

August 14, 2006

**HEADS-UP ON EXECUTIVE COMPENSATION DISCLOSURE**

**Final SEC Rules on Proxy Disclosure of Executive and Director Compensation Effective for 2007 Proxy Season**

On August 11<sup>th</sup>, the SEC issued the text of final rules that make major revisions to the proxy disclosure of executive and director compensation. The rules are effective for proxy statements filed on or after December 15, 2006 for fiscal years ending on or after that date.

The final rules, which were approved by a unanimous vote at the July 26<sup>th</sup> SEC open meeting, are similar to the proposed rules<sup>1</sup> issued on January 27<sup>th</sup> with some significant differences, including the determination of named executive officers and enhanced disclosure of option grants (especially related to the timing and pricing of grants). The text of the final rules contains clarifications and additional details to the description that the SEC provided in the press release following the meeting, and to the remarks of SEC commissioners and staff made during the meeting.

This alert letter highlights the major differences in the final rules from the proposed rules. It also briefly discusses the request for additional comments on the proposed rule on narrative disclosure of total compensation of up to three additional employees that was not finalized.

Attached to this alert letter is a copy of the Summary Compensation Table, the other six executive compensation tables and the Director Compensation Table.

**SUMMARY COMPENSATION TABLE**

**Named Executive Officers.** The determination of the executive officers whose compensation must be disclosed (“Named Executive Officers”), other than the chief executive officer and chief financial officer, will be made on the basis of total compensation for the year. This amount will include salary, bonus, stock awards, option awards, non-equity incentive plan compensation, and other compensation such as perquisites and personal benefits, the dollar value of insurance premiums paid by the Company, and tax reimbursements and “gross-ups.” It will not include the change in actuarial value of pension benefits and any above-market or preferential earnings on nonqualified deferred compensation.

<sup>1</sup> Refer to our letter dated February 1, 2006 that is available on our website at [http://www.fwcook.com/alert\\_letters/2-1-06\\_SEC\\_Proposals-on-Executive-Compensation-Disclosure.pdf](http://www.fwcook.com/alert_letters/2-1-06_SEC_Proposals-on-Executive-Compensation-Disclosure.pdf)

**Total Compensation Column.** The new total compensation column in the Summary Compensation Table will now be the last column rather than the first column, as proposed. It will represent the sum of the columns that precede it in the Summary Compensation Table.

**Bonus and Non-Equity Incentive Plan Compensation Columns.** Annual cash “bonuses” under short-term incentive plans will be reported in the non-equity incentive plan compensation column if they are based on pre-established and communicated performance targets and the outcome of the targets is substantially uncertain; otherwise, the bonus amounts would be reported in the bonus column. If bonus amounts are reported in the non-equity incentive plan compensation column, additional disclosure will be required in the Grants of Plan-Based Awards table.

**Equity Award Columns.** Dividends and dividend equivalents will be excluded from the equity award columns. If they have not been factored into the grant date fair value of the awards determined pursuant to FAS 123(R), the dividends and dividend equivalents will be included in the All Other Compensation column when paid or accrued.

**Change in Pension Value and Nonqualified Deferred Compensation Earnings Column.** A new column will report the increase in the actuarial present value of accumulated pension benefits, as well as the above-market or preferential earnings on nonqualified deferred compensation. The increase in the value of pension benefits will be calculated in the same manner as required for the new Pension Benefits table discussed below.

Interest will be above-market if the rate exceeds 120% of the applicable federal long-term rate under Section 1274(d) of the Internal Revenue Code. Dividend equivalents credited on deferred stock units will generally not be treated as preferential earnings.

**All Other Compensation Column.** In recognition of the disclosure in the new column discussed above, the All Other Compensation column will not include the amount of the increase in pension value or any nonqualified deferred compensation earnings.

