

## Legal Updates & News

### Bulletins

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#### **SEC Publishes Updates to the Manual of Publicly Available Telephone Interpretations – Additional Proxy Statement and Form 10-K Compliance and Disclosure Interpretations Are Effective Immediately**

March 2007

#### **SEC Publishes Updates to the Manual of Publicly Available Telephone Interpretations – Additional Proxy Statement and Form 10-K Compliance and Disclosure Interpretations Are Effective Immediately**

*SEC Staff Gives New Advice and Interpretations and Reconfirms Prior Advice Concerning Proxy Statement and Other Disclosures Under Regulation S-K:*

- *Item 201 - Common Equity Information and Shareholder Matters*
- *Item 403 - Security Ownership*
- *Item 404 - Transactions with Related Persons*
- *Item 407 - Corporate Governance*

On March 13, 2007, the Staff released additional Compliance and Disclosure Interpretations in the form of revisions to its Manual of Publicly Available Telephone Interpretations <http://www.sec.gov/divisions/corpfin/cfnew/cfnew031307.shtml>. These interpretations replace, revise or reconfirm earlier interpretations in the area of share ownership and related party disclosures in proxy statements, annual reports and Forms 10-K and are effective immediately.

Of the almost 50 topics covered, the following new, revised or reconfirmed interpretations are of interest and particularly germane to this year's annual proxy statement drafting process.

#### **Item 201 of Regulation S-K – “Market Price of and Dividends on the Registrant’s Common Equity and Related Shareholder Matters”**

##### ***Equity Compensation Plan Information Table***

**Question 4.01.** The Equity Compensation Plan Information table required by Item 201(d) of Regulation S-K should be included or incorporated by reference in Part III, Item 12 of Form 10-K rather than in Part II, Item 5 of Form 10-K.

**Interpretation 4.02.** Plans that expressly permit awards to be settled in *either* cash or stock need to be disclosed under Item 201(d) of Regulation S-K. Plans that permit settlement *only* in cash need not be disclosed under Item 201(d).

**Question 4.03.** Shares that may be issued under performance share awards and as phantom shares are to be reported in Column (a) of the Equity Compensation Plan Information table with footnote disclosure explaining the nature of the awards and explaining that these award are not included in the weighted average exercise price calculation.

**Question 4.04.** Shares subject to outstanding rights under an employee stock purchase plan should be reported in Column (c) of the Equity Compensation Plan Information table with a footnote reference to the total number of shares remaining available in the Plan as well as the number of shares subject to purchase during

any current purchase period.

### **Performance Graph**

**Question 5.01.** This reaffirms prior policy (402(l)-#30) that a company may plot monthly or quarterly performance graph returns so long as they are plotted at the same intervals.

**Interpretations 5.01 and 5.08.** This reaffirms prior policy (402(l)-#32) that if a self-constructed index is changed, the reasons must be given as well as the total return under both the new and prior index.

**Question 5.02.** This reaffirms prior policy (402(l)-#31) that a self-constructed peer index should weight the returns, based on market capitalization, measured as of the beginning of each period for which a return is indicated.

**Questions 5.05, 5.06 and 5.07.** The performance graph may be included (i) under Item 5 of Form 10-K (if the Form 10-K will be delivered to shareholders as a “Form 10-K Wrap” to satisfy the requirements of Rule 14a-3 of the Exchange Act concurrent with, or prior to, the delivery of the proxy statement to shareholders), (ii) in a “glossy” annual report to shareholders (that is delivered with, or prior to, the delivery of the proxy statement), or (iii) in the proxy statement (but only if it is also included in a delivered Form 10-K or “glossy” annual report as described in (i) or (ii) above).

**Interpretation 5.07.** A company with multiple lines of business may use a peer group of companies from different industries with the lines of business weighted by revenues or assets.

### **Item 403 of Regulation S-K – “Security Ownership of Certain Beneficial Owners and Management”**

#### **Security Ownership of Management**

**Question 2.01.** This reaffirms prior policy (403-#20) that the shareholdings of all directors named in the Company’s proxy statement, even if the terms of one or more directors will not continue past the date of the annual meeting, must still be disclosed in the beneficial ownership table.

**Question 2.04.** Shares subject to either a “regular pledge” or “negative pledge” must be indicated by footnote or otherwise.

### **Item 404 of Regulation S-K – “Transactions with Related Persons, Promoters and Certain Control Persons”**

#### **Transactions with Related Persons**

**Question 2.02.** In determining whether the \$120,000 threshold amount has been met, the value at year end of unexercised in-the-money options held by the related party must be included based on either an “in-the-money” or a Black Scholes-type valuation analysis.

**Question 3.01.** If a company has no reportable related-person transactions it still must disclose its policies for the review, approval or ratification of related-person transactions.

**Interpretation 2.06.** The contract between a company and the fund manager of the company’s pension plan (if the plan is a greater-than-5% shareholder of the company) must be disclosed if the amount involved exceeds \$120,000.

**Interpretation 2.07.** Compensation payments to a child of a company director must be reported as a related-party transaction if that compensation (including the value of equity awards (see Question 2.02 immediately above)) exceeds \$120,000.

### **Item 407 of Regulation S-K – “Corporate Governance”**

#### **Nominating Committee**

**Question 3.01.** The processes, policies and nominee qualifications for director nominations must be included in the proxy statement. A web site posting does *not* suffice.

#### **Compensation Committee**

**Question 5.01.** All compensation consultants with any role in determining executive or director compensation, whether or not they consulted with the board or the compensation committee, must be disclosed.

***Board Meetings and Committees; Annual Meeting Attendance***

**Interpretation 2.01.** The number of meetings of the board or committees of the board used to calculate directors' attendance at such meetings does not include actions by written consent.

The SEC's new executive compensation disclosure rules, adopted in August and amended in December 2006, can be located at: <http://www.sec.gov/rules/final/2006/33-8732afr.pdf> and <http://www.sec.gov/rules/final/2006/33-8765.pdf>, respectively.

The Staff's questions and answers regarding these new rules published in February 2007 can be located at: <http://www.sec.gov/divisions/corpfin/guidance/execcomp402interp.pdf>.

Morrison & Foerster's various legal updates on the new disclosure and executive compensation rules can be found at: <http://www.mofo.com/news/updates/index.html>.