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**SEC Staff Updates Interpretive Guidance
On Executive and Director Compensation Disclosure Rules**

The staff of the Securities and Exchange Commission (SEC) periodically updates its interpretive guidance on executive and director compensation proxy disclosure rules through the release of Compliance & Disclosure Interpretations (CDIs). The CDIs are drafted in question and answer format for issues of general applicability, and also in the form of interpretive responses regarding particular situations. The most recent guidance was released on May 17, 2013. The interpretative guidance is briefly summarized below with the most recent guidance presented in *italics*.

Shareholder Advisory Votes on Executive Compensation

- The say-on-pay vote resolution may omit the reference to “Item 402 of Regulation S-K” and replace with a plain-English equivalent, such as “the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement”
- The say-when-on-pay vote does not need to be in the form of a resolution
- The say-when-on-pay vote may omit the reference to “every 1, 2, or 3 years, or abstain” and replace with “every year, every other year, or every three years, or abstain”

Compensation Discussion and Analysis

- The Compensation Discussion and Analysis (CD&A) disclosure requirements related to stock option grant timing and exercise price determination are applicable to all types of equity awards (not just stock options), and may require disclosure of grant practices that occurred before or after the last completed fiscal year
- When evaluating whether performance targets may be omitted from disclosure, companies must first determine if such disclosure is material to an understanding of compensation paid for the last completed fiscal year; if not material, no disclosure is required; if material, quantitative performance targets must be disclosed unless the goals involve confidential trade secrets or commercial or financial information, the disclosure of which would result in competitive harm to the company; there is no requirement to disclose quantitative targets for inherently subjective or qualitative assessments, such as “demonstrated leadership”
- The discussion of performance targets/goals for future fiscal years should be included in the CD&A only if it enhances the understanding of the named executive officers’ compensation for the last completed fiscal year

- *Disclosure of non-GAAP performance goals (and actual performance versus those goals) is not subject to the general rules regarding disclosure of non-GAAP financial measures, but this exception is limited solely to disclosure of performance goals and does not apply to disclosure of non-GAAP financial measures presented elsewhere in the proxy statement*
- When determining whether a company's benchmarking practices need to be discussed and analyzed, "benchmarking" is defined generally as using compensation data about other companies as a reference point to provide a framework for compensation decisions; benchmarking does not include use of broad-based third-party surveys for more general understanding purposes
- If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then discussion and analysis of that role is required in the CD&A (in addition to the required disclosure of any compensation consultant involvement in the compensation committee governance disclosures)

Named Executive Officers

- Compensation information for fiscal years prior to becoming a named executive officer does not need to be disclosed
- If an individual is a named executive officer for the last completed fiscal year and the third preceding fiscal year, but not the second preceding fiscal year, compensation information must be disclosed in the Summary Compensation Table for all three fiscal years
- If an individual ceases to be an executive officer during the fiscal year but remains employed by the company, the employee must be included in the Summary Compensation Table if the employee would otherwise be one of the two additional individuals whose total compensation for the year (based on the employee's compensation for the full year) was higher than the total compensation of the three highest paid executive officers, other than the chief executive officer and chief financial officer, who are treated as named executive officers
- If an individual served as chief financial officer for part of the last completed fiscal year but was serving as one of the three most highly compensated officers in a different capacity at year end, the individual should be included as a named executive officer by reason of being the chief financial officer and not by reason of being one of the three most highly compensated officers at fiscal year end
- Equity compensation from the acquired company that is assumed in an acquisition should not be taken into consideration when determining named executive officer status for acquired company executives who become acquirer company executives, and should not be reported in the Summary Compensation Table or Grants of Plan-Based Awards Table of the acquirer company; however, such equity compensation should be reported in the Outstanding Equity Awards at Fiscal Year-End Table and Options Exercised and Stock Vested Table of the acquirer company

