash bonus to a named executive officer pursuant to the omnibus plan that was not subject to the achievement of performance goals.
The payment in March of Year 4 will be included in the registrant’s disclosure under Item 402 in its definitive proxy statement and/or annual report on Form 10-K filed in Year 5.

Would an Item 5.02(e) Form 8-K be required for the payment of the discretionary bonus in March of Year 4?

**Suggested Answer:** Under Instruction 2 to Item 5.02(e), the registrant is not required to file an Item 5.02(e) Form 8-K to report the payment of a discretionary bonus if the payment is materially consistent with the terms and conditions of payments permitted to be made under a plan that was previously disclosed to shareholders.

For this purpose, the payment of an amount that is permitted under the terms of an omnibus plan will be considered to be the payment of an amount materially consistent with the terms and conditions of the previously-disclosed plan. The fact that the registrant does not have a practice of paying such amounts is not relevant as to whether the payment of a discretionary bonus would trigger disclosure under Item 5.02(e) of Form 8-K. (See, for example, Compliance and Disclosure Interpretation 117.13.) Thus, Item 5.02(e) disclosure would not be required for the payment of the discretionary bonus in March of Year 5.

**SEC RESPONSE:** If the payment of the discretionary bonus is materially consistent with the terms and conditions of payments permitted to be made under the omnibus incentive plan that has been previously disclosed to shareholders, an Item 5.02(e) Form 8-K is not required to disclose the payment of the discretionary bonus. See also the response to Question 1 above.

**Exchange Act Rule 14a-21**

See Question 3 under Proxy Rules (including Executive Compensation Disclosure) above.

**Regulation BTR**

No questions at this time

**Section 16**

No questions at this time