JCEB Questions for SEC – 2013
(May 7, 2013)

Proxy Rules (including Executive Compensation Disclosure)

1. Grant Date Reporting vs. Service Inception Date Reporting. On February 1, 2012, a registrant with a calendar year fiscal year grants an executive officer a performance share award for 100,000 shares of the registrant's common stock when the market price of the common stock is $10.00 per share. Performance is measured with reference to 2012 EBITDA and, depending on the registrant's performance during 2012, the number of shares earned may be reduced to zero or increased up to 200% of the target award (that is, 200,000 shares). The executive officer will vest in the earned shares only if he or she remains employed with the registrant until the end of 2014 (in other words, one year after the number of shares earned under the award is determined in early 2013 following the end of the 2012 performance period).

Further, the terms of the award provide that the Compensation Committee of the registrant's Board of Directors reserves the discretion at any time prior to the end of the year in which the award is granted to reduce the target number of shares subject to the award and that such discretion may be exercised only once. For example, assume that on December 1, 2012 the Compensation Committee reduces the target number of shares subject to the performance share award to 50,000 shares when the market price of the registrant's common stock is $8.00 per share and the probable outcome of the performance condition is 100%.

Which of the following amounts should be considered to be the grant date fair value for the performance share award for purposes of determining the executive officer's total compensation, identifying the registrant's named executive officers for the fiscal year, and reporting the award in the "Stock Awards" column (column (e)) of the Summary Compensation Table: (a) the fair value of the award on February 1, 2012, the original date of grant (in this example, $1 million), or (b) the fair value of the award on December 1, 2012, the date the target number of shares subject to the award is reduced by the Compensation Committee (in this example, $400,000)?

Suggested Answer: The amount that should be reported in the "Stock Awards" column (column (e)) of the Summary Compensation Table is $400,000, the fair value of the performance share award as modified on December 1, 2012. This result is consistent with the general rule under Item 402(c)(2)(v) of Regulation S-K that, in determining the amount to be reported in the Summary Compensation Table, the aggregate grant date fair value computed in accordance with FASB ASC Topic 718 should be used. In this situation, FASB ASC Topic 718 provides that the existence of the ability of the Compensation Committee of the registrant's Board of Directors to exercise "negative" discretion causes the grant date for the award to be the date on which the Compensation Committee has determined whether to exercise its discretion. This situation differs from the situation described in Compliance and Disclosure Interpretation Question 119.24 (Regulation S-K), which provides that the service inception date, rather than the grant date, is used in certain limited circumstances.

C&DI 119.24 concerned a performance share award that provided the compensation committee with "negative" discretion to reduce the number of shares awarded at any time prior to the end of the three-year vesting period. In that situation, the SEC Staff concluded that reporting at the service inception date was appropriate:

> "In a situation in which the compensation committee's right to exercise "negative" discretion may preclude, in certain circumstances, a grant date for the award during the year in which the compensation committee communicated the terms of the award and performance targets to the executive officer and in which the service inception date begins, the award should be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table as compensation for the year in which the service inception date begins. Notwithstanding the accounting treatment for the award, reporting the award in this manner better reflects the compensation committee's decisions with respect to the award."

In our view, the critical distinction between the situation that is the subject of this question and the situation described in C&DI 119.24 is that, in the latter situation the facts presented would have resulted in the equity award being reported in the Summary Compensation Table a year later than the year in which service began and the terms of the award were first communicated to the recipient, which the SEC Staff concluded would result in the Summary Compensation Table not reflecting the Compensation Committee's decision with respect to the award at a time when the information was most useful to investors. In the situation that is the subject of this question, however, using the award's grant date as determined under FASB ASC Topic 718 (December 1, 2012) still results in the award being reported in the year in which the Compensation Committee first communicated the terms of the award and the performance targets to the executive officer. As a result, the concerns presented by the situation described in C&DI 119.24 are not implicated.