Summary Compensation Table

- Death benefits received from a company funded life insurance policy should not be taken into account when determining whether an executive is a named executive officer, and should not be reported as compensation in the Summary Compensation Table
- If the rules do not specifically limit footnote disclosure to the last completed fiscal year, footnote disclosure for prior reported years is required only if material to an understanding of compensation for the last completed fiscal year
- Following a merger among operating companies, there is no concept of “successor” compensation; therefore, the surviving company in the merger need not report compensation paid by predecessor companies that disappeared in the merger; further, compensation paid by the predecessor companies need not be counted in determining whether an individual is a named executive officer of the surviving company; different rules may apply in situations involving an “amalgamation” or combination of companies, an operating company combination with a “shell” company, or a spinoff
- Cash bonuses based on performance criteria that are substantially uncertain and communicated to participants at the onset of the performance period should be reported in the Nonequity Incentive Plan Compensation column of the Summary Compensation Table, regardless of the length of the performance period or whether negative discretion is permissible, and the basis for the use of negative discretion may need to be disclosed in the CD&A
- Discretionary cash bonuses that are not based on any performance criteria should be reported in the Bonus column of the Summary Compensation Table, including amounts paid in excess of amounts earned by meeting the performance criteria in a nonequity incentive plan
- Cash retention bonuses that are conditioned on future services are not reported in the bonus column until the fiscal year in which earned
- Bonus amounts that are recovered by the company pursuant to a recoupment or clawback policy in a year subsequent to the year in which the bonus is earned should be reported as an adjustment to the Bonus Column (d) and Total Column (j) for the year in which the bonus is earned, as opposed to the year the compensation is recovered, with appropriate footnote disclosure of the amount recovered; amounts recovered do not affect the named executive officer determination for the year in which the bonus is recovered
- For arrangements in which the named executive officer may elect to receive equity compensation in lieu of what would otherwise be paid in cash, if the amount of salary or bonus forgone is less than the value of the equity compensation received, the incremental value of the equity compensation should be reported in the Stock or Option Awards column of the Summary Compensation Table, as appropriate; similarly, if the conversion election is embedded in the terms of the equity award such that the award falls within the scope of FASB ASC Topic 718 (formerly FAS 123R), the value of the equity compensation should be reported in the Stock or Option Awards column of the Summary Compensation Table, as appropriate

- The grant of an annual incentive plan award in which there is no right to stock settlement embedded in the terms of the award should be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table as a nonequity incentive plan award, with appropriate footnote disclosure of any subsequent stock settlement; conversely, the grant of an annual incentive plan award in which there is a right to elect stock settlement embedded in the terms of the award should be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table as an equity incentive plan award if stock settlement is in fact elected and as a nonequity incentive plan award if not so elected
- The disclosure of stock or option award valuation assumptions for the last completed fiscal year may be incorporated by reference to the Grants of Plan-Based Awards Table if the company chooses to report those assumptions in that table
- The grant of a stock or option award that is subsequently forfeited in the same fiscal year should be taken into consideration when determining named executive officer status and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table
- The grant date fair value of stock or option awards that are subject to time-based vesting conditions should also exclude the effect of estimated forfeitures, similar to the instructions for performance-based vesting conditions
- The grant date fair value of stock or option awards that are subject to performance conditions is 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 shares actually earned, is known by the time the proxy statement is filed
- If a company modifies an outstanding stock or option award to accelerate the vesting of an award that would otherwise be forfeited absent the acceleration, the incremental fair value of the modified award is equal to the entire fair value of the modified award because the fair value of the original award prior to modification is zero as it would not have vested; the entire fair value of the modified award should be taken into consideration in the year of modification when determining named executive officer status and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table, regardless of whether the modification occurs in the same or subsequent year of grant; this treatment differs from the accounting guidance in FASB ASC Topic 718 which states that modifications that relax a vesting condition that was not probable of attainment at the modification date result in a final measure of compensation cost equal to the fair value of the award at the modification date, as opposed to recognizing the entire fair value of both the original and modified award as required by the guidance above
- If a company grants an equity incentive plan award that provides for negative discretion to comply with federal tax rules and results in a delayed grant date for accounting purposes, the award should nevertheless be taken into consideration when determining named executive officer status and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table for the year in which the term of the award and performance targets are communicated to the named executive officer and the service inception date begins, not the later grant date for accounting purposes; the amount reported in both tables should be the then-probable outcome of the performance condition(s) as of the service inception date

