EXEQUITY

Client Briefing
Considerations in Preparing the Compensation and Discussion Analysis Section

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The new proxy disclosure rules[1] require public companies (that are not small business issuers) to include a Compensation Discussion and Analysis (CD&A) section in their proxy statements. Unlike the current Board Compensation Committee Report, the CD&A will be a filed document, and be prepared by management, with significant input and guidance from a company's Compensation Committee. One of the most striking changes is that the CD&A requires a company to provide ***analysis*** *regarding its compensation programs, policies and actions.*

This will require companies to analyze each element of compensation provided to executive officers, both on an individual element basis and in the aggregate. Further, this analysis will have to focus on both targeted pay opportunities and actual pay delivered. Companies must explain ***why*** *and* ***how*** *these compensation amounts were determined, as well as the process for setting such compensation amounts. Also required is a description of the factors considered in setting such amounts, such as surveys and other benchmarks, internal pay equity, competitive market forces for executive talent, company performance, industry factors, etc. In short, companies will need to* ***explain why they think what they paid as compensation to their executives is justified, appropriate and in the best interests of the company and shareholders****.*

According to Professor Jeffrey N. Gordon, on whose article the U.S. Securities and Exchange Commission (SEC) relied in proposing the CD&A, the "CD&A should provide a bottom line assessment of the different compensation elements…and then provide a justification for the compensation in light of the demands of the job, the particular industry, the actual performance, and other factors deemed relevant – in short, an explanation of why the Compensation Committee thinks the compensation is warranted."[2]

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[1] *Executive Compensation and Related Person Disclosure,* SEC Release Nos. 33-8732; 34-54302; IC-27444; File No. S7-03-06, issued August 11, 2006 and published in the Federal Register, 17 CFR Parts 228, 229, 232, 239, 240, 245, 249 and 274, September 8, 2006 [71 FR 53158].

[2] Jeffrey N. Gordon, *Executive Compensation: If There's a Problem, What's The Remedy? The Case for "Compensation Discussion and Analysis*," Journal of Corporation Law, Summer 2006. Available at SSRN: http://ssrn.com/abstract=686464.

What the SEC Requires

The following sections detail the requirements for the new CD&A section of the proxy statement.

Six Core Questions

The SEC intends the CD&A to be an overview to the compensation disclosure in a company's proxy statement, *i.e.*, a narrative disclosure that puts into context the compensation disclosure provided elsewhere in the proxy. The CD&A needs to explain the material elements of the company's Named Executive Officers' (NEOs) (the executives required to be included in the compensation disclosure tables) compensation by answering the following questions:

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?
- How do each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

Purpose of the CD&A

The CD&A is intended to:

- Provide material information about the compensation objectives and policies for the NEOs without resorting to boilerplate disclosure
- Put into perspective for investors the numbers and narrative that follow it in the compensation disclosure tables
- Be comprehensive, so it will call for discussion of material compensation policies the company applies, even if not included among the examples set out in the rules.

Principles-Based Disclosure

The CD&A disclosure requirement is principles-based. The proxy disclosure rules identify the disclosure concept for the CD&A and provide several illustrative examples. A company must assess the materiality to investors of the information that is identified by each example in light of the particular situation of the company. In some cases an example may not be material to a particular company, and therefore no disclosure would be required. Additionally, there may be items of a company's compensation programs and policies that are not mentioned in the examples detailed in the new rules. If these items are material, companies must disclose them in the CD&A, even though it does not fall within the rules' examples.

In two speeches[3] shortly after the final proxy disclosure rules were issued, John White, Director of the SEC's Division of Corporation Finance, explained what a principles-based disclosure means. Director White referenced the description used by Robert Herz, chairman of the Financial Accounting Standards Board, in 2002:

> Under a principles-based approach, one starts with laying out the key objectives of good reporting in the subject area, and then provides guidance explaining the objective and relating it to some common examples. While rules are sometimes unavoidable, the intent is not to try to provide specific guidance, or rules, for every possible situation. Rather, if in doubt, the reader is directed back to the principles.[4]

Director White went on to say that when his predecessors studied principles-based accounting a few years ago, they noted the difficulties of a pure principles-based – or "principles only" – system and concluded that some structure is useful.[5] Thus, the new rules include both a disclosure principle as well as examples of disclosures.

Examples of Material Disclosures

The final proxy disclosure rules detail the following examples of matters that could be appropriate (if material for the company) for the CD&A to address:

- Policies for allocating between long-term and currently paid out compensation;
- Policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation;
- For long-term compensation, the basis for allocating compensation to each different form of award;
- How the determination is made as to when awards are granted, including awards of equity-based compensation such as options;
- What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
- How specific elements of compensation are structured and implemented to reflect these items of the company's performance and the executive's individual performance;
- The factors considered in decisions to increase or decrease compensation materially;
- How compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (*e.g.,* how gains from prior option or stock awards are considered in setting retirement benefits);
- The impact of accounting and tax treatments of a particular form of compensation;

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[3] *Speech by SEC Staff: Principles Matter*, by John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, Practising Law Institute Conference, New York, NY, September 6, 2006 [http://www.sec.gov/news/speech/2006/spch090606jww.htm] (hereafter the *Principles Matter Speech*), and *Speech by SEC Staff: The Principles Matter: Options Disclosure*, by John W. White, Division of Corporation Finance, U.S. Securities and Exchange Commission, Corporate Counsel Conference, Washington, D.C., September 11, 2006 [http://www.sec.gov/news/speech/2006/spch091106jww.htm].