Further, we believe that the situation that is the subject of this question can be distinguished from the situation addressed in Compliance and Disclosure Interpretation Question 117.04 (Regulation S-K), which provides that, where a registrant grants an equity award to an executive officer which is subsequently forfeited during the same fiscal year, the grant date fair value of the award should be included for purposes of determining the executive officer's total compensation and identifying named executive officers. It is our understanding that the rationale for the SEC Staff's position in this situation is that the registrant's decision to grant the award to the executive officer (along with the relevant details of the award) is relevant information that is useful to investors should the executive officer be determined to qualify as a named executive officer. In the situation that is the subject of this question, the intent of the Compensation Committee with respect to the amount of the performance share award will still be communicated to investors as the Compensation Committee must exercise its discretion to reduce the target number of shares subject to the award, if at all, within the same fiscal year in which it decided to grant the award to the executive officer.

SEC RESPONSE: The SEC Staff agreed with the suggested answer to this question. Since the terms of the original performance share award as granted on February 1, 2012 expressly reserves to the Compensation Committee of the registrant's Board of Directors the ability to exercise "negative discretion" with respect to the number of shares subject to the award (provided that

discretion is exercised (i) prior to the end of the year in which the award is granted and (ii) only once), the grant date fair value for the award for purposes of determining the executive officer's total compensation, identifying the registrant's named executive officers for the fiscal year, and reporting the award in the "Stock Awards" column (column (e)) of the Summary Compensation Table should be amount based on the number of shares subject to the award and the market price of the registrant's common stock at the time such discretion is exercised (assuming such an exercise of discretion).

2. Reporting of Stock Award Premium. Under the terms and conditions of its director compensation program, a registrant permits its non-employee directors to elect to receive up to 100% of their annual cash retainer (plus board chair and committee chair retainers, as applicable) in the form of restricted stock unit ("RSU") awards for shares of the registrant's common stock. For every dollar foregone, a non-employee director will receive shares of the registrant's common stock with a value of $1.20 pursuant to the RSU award (that is, a 20% premium). The registrant proposes to report the amount of the foregone cash retainers in the "Fees Earned or Paid in Cash" column (column (b)) of the Director Compensation Table and the full incremental 20% premium in the "Stock Awards" column (column (c)) of the Director Compensation Table.

The registrant is basing this reporting treatment on the Instruction to Item 402(k) (which provides that, in addition to the Instruction to Item 402(k)(2)(iii) and (iv) and the Instructions to Item 402(k)(2)(vii), the Instructions to Item 402(c)(2)(iii) and (iv) apply equally to Item 402(k)) and Compliance and Disclosure Interpretation 119.03 (Regulation S-K) which reads as follows:

> **Question:** Instruction 2 to Item 402(c)(2)(iii) and (iv) provides that companies are to include in the Salary column (column (c)) or the Bonus column (column (d) any amount of salary or bonus forgone at the election of a named executive officer under which stock, equity-based, or other forms of non-cash compensation have been received instead by the named executive officer. In a situation where the value of the stock, equity-based or other form of non-cash compensation is the same as the amount of salary or bonus foregone at the election of the named executive officer, does this mean the amounts are only reported in the Salary or Bonus column and not in any other column of the Summary Compensation Table?
>
> **Answer:** Yes, under Instruction 2 to Item 402(c)(2)(iii) and (iv) the amounts should be disclosed in the Salary or Bonus column, as applicable. The result would be different if the amount of salary or bonus foregone at the election of the named executive officer was less than the value of the equity-based compensation received instead of the salary or bonus, or if 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). In the former case, the incremental value of an equity award would be reported in the Stock Awards or Option Awards columns, and in the latter case the award would be reported in the Stock Awards or Option Awards columns. In both of these special cases, the amounts reported in the Stock Awards and Option Awards columns would be the dollar amounts recognized for financial statement reporting purposes with respect to the applicable fiscal year, and footnote disclosure should be provided regarding the circumstances of the

awards. Appropriate disclosure about equity-based compensation received instead of salary or bonus must be provided in the Grants of Plan-Based Awards Table, the Outstanding Equity Awards at Fiscal Year End Table and the Option Exercises and Stock Vested Table. [Aug. 8, 2007] (emphasis supplied)

While we believe that this reporting treatment is consistent with the guidance set forth in C&DI 119.03, we note that the literal language of the Interpretation would appear to require that the amount to be reported in the "Stock Awards" column for the incremental 20% premium be the "dollar [amount] recognized for financial statement reporting purposes with respect to the applicable fiscal year." C&DI 119.03 predates the August 2007 amendments to Item 402 that changed the methodology for the reporting of stock and option awards in the Summary Compensation Table so that the amount reported is an award's full grant date fair value, rather than the amount recognized as compensation expense for financial reporting purposes during the fiscal year. Thus, it appears that the relevant language of C&DI 119.03 should be read to conform to this change in the methodology for the reporting of stock and option awards.