- The grant of an annual nonequity incentive plan award that is subsequently declined by a named executive officer should nevertheless be taken into consideration when determining named executive officer status and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table, with appropriate disclosure of the compensation declined in the Compensation Discussion and Analysis and Summary Compensation Table by either a footnote or an adjoining column to the nonequity incentive plan compensation column; conversely, the decision by a named executive officer not to accept a discretionary bonus award before it is granted should not be taken into consideration when determining named executive officer status or reported in the Summary Compensation Table
- Companies with multiple pension plans are permitted to aggregate all increases or decreases in the actuarial present value of accumulated pension benefits before applying the “no negative number” provisions applicable to the Change in Pension Value column of the Summary Compensation table
- If the \$10,000 reporting threshold for perquisites is exceeded, each perquisite must be separately identified by type even if there is no incremental company cost (no reporting is required for perquisites that are fully reimbursed by the executive)
- No disclosure is required for compensatory benefits received from nondiscriminatory Section 423 employee stock purchase plans
- No disclosure is required for nondiscriminatory group disability benefits available to all salaried employees, similar to the exclusion for nondiscriminatory group life, health, hospitalization and medical reimbursement plans
- No disclosure is required for dividends, dividend equivalents, or other earnings on equity awards granted prior to the effective date of the new disclosure rules if the earnings would have been appropriately factored into the grant date fair value of the related award in accordance with FASB ASC Topic 718
- Nonqualified deferred compensation payouts are not disclosed in the Summary Compensation Table, but rather in the Aggregate Withdrawals/Distributions column of the Nonqualified Deferred Compensation table
- Tax gross-up payments should be reported in the Summary Compensation Table for the same year as the related perquisites or other compensation is disclosed, and not in the year actually paid (if later)
- For amounts paid or accrued in connection with termination of employment or change in control, an amount is accrued and should be disclosed if all performance necessary to earn the amount is complete. Conversely, an amount is not accrued (and thus should not be disclosed) if future performance or compliance with a restrictive covenant is required for payment to become due. For example, if a named executive officer has completed all performance to earn an amount, but the payment is subject to deferral, the amount is considered earned and should be disclosed. Conversely, if an amount would be payable in the future subject to the named executive officer’s cooperation or compliance with a non-compete, the amount is not reportable because future performance is required. Notwithstanding the above, future amounts payable that are not required to be reported in the Summary Compensation Table should be disclosed in the Potential Payments upon Termination or Change in Control section.

Grants of Plan-Based Awards Table

- If an equity incentive plan award is denominated in dollars, but payable in stock, it should be reported in columns (f) through (h) of the Grants of Plan-Based Awards Table with footnote disclosure explaining the stock payout provisions; companies are permitted to change the (#) to (\$) in the column headers if all awards in the column are structured that way
- For cash awards that are made in the same year they were earned under an annual nonequity incentive plan (and the amounts are disclosed in the Summary Compensation Table), companies are permitted to change “future” to “possible” in the header for columns (c) through (e) of the Grants of Plan-Based Awards Table
- Disclosure is required for “reload” stock options, as well as for stock and option awards of a parent or subsidiary company
- The grant date fair value reported in column (l) of the Grants of Plan-Based Awards Table for equity incentive plan awards, such as performance shares, should (1) include all tranches of an award for which performance targets are established at the start of the performance period, (2) exclude all tranches of an award for which performance targets are established in subsequent fiscal years, and (3) include any incremental value from amended or modified awards

Outstanding Equity Awards at Fiscal Year-End Table

- Dividends or dividend equivalents paid on restricted stock that are credited and reinvested into additional equity awards should be reported in the Outstanding Equity Awards at Fiscal Year-End Table while unvested, and in the Option Exercises and Stock Vested Table upon vesting
- Shares acquired upon option exercise that are subject to a company repurchase obligation (at the exercise price) are reported in columns (g) and (h) of the Outstanding Equity Awards at Fiscal Year-End Table until the repurchase obligation lapses, at which time such shares are reported in columns (d) and (e) of the Option Exercises and Stock Vested Table
- Equity incentive plan awards reported in columns (d), (i), or (j) of the Outstanding Equity Awards at Fiscal Year-End Table are based on achievement of threshold performance, except that if cumulative performance to date as of the last completed fiscal year exceeds threshold, the next higher level of performance (that is, either target or maximum) should be reported
- Equity incentive plan awards that are earned as of the last completed fiscal year end but paid in restricted stock should be reported in columns (g) and (h) rather than (i) and (j) of the Outstanding Awards at Fiscal Year-End Table, based on the actual number of equity incentive plan awards earned (even if the actual number of shares earned is determined after fiscal year end)
- It is permissible to add a grant date column to the table and a related footnote detailing the vesting schedule that relates to that grant, provided that if a different vesting schedule applies to any award the table must include disclosure about that vesting schedule

Option Exercises and Stock Vested Table

- The gross number of shares underlying an exercised stock appreciation right should be reported in the Option Exercises and Stock Vested Table, not just the net profit shares
- Shares acquired upon option exercise that are subject to a company repurchase obligation (at the exercise price) should not be reported as option exercises in columns (b) or (c) of the Option Exercises and Stock Vested Table, but rather in columns (d) and (e) of the Option Exercise and Stock Vested Table as vested stock when the repurchase obligation lapses