#### **GRANTS OF PLAN-BASED AWARDS TABLE**

The Summary Compensation Table will be followed by one supplemental table instead of two tables, as proposed. The new Grants of Plan-Based Awards combines information from the originally proposed Grants of Performance-Based Awards and Grants of All Other Equity Awards tables, to report information relating to grants of non-equity performance-based awards and equity-based compensation awards in a single table that eliminates some of the columns from the proposed tables. In addition, in light of the recent controversy over stock option grant practices (e.g., “backdating” and “springloading”), this table would include (i) the closing market price of the company’s stock on the grant date of a stock option if it is greater than the option exercise price and (ii) the date of action by the compensation committee to grant the stock option if it is different than the grant date.

#### **OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END TABLE**

The Outstanding Equity Awards at Fiscal Year-End table has been expanded, and its format revised to distinguish more clearly the information presented between awards of stock options and stock appreciation rights (“SARs”) and awards of stock and stock units. New columns for awards of stock options and SARs will show the exercise price and expiration date. All

information for stock options and SARs must be shown for each grant rather than in the aggregate, as proposed.

## **RETIREMENT AND POST-EMPLOYMENT COMPENSATION**

**Pension Benefits.** The new Pension Benefits table will show the actuarial present value of the accumulated pension benefits of the Named Executive Officers under each defined benefit retirement plan (both tax-qualified and non-qualified), instead of their estimated annual retirement benefits. The actuarial present value will be calculated based on current compensation and the assumptions used for financial statement purposes, except that the plan's normal retirement age will be used.

**Termination and Change in Control Payments.** The quantification of amounts in the narrative disclosure will assume that the applicable triggering event took place on the last business day of the company's fiscal year, and that the per-share price of the company's stock was the closing market price on that date.

## **NARRATIVE DISCLOSURE OF COMPENSATION OF UP TO THREE OTHER EMPLOYEES – ADDITIONAL COMMENTS REQUESTED**

In response to the comments it received, the SEC has requested additional comments on the proposed rule for narrative disclosure of total compensation for the last year for up to three employees in addition to the Named Executive Officers. The SEC stated that the disclosure would be limited to employees who have responsibility for significant policy decisions within the company, a significant subsidiary, or a principal business unit, division or function. Disclosure would continue to be required only if the employee's compensation was higher than that of the lowest-paid Named Executive Officer. The SEC has specifically requested additional comments on a variety of issues including whether the disclosure should (i) only apply to companies with a market capitalization greater than \$700 million, and (ii) only identify the employee's position, or also include the employee's name.

## **COMPENSATION DISCUSSION AND ANALYSIS**

**Compensation Discussion and Analysis.** The Compensation Discussion and Analysis ("CD&A"), which will be treated as filed with the SEC and subject to the disclosure and liability provisions of the securities laws including certification by the CEO and CFO, will be required to include additional disclosure regarding grants of stock options to executives, including how the determination is made as to when options are granted. If there is a program, plan or practice to time stock option grants to executives in coordination with the release of material non-public information, the CD&A must include a statement that option grants may be made at times when the compensation committee (or board of directors if it grants options) is in possession of material non-public information. In that event, additional questions will have to be addressed, such as how that information was taken into account in determining whether and in what amounts to make grants and whether the compensation committee (or board of directors) delegates any aspect of the administration of the program, plan or practice to any other persons.

The CD&A will not have to address what the Company's executive compensation program is designed not to reward, as originally proposed. Certain actions taken after the end of the fiscal year may also need to be discussed, such as the adoption or implementation of new or modified programs if they could affect a fair understanding of the compensation of the Named Executive Officers for that fiscal year.

The CD&A must also discuss (i) company policies and decisions with respect to recapture of awards and payments in the event of a restatement or adjustment of relevant performance measures that would reduce the amount awarded or paid and (ii) the basis for selecting certain events as triggers for payments under post-termination agreements, such as a single-trigger for payment in the event of a change in control.

**Compensation Committee Report.** A new Compensation Committee Report under the signature of the compensation committee will state whether the committee has reviewed and discussed the CD&A with management and, based on the review and discussion, has recommended that the CD&A be included in the proxy statement (and the company's annual report on Form 10-K). The Compensation Committee Report will be treated as furnished with the SEC.