[4] *Ibid.*

[5] *Principles Matter Speech.*

- The company's equity or other security ownership requirements or guidelines and any company policies regarding hedging the economic risk of such ownership;
- Whether the company engaged in any benchmarking of total compensation or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies); and
- The role of executive officers in the compensation process.

These are the examples mentioned in the final proxy disclosure rules. They are not intended to be an exhaustive list. Consequently, the fact that an item is not dealt with in these examples is not dispositive of whether it must be disclosed. Instead, the proper inquiry for any item or fact related to a company's compensation in determining if disclosure is required is to determine whether the item is material. If it is, then the principles of disclosure underlying the new rules will require that it be disclosed in the CD&A.

CD&A Template

Given the comments from the SEC, it is not appropriate to provide a one-size-fits-all template for use in creating a CD&A. Instead, each CD&A must be individually tailored to the specific compensation philosophy, programs, actions taken by each company, as well as the material items of compensation for each company. As a result, this document attempts to outline some of the sections that might be included in a CD&A. Care should be taken to ensure that all material aspects of a company's compensation philosophy, programs, performance and unique situation are considered and included when preparing the CD&A.

Sample Outline for the CD&A

What follows is a possible outline of the different sections that could make-up the CD&A:

- Introduction/Corporate Governance Section
  - Compensation Committee Members and the Compensation Committee Charter – corporate governance information about the committee
  - Compensation Consultant – name of firm, duties and assignment
  - Role of Executives in Establishing Compensation
  - Compensation Committee Activity – meetings, decisions, plan approvals, etc.
- Objectives of Compensation Programs Section
  - Compensation Philosophy
  - Benchmarking of Compensation (total compensation or any element of compensation)
  - Company Compensation Policies
- Compensation Programs Design Section
  - Narrative addresses the following questions:
    - What are the compensation programs intended to accomplish, *i.e.*, attract, motivate, retain employees, etc.?

- Why does the company provide each element?
- How does the company determine the amount for each element (and disclose any applicable formulas)?
- How does each element of compensation and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

- Impact of Performance on Compensation
  - Disclosure of performance goals, or
  - Nondisclosure of performance goals – discussion of how difficult it would be to achieve the non-disclosed targets/goals
  - Actual performance versus compensation paid
  - Performance relative to that of any peer/comparator group

- Elements of Compensation
  - Elements of In-Service Compensation and Benefits
    - Base Salary
    - Annual Bonus / Short Term Incentive
    - Long-Term Incentives
    - Personal Benefits and Perquisites
    - Other Elements
  - Elements of Post-Termination Compensation and Benefits
    - The various termination events that trigger post-termination payments and benefits, including:
      - Retirement
      - Change-in-Control
      - Severance
      - For Cause
      - Other Terminations (death, disability, voluntary, etc.)
    - Does a written agreement apply?
    - Impact on Current Cash Compensation
    - Impact on Deferred Compensation
    - Impact on Equity Compensation
    - Impact on Non-equity incentive compensation
    - Impact on Personal benefits and perquisites
    - Required restrictive covenants and agreements (non-solicit, non-disparagement, non-compete, etc.) from NEOs
- Stock Ownership/Retention Guidelines

- ❖ Impact of Regulatory Requirements on Compensation
- ❖ Conclusion

CD&A Checklist

Following is a checklist for the CD&A that includes key questions for each section that may be included in the CD&A.

Introduction/Corporate Governance Section

This section provides the lead-in to the CD&A. Companies should start with the facts about their Compensation Committee (those required under the newly-codified corporate governance requirements[6]), the role of any Compensation Consultant, and the role of executives in the company's compensation design, process and decisions.

Compensation Committee Members and the Compensation Committee Charter

This section identifies the members of the Compensation Committee during the year and their responsibilities.