Pension Benefits Table

- When a pension plan has a stated “normal” retirement age and an early retirement age at which benefits are paid without any reduction, the early retirement age should be used for determining pension benefits (and the normal age may be included as an additional column)
- The actuarial present value of accumulated pension benefits that vest upon reaching a certain age should assume that the normal retirement age (or early retirement age, if applicable) is attained, and should ignore actuarial “preretirement decrements”
- The present value of accumulated benefits for a cash balance pension plan is the actuarial present value of the accumulated benefits under the plan, not simply the accrued benefits

Nonqualified Deferred Compensation Table

- Earnings on nonqualified deferred compensation are not “above-market” or “preferential” if calculated in the same manner and rate as earnings on externally managed investments for employees participating in a broad-based, tax-qualified plan (this position may not be available for supplemental retirement plans that do not have any relationship to a tax-qualified retirement plan of the employer)
- Earnings include dividends, stock price appreciation or depreciation, and other similar items, and should encompass any increase or decrease in the account balance during the last completed fiscal year that is not attributable to contributions, withdrawals, or distributions during the year
- Footnote disclosure of amounts reported in the Nonqualified Deferred Compensation Table that were previously reported in the Summary Compensation Table is only required if such amounts were actually previously reported in the Summary Compensation Table
- Company contributions should include all contributions earned during the last completed fiscal year, even if actually credited to the executive’s account in the following year
- Disclosure is required on a plan-by-plan basis for all nonqualified deferred compensation and defined contribution plans, including voluntary and mandatory deferrals of vested equity awards

Potential Payments upon Termination or Change in Control

- Companies are to describe and quantify the estimated payments and benefits upon each potential triggering event, except that if a triggering event has actually occurred, disclosure is

only required for that specific triggering event (even if such event occurs after the end of the last completed fiscal year but before the proxy statement is filed)

- Where the vesting of outstanding stock options is accelerated, companies are to report the “spread” between the exercise (if any) and the closing market price as of fiscal year end to calculate the value of the awards (even if the acceleration is pursuant to a broad-based equity compensation program)
- For purposes of quantifying any excise tax gross up payments, companies may not substitute the first day of the following fiscal year for the last business day of the last completed fiscal year

Director Compensation Table

- Director compensation disclosure is required for persons who served as director during the last completed fiscal year but no longer serve as director at year end, or are not standing for re-election the next year
- Director or executive compensation disclosure is not required for an executive officer (who is not a named executive officer) who is also a director and does not receive additional compensation for services as a director (footnote disclosure of this fact is required)
- Companies are to provide footnote disclosure for each director of the grant date fair value of each equity award granted during the last completed fiscal year computed in accordance with FASB ASC TOPIC 718 (including the incremental fair value of repriced or materially modified option awards), and the aggregate number of nonvested stock and unexercised option awards outstanding at fiscal year end
- Charitable matching gift programs must be disclosed in the All Other Compensation column of the Director Compensation Table, even where they do not discriminate in favor of officers or directors

Compensation Consultant Fee Disclosure

- For purposes of the executive compensation consultant fee disclosure rules, there is no limitation on the types of services that are included in the definition of “additional services,” and such services can include services to executives as well as nonexecutives and revenue from the sale of products to the company; if disclosure is required and the consultant provides services involving broad-based nondiscriminatory plans or the provision of noncustomized survey information, the classification of such services as executive/director or additional consulting services depends on whether the executives/directors benefit from such services under the facts and circumstances; by their terms, related services for benefits administration, human resources services, actuarial services, merger integration services, and noncustomized survey information for nonexecutive/director compensation are classified as additional services

Compensation Policies and Practices as they Relate to Risk Management

- If a company elects or is required to provide narrative disclosure in regard to compensation policies and practices as they relate to risk management, such disclosure should be included

with the company's other executive/director compensation proxy disclosures and not located or presented in a manner that obscures it

Golden Parachute Compensation

- For purposes of the golden parachute compensation disclosures required in connection with a change in control transaction, the named executive officers are those reported in the Summary Compensation Table for the last completed fiscal year, as well as any chief executive officer and chief financial officer that served subsequent to the last completed fiscal year (but excluding other executives not employed at the end of the last completed fiscal year)

Finally, there is additional guidance in the interpretive responses regarding particular situations that deal with spinoffs, mergers, public offerings, changes in fiscal year end, and parent/subsidiary relationships.

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General questions about this letter can be addressed to Thomas Haines in our Chicago office at 312-332-0910 or by email at tmhaines@fwcook.com. Copies of this letter and other related materials are available on our website at www.fwcook.com.