## **MISCELLANEOUS**

Other significant differences in the final rules from the proposed rules are:

- There appears to be a higher standard for non-disclosure of target levels relating to specific quantitative or qualitative performance related factors used in determining annual bonus and long-term incentive compensation.
- Only the incremental fair value of any option/SAR repricing or material modification will be reported in the Option Award column of the Summary Compensation Table.
- The Option Exercises and Stock Vested Table will not include a column showing the grant date fair value previously reported in the Summary Compensation Table.
- The Performance Graph will be retained but will appear in the company's annual report on Form 10-K rather than in the proxy statement as part of executive compensation disclosure.

## **EFFECTIVE DATE**

The final rules are effective for proxy statements filed on or after December 15, 2006, for fiscal years ending on or after December 15, 2006.

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This letter is intended to alert compensation professionals about developments that may affect their companies, and should not be considered or relied upon as legal advice. Specific questions about the applicability of the final SEC rules to proxy disclosure of compensation of executives and directors should be discussed with appropriate counsel. General questions applicable to the final rules on proxy disclosure of executive and director compensation may be directed to Richard Alpern in our New York office at 212-299-3599 or by email at [ralpern@fwcook.com](mailto:ralpern@fwcook.com). This letter and other published materials are available on our website, [www.fwcook.com](http://www.fwcook.com).

SUMMARY COMPENSATION TABLE

Name and Principal Position	Year	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Nonqualified Deferred Compensation Earnings (\$)	All Other Compensation (\$)	Total (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO	_____								
	_____								
	_____								
PFO	_____								
	_____								
	_____								
A	_____								
	_____								
	_____								
B	_____								
	_____								
	_____								
C	_____								
	_____								
	_____								

**GRANTS OF PLAN-BASED AWARDS**

Name	Grant Date	Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Future Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or Units (#)	All Other Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards (\$/Sh)
		Threshold (\$)	Target (\$)	Maximum (\$)	Threshold (#)	Target (#)	Maximum (#)			
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
PEO										
PFO										
A										
B										
C										

**OUTSTANDING EQUITY AWARDS AT FISCAL YEAR-END**

Name	Option Awards					Stock Awards			
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price (\$)	Option Expiration Date	Number of Shares or Units of Stock That Have Not Vested (#)	Market Value of Shares or Units of Stock That Have Not Vested (\$)	Equity Incentive Plan Awards: Number of Unearned Shares, Units or Other Rights That Have Not Vested (#)	Equity Incentive Plan Awards: Market or Payout Value of Unearned Shares, Units or Other Rights That Have Not Vested (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
PFO									
A									
B									
C									

OPTION EXERCISES AND STOCK VESTED

Name	Option Awards		Stock Awards	
	Number of Shares Acquired on Exercise (#)	Value Realized on Exercise (\$)	Number of Shares Acquired on Vesting (#)	Value Realized on Vesting (\$)
(a)	(b)	(c)	(d)	(e)
PEO				
PFO				
A				
B				
C				

PENSION BENEFITS

Name	Plan Name	Number of Years Credited Service (#)	Present Value of Accumulated Benefit (\$)	Payments During Last Fiscal Year (\$)
(a)	(b)	(c)	(d)	(e)
PEO				
PFO				
A				
B				
C				

NONQUALIFIED DEFERRED COMPENSATION

Name	Executive Contributions in Last FY (\$)	Registrant Contributions in Last FY (\$)	Aggregate Earnings in Last FY (\$)	Aggregate Withdrawals/Distributions (\$)	Aggregate Balance at Last FYE (\$)
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

DIRECTOR COMPENSATION

Name	Fees Earned or Paid in Cash (\$)	Stock Awards (\$)	Option Awards (\$)	Non-Equity Incentive Plan Compensation (\$)	Change in Pension Value and Nonqualified Deferred Compensation Earnings	All Other Compensation (\$)	Total (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
A							
B							
C							
D							
E							