Key Questions

- What is the composition of the Compensation Committee?
- If a Compensation Committee or similar committee does not exist, why not?
- If no such committee exists, which directors participate in the consideration of executive officer and director compensation?
- Are members of the Compensation Committee independent? Under which definition(s)? Who determined this?
- What are the qualifications for directors to serve on the Compensation Committee? Is any special knowledge about compensation matters required? What knowledge of compensation matters does each director posses?
- What are the Compensation Committee's primary responsibilities?
- Does the Compensation Committee have a charter? Where can it be found (give web address if available online)? If not available online, has the charter been filed with the proxy as required (every three fiscal years or if materially revised since the beginning of the last fiscal year)?
- How can the charter be revised? When was the charter last reviewed? What was the result of this review?
- Does the Compensation Committee have the authority to secure the services of advisers both inside and outside the company? Does it have budgetary authority for outside advisers it retains?
- Who is in charge of the Compensation Committee's meeting agendas?
- Who sets the Compensation Committee's meetings and calendar?
- What is the Compensation Committee's scope of authority?
- To what extent may the Compensation Committee delegate its authority to other persons? What authority may be delegated? To whom?
- What authority has been delegated by the Compensation Committee? To whom?

Compensation Consultant

The proxy disclosure rules require companies to identify any compensation consultants that had a role in determining or recommending the amount or form of executive and director compensation and provide related information.

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[6] Item 407(e) of Regulation S-K.

Key Questions

- Does the Compensation Committee engage an outside compensation consultant to advise the Committee? Is that consultant and the consultant's firm considered independent? Factors the Committee might consider in evaluating this are:
    - The ability to hire and fire the consultant;
    - The amount of work outside of executive compensation services that are performed by the consultant's firm for the company;
    - The portion of the consultant's work that is commissioned by the Committee as opposed to management;
    - Whether the Committee is copied on final work product prepared for management; and
    - Whether the Committee receives copies of all of the consultant's bills to the company.
- Does the company's management retain a compensation consultant? Is it the same as the Compensation Committee's consultant?
- Who acted as a compensation consultant to the Compensation Committee since the beginning of the last fiscal year?
- If either the Compensation Committee or management retains the services of a compensation consultant, what is the nature and scope of the compensation consultant's assignments? Who determines the compensation consultant's assignments?
- What role does the compensation consultant have in determining compensation programs, *e.g.*, the compensation consultant provides competitive data and business and technical considerations and does/does not recommend pay program and pay level changes?

Role of Executives in Establishing Compensation

This section should detail the role of executives in the company's process for setting compensation, especially the role of the CEO in setting the compensation of his/her direct reports. For example, are certain executives required to attend the Compensation Committee's meetings, act as secretary for the Committee, prepare materials and agendas for committee meetings, etc.

Key Questions

- Which executive(s) play a role in the assessment, design and/or recommendation of compensation programs, plans and awards for executives and directors?
- Who are these executives?
- What do these executives actually do in relation to the company's compensation programs, policies, actions and/or decisions?
- Do the executives attend meetings of the Compensation Committee? General meetings? Executive sessions?
- What tasks does the Compensation Committee delegate to executive(s)?

Compensation Committee Activity

This section should discuss the administrative details concerning the Compensation Committee activities during the past fiscal year, and before or after the last fiscal year if material to a complete understanding of the compensation disclosures.

Key Questions

- What actions did the Compensation Committee take since the beginning of the last fiscal year and prior to the time the next proxy will be filed?
- Did the Compensation Committee adopt any new compensation plans or programs or amend any existing compensation plans or programs?
- Did the Compensation Committee institute any new compensation policies or amend any existing compensation policies?
- Why did the Compensation Committee take these actions?
- How many times during the last year did the Compensation Committee meet?
- Did any executives attend these meetings? Who and why?
- How many times did the Compensation Committee meet in executive session during the year?

- Did any executives attend these executive sessions? If so, who? Did any adviser to the Compensation Committee attend these executive sessions? If so, indicate the adviser and relationship to the Compensation Committee.
- Did the Compensation Committee review the amounts payable under each individual element of compensation as well as in the aggregate for each NEO? What conclusions did it reach regarding the individual elements of, and total aggregate compensation, paid to each NEO? Factors the Compensation Committee might consider in analyzing the compensation include:
  - Total compensation, all equity awards granted to each NEO since starting with the company, total wealth accumulation of each NEO, and future compensation opportunities, all as depicted within tally sheets prepared for each NEO,
  - Internal pay equity,
  - The company's stock ownership and/or stock retention policies, including any hold-until-retirement policies,
  - The competitive environment for recruiting NEOs., and what the relevant competitors pay, and
  - The "need" to provide each element of compensation and the amounts targeted and delivered.

Objectives of Compensation Programs Section

Companies should lay out the underlying objectives of their compensation programs and policies in this section. In doing so, we believe companies should first set out their compensation philosophy and explain how it impacts the company's compensation decisions and designs. Next, the company should explain if it benchmarks all or any element of compensation for executives. If the company does, it should disclose the companies that are in the peer/comparator group used for benchmarking purposes, why this group was selected, whether and when it is reviewed, by whom, and when it was last reviewed and what actions were taken, if any, as a result. Finally, the company should disclose its standard compensation policies that are material for shareholders to gain an understanding of the company's compensation programs, policies and decisions.

Compensation Philosophy

This section should be designed to detail the company's general compensation philosophy.

Key Questions

- What