Please confirm that, for purposes of applying C&DI 119.03, in situations where the amount of salary or bonus forgone at the election of a named executive officer or director under which stock, equity-based, or other forms of non-cash compensation have been received instead by the named executive officer or director is

- less than the value of the equity-based compensation received instead of the salary or bonus, or

- if the agreement pursuant to which the executive officer had the option to elect settlement in stock or equity-based compensation was within the scope of FASB ASC Topic 718 (e.g., the right to stock settlement is embedded in the terms of the award)

the amount to be reported in the "Stock Awards" and "Option Awards" columns of the Summary Compensation Table would be the full grant date fair value of the equity award representing the incremental additional value of such award in excess of the amount of salary or bonus foregone (in the former situation) or the full grant date fair value of the equity award received in lieu of the amount of salary or bonus foregone (in the latter situation).

Suggested Answer: The SEC Staff agrees with the reporting treatment described above. In the situation described in this question, clearly the SEC Staff intends for this "premium" to be reported as a stock award (which differentiates it from the underlying retainer amount) and it is reasonable that this reporting be made consistent with the SEC's current disclosure requirements for equity awards. Further, the same result would apply where the agreement pursuant to which the named executive officer has the option to elect settlement in stock or equity-based compensation was within the scope of FASB ASC Topic 718 (e.g., the right to stock settlement is embedded in the terms of the award).

SEC RESPONSE: The SEC Staff agreed with the suggested answer to this question. For purposes of applying C&DI 119.03 in situations where the amount of salary or bonus forgone at the election of a named executive officer or director under which stock, equity-based, or other

forms of non-cash compensation have been received instead by the named executive officer or director is

- less than the value of the equity-based compensation received instead of the salary or bonus, or

- if the agreement pursuant to which the executive officer had the option to elect settlement in stock or equity-based compensation was within the scope of FASB ASC Topic 718 (e.g., the right to stock settlement is embedded in the terms of the award)

the amount to be reported in the "Stock Awards" and "Option Awards" columns of the Summary Compensation Table should be the full grant date fair value of the equity award representing the incremental additional value of such award in excess of the amount of salary or bonus foregone (in the former situation) or the full grant date fair value of the equity award received in lieu of the amount of salary or bonus foregone (in the latter situation). **NOTE:** On May 17, 2013, the SEC Staff made a conforming revision to C&DI 119.03 to reflect this grant date fair value valuation.

3. Option Exercises and Stock Vested Table. A registrant grants its executive officer performance share awards pursuant to which the number of shares of the registrant's common stock that may be earned is based on the registrant's revenues over a specified performance period. Before issuance of the shares of common stock earned pursuant to the awards, the Compensation Committee of the registrant's Board of Directors must first certify the registrant's revenues for the performance period and determine the number of shares of common stock earned. These actions will not take place until sometime after the end of the performance period (which coincides with the end of the registrant's last completed fiscal year).

In determining the "vesting date" of a performance share award for purposes of determining the number of shares of common stock to be reported in the "Number of Shares Acquired on Vesting" column (column (d)), as well as the value of such shares to be reported in the "Value Realized Upon Vesting" column (column (e)), of the Option Exercises and Stock Vested Table, is the vesting date the last day of the performance period (that is, the last day of the last completed fiscal year) or the day upon which the Compensation Committee certifies that the performance criteria for the performance share award have been satisfied and determined the number of shares of common stock earned?

Suggested Answer: The registrant should treat the last day of the performance period (that is, the last day of the last completed fiscal year) as the vesting date of any shares of common stock earned under the performance share award.

The response of the SEC Staff in Compliance and Disclosure Interpretation 122.03 (Regulation S-K) is instructive in this situation:

> **Question:** A company's performance-based restricted stock unit ("RSU") plan measures performance over a three-year period. After the end of the three-year performance period (2007-2009), the compensation committee will evaluate performance to determine the

number of RSUs earned by the named executive officers. The named executive officers must remain employed by the company for a subsequent two-year service-based vesting period (2010-2011). Upon completion of service-based vesting, the company will pay the named executive officers the shares underlying the RSUs. In the Outstanding Equity Awards at Fiscal Year-End Table for fiscal year 2009, how should information about the shares underlying the RSUs be reported?

Answer: The number of shares reported should be based on the actual number of shares underlying the RSUs that were earned at the end of the three-year performance period. This is the case even if this number will be determined after the 2009 fiscal year end. The shares should not be reported in columns (i) and (j) because they are no longer subject to performance-based conditions. Instead, the shares should be reported in columns (g) and (h) because they are subject to service-based vesting. [May 29, 2009]

In its response, the SEC Staff indicates that the number of shares underlying a performance share award should be reported based on the actual number of shares earned as of the end of the performance period, even though this number will not be determined until after the end of the fiscal year. We believe that the same principle should apply to the determination of when shares earned pursuant to a performance-based equity award should be considered "vested" for purposes of reporting the award in the Option Exercises and Stock Vested Table.

SEC RESPONSE: The SEC Staff agreed with the suggested answer to this question. For purposes of determining the number of shares of common stock to be reported in the "Number of Shares Acquired on Vesting" column (column (d)), as well as the value of such shares to be reported in the "Value Realized Upon Vesting" column (column (e)), of the Option Exercises and Stock Vested Table, a registrant should treat the last day of the performance period (that is, the last day of the last completed fiscal year) as the vesting date of any shares of common stock earned under the performance share award.

4. Reporting of Retention Bonus. In March 2013, a registrant with a calendar year fiscal year hires a new executive officer. Pursuant to the executive officer's employment offer letter, she is guaranteed a bonus in the amount of $250,000 for 2013, which amount will be paid within 60 days after the end of 2013 provided that she remains employed by the registrant through the date of payment. Should this guaranteed bonus be reported in the "Bonus" column (column (d)) of the registrant's Summary Compensation Table for 2013 or 2014?

While the SEC's rules generally provide that bonuses are to be disclosed when earned, which may not necessarily coincide with when the bonus is actually paid, Compliance and Disclosure Interpretation 119.17 (Regulation S-K) states that a cash "retention" bonus is reportable in the Summary Compensation Table for the year in which the performance condition has been satisfied.

Suggested Answer: The registrant should report the guaranteed bonus in the "Bonus" column (column (d)) of its Summary Compensation Table for 2013. Unlike C&DI 119.17, which addressed the question of whether a retention bonus should be reported in the year of grant or the year in which the performance condition has been satisfied, this situation involves the reporting

of a guaranteed bonus for 2013, subject to the condition that the executive officer remain employed with the registrant through the date of payment (which will necessarily take place in the following fiscal year). In our experience, numerous registrants impose a "be present or lose it" condition on the payment of short-term incentive compensation awards (whether characterized as a "bonus" or a "non-equity incentive plan compensation" award). In some instances, this condition is explicit; in others it is implicit.

In this situation, while the receipt of payment of the guaranteed bonus is condition on continued employment until the payment date, the primary purpose of the bonus is not to ensure continued employment through a specified payment date, but to ensure that the executive officer provides services to the registrant for the remainder of the year of initial employment (indeed, often the guaranteed bonus would be paid at the same time as non-guaranteed, year-end bonuses for other executives). Treating what is generally considered an administrative requirement that an executive officer remain employed until the payment is made as a performance condition that shifts reporting to the fiscal year following the fiscal year in which the substantive consideration for the payment has been satisfied would misrepresent the intent of the registrant (or the Compensation Committee of the registrant's Board of Directors) and, further, would frustrate transparency about a registrant's compensation actions as it would result in a reporting anomaly that would "de-link" a cash payment from the period during which the payment was earned.

SEC RESPONSE: The SEC Staff agreed with the suggested answer to this question. Since the payment of the bonus in 2014 is an administrative condition, rather than an inducement to ensure that the executive officer remains employed through the payment date, the registrant should report the guaranteed bonus in the "Bonus" column (column (d)) of its Summary Compensation Table for 2013.

5. Reporting of Long-Term Incentive Award Payable in Both Cash and Equity. In January 2013, a registrant with a calendar year fiscal year grants an executive officer a performance-based long-term incentive award that is payable half in cash and half in the form of a restricted stock unit ("RSU") award for shares of the registrant's common stock if the target level for the award's performance measure is achieved over a two-year performance period (that is, January 1, 2013 through December 31, 2014). Both the cash and equity portion of the award earned, if any, are subject to a one-year holding period before payout.

After the end of the performance period, the Compensation Committee of the registrant's Board of Director certifies that the target performance level has been achieved. Accordingly, the portion of the award that is payable in cash and portion that is payable in the form of an RSU award is determined at that time.

It is our understanding that, based on the requirements of Item 402(c)(2)(vii) of Regulation S-K, the portion of the award that has been earned that is payable in cash would be reported in the "Non-Equity Incentive Plan Compensation" column (column (g)) of the Summary Compensation Table for 2014, even though this amount is subject to a holding period before payout. While it is clear that the portion of the award that has been earned that is payable in the form of an RSU award is to be reported in the "Stock Awards" column (column (e)) of the Summary Compensation Table, it is unclear whether this amount is to be reported for 2014 (the most recent

fiscal year to which the underlying performance relates), 2015 (the fiscal year in which the RSU award is formally granted), or 2016 (the fiscal year in which the shares of the registrant's common stock subject to the RSU award are actually issued)? Also, it is unclear whether the registrant should report the RSU award in its Outstanding Equity Awards at Fiscal Year-End Table for 2014 or 2015?

Suggested Answer: The portion of the long-term incentive award that is payable in the form of an RSU award should be reported in the "Stock Awards" column (column (e)) of the Summary Compensation Table for 2014, the most recent fiscal year to which the underlying performance relates. Since the terms of the long-term incentive award specifically provide for partial payment in the form of equity, the RSU award should be reported in the fiscal year in which the performance measure target levels are set and the award is communicated to the executive officer.

To attribute the portion of the long-term incentive award that is payable in the form of an RSU award to the fiscal year in which the RSU award is granted would necessitate the bifurcation of the reporting of the award between two separate fiscal years; thereby requiring that the registrant address this bifurcation in the Compensation Discussion and Analysis and the narrative accompanying the Compensation Discussion and Analysis and the Grants of Plan-Based Awards Table.

SEC RESPONSE: The portion of the long-term incentive award that is payable in the form of an RSU award should be reported in the "Stock Awards" column (column (e)) of the Summary Compensation Table for 2015, the year in which the RSU award is granted. This result is required by the express language of Item 402(c)(1) and 402(c)(2)(v) of Regulation S-K. If the one-year holding period before payout in effect is time-based vesting until the fiscal year-end of 2015, the RSU award will be reportable in columns (g) and (h) of the Outstanding Equity Awards at Fiscal Year-End Table, as provided in C&DI 122.03. Upon satisfying such time-based vesting, the award will become reportable in the Option Exercises and Stock Vested Table.

6. Outstanding Equity Awards at Fiscal Year-End Table. Instruction 2 to Item 402(f)(2) of Regulation S-K states that the "vesting dates of options, shares of stock, and equity incentive plan awards held at fiscal-year end must be disclosed by footnote in the applicable column where the outstanding award is reported." Is this disclosure required for outstanding equity awards that have already fully vested, or with respect to the vested portion of partially-vested outstanding equity awards?

Suggested Answer: For purposes of Instruction 2, the relevant information to be reported in the required footnote (or footnotes) consists of the vesting date or dates for all unvested stock options and stock awards, including equity incentive plan awards. In the case of outstanding and unexercised stock options that have fully vested, it is not necessary to disclose the historical vesting schedules for such options.

The lead-in text to Item 402(f)(1) states that the Outstanding Equity Awards at Fiscal Year-End Table requires disclosure with respect to: "unexercised options; stock that has not vested; and equity incentive plan awards . . . outstanding as of the end of the registrant's last completed fiscal year .

. . ." Instruction 2 similarly applies to "awards held at fiscal-year end . . . ." This language clearly indicates that restricted stock awards and restricted stock unit awards that have fully vested by fiscal year-end do not need to be reported in the table at all. Similarly, it is not relevant to investors to disclose the specific historical vesting schedule and dates for stock options and other stock awards, or portions thereof, which have already vested as of fiscal year-end.

SEC RESPONSE: The SEC Staff agreed with the suggested answer to this question. For purposes of Instruction 2 to Item 402(f)(2) of Regulation S-K, the relevant information to be reported in the required footnote (or footnotes) consists of the vesting date or dates for all unvested stock options and stock awards, including equity incentive plan awards. In the case of outstanding and unexercised stock options that have fully vested, it is not necessary to disclose the historical vesting schedules for such options.

Securities Act Rule 144

No questions at this time

Securities Registration

No questions at this time

Form S-8

1. Transfer of Filing Fees. Compliance and Disclosure Interpretation 240.11 (Securities Act Rules) provides as follows:

> **Question:** An issuer has a Form S-8 on file that registers shares of common stock to be issued upon the exercise of outstanding options. The issuer has decided to stop granting stock options and believes that it has more shares registered on the Form S-8 than it will need to cover the exercise of the outstanding options. May the issuer transfer to a new registration statement the filing fees associated with the securities that the issuer believes it will not need to issue, and continue to use the Form S-8 to cover the exercise of the outstanding options?
>
> **Answer:** No. Because Rule 457(p) permits filing fees to be transferred only after the registered offering has been completed or terminated or the registration statement has been withdrawn, the issuer may not transfer the fees associated with the securities that it believes it will not need to issue until the issuer completes or terminates the offering registered on Form S-8. [Jan. 26, 2009]

In a situation as described in the CD&I, would it be permissible for an issuer to file a post-effective amendment to the registration statement on Form S-8 to add another employee stock plan to the registration statement (essentially by listing on the cover page under “Full title of the plan” the formal name of the additional employee stock plan) for purposes of using the

previously-registered securities that will no longer be needed to fulfill commitments to issue securities made under the employee stock plan originally issued under the registration statement?

Suggested Answer: Yes. We believe that this situation is analogous to amending a registration statement on Form S-1 or S-3 to change the issuer's plan of distribution. Thus, it would be permissible for an issuer to file a post-effective amendment to the registration statement to add a new employee stock plan to the registered offering for purposes of issuing the securities originally registered.

SEC RESPONSE: No. Since the additional employee stock plan that the question seeks to add to the existing registration statement on Form S-8 involves a separate and distinct offering of securities, it is not permissible to add this plan to the registration statement via a post-effective amendment. This principle is reflected in Compliance and Disclosure Interpretation 126.06 which, while it permits the registration of multiple employee stock plans on a single registration statement on Form S-8 as a matter of administrative convenience, requires that the registration statement expressly state the amount of securities that is being registered with respect to each individual plan.

Exchange Act Rule 10C-1

1. Assessing the Independence of Compensation Consultants and Other Advisors to the Compensation Committee. The Instruction to new Exchange Act Rule 10C-1(b)(4) (as implemented through the listing standards of the national securities exchanges) states that the Compensation Committee of a listed issuer must conduct an independence assessment (as outlined in Rule 10C-1(b)(4)) with respect to any compensation consultant, legal counsel (other than in-house legal counsel) or other adviser that provides advice to the Compensation Committee. While it is reasonably clear that where a Compensation Committee seeks to directly engage a compensation consultant, legal counsel, or other advisor, that the subject advisor should expect that, during the course of its engagement, it will provide advice to the Compensation Committee, it is less clear, particularly in the case of legal counsel that has been engaged by the listed issuer itself, when its work for the issuer will rise to the level of being considered having "provided advice" to the Compensation Committee.

For example, where a listed issuer's outside legal counsel is involved in the preparation and/or review of the executive compensation disclosure required by Item 402 of Regulation S-K for inclusion in the issuer's proxy statement (and, via incorporation by reference, the issuer's annual report on Form 10-K), including the drafting and/or review of the Compensation Discussion and Analysis and the required compensation tables, would this be considered "providing advice" to the Compensation Committee (particularly in light of the requirement pursuant to Item 407(e)(5) of Regulation S-K that the Compensation Committee recommend to the Board of Directors that the Compensation Discussion and Analysis be included in the listed issuer's annual report on Form 10-K and proxy statement or information statement?

Further, where pursuant to its engagement with the listed issuer, its outside legal counsel provides advice to the issuer's general counsel on an executive compensation matter, would the legal counsel be considered to have "provided advice" to the Compensation Committee where (i)

the legal counsel has no reason to believe that its name (or any reference to having consulted with outside legal counsel) is being invoked when the general counsel subsequently provides advice to the Compensation Committee on the matter and (ii) the Compensation Committee has no reason to believe that the general counsel would be consulting with outside legal counsel in connection with advising the Compensation Committee on the matter?

SEC RESPONSE: The Staff and the members of the JCEB in attendance engaged in a lengthy discussion on what it means to "provide advice" as contemplated by the Instruction to Rule 10C-1(b)(4), particularly as it relates to outside legal counsel. While the Staff declined to provide a "bright line" text on the matter, several scenarios were presented and explored on the possible factors that may need to be analyzed in determining when a listed issuer's outside legal counsel (or other outside adviser) is indirectly "providing advice" to a compensation committee.

Subsequently, at a meeting of the Securities Law Committee of the Society of Corporate Secretaries and Governance Professionals, the Staff clarified its views on this matter in response to certain statements made following the JCEB-SEC Staff meeting as to the substance of this discussion. The Staff indicated to the Society that, while the question does not lend itself to a "bright line" test, in-house legal counsel should be in the best position to make the determination and control the vetting process. For example, if in-house legal counsel has a lawyer outside the door of the compensation committee meeting and goes out and gets advice and then comes back in and transmits that advice, then obviously that adviser should have been vetted. He called this the "ventriloquist" scenario. On the other hand, if in-house legal counsel speaks to several outside legal counsel as a matter of course and then is in a compensation committee meeting giving advice based on what he or she has heard and formulated in his or her own mind, this situation would not require that these counsel be vetted.

For everything else -- including the more realistic scenario of in-house legal counsel talking to one outside law firm on a regular basis -- the listed issuer must use its judgment as to whether, based on the relevant facts and circumstances, a party is providing advice to the compensation committee and, thus, an independence assessment is required.

Rule 701

No questions at this time

Form 8-K

No questions at this time

Exchange Act Rule 14a-21

No questions at this time

Regulation BTR

No questions at this time

Section 16

No questions at this time

Tax Qualified Defined Benefit Plans

1. A multiemployer pension plan (the "Plan") allows participation by self-employed employees within the meaning of Section 401(c)(1) of the Internal Revenue Code. The Plan is a qualified under Internal Revenue Code §401(a). The Plan employs an investment consultant to make recommendations regarding the investment of Plan assets. The investment consultant has recommended investment of Plan assets in a collective trust fund. The collective trust fund has not registered any interest or participation in the collective trust fund, pursuant to exemptions set forth in Section 3(a)(2) of the Securities Act of 1933. If the Plan participates in the collective trust, is it necessary that the requirements of Securities Act Rule 180 be met in order for the collective trust to remain exempt from registration?

Suggested Answer 1: No, as this is not the type of participation in a collective trust fund which requires compliance with Securities Act Rule 180 to protect the public interest and investors. The issuance of shares or interests to the Plan would fall within the exemptions under Section 3(a)(2) of the Securities Act of 1933.

Suggested Answer 2: Yes, and the Plan interest or participation in the collective trust are exempt from registration under Securities Act Rule 180(b) based on the facts set forth above.

Suggested Answer 3: Yes, and the Plan interest or participation in the collective trust are exempt from registration under Securities Act Rule 180(a) based on the facts set forth above. In particular, the requirements of Securities Act Rule 180(a)(2) are met because all employees covered by the Plan are employed by employers subject to the terms of a collective bargaining agreement pursuant to which contributions are made to the Plan and this this meets the requirement that the plan cover only employees of "interrelated partnerships," which does not refer to LLPs or other type of partnerships but rather an affiliation or relationship. Further, the requirements of Securities Act Rule 180(a)(3)(ii) are met because the Plan obtained the advice of an investment consultant who meets the definition of an entity described in Securities Act Rule 180(a)(3)(ii)(A) and (B).

SEC RESPONSE: The Staff of the Division of Investment Management, which administers Securities Act Rule 180, indicated that it would need more information to provide an answer to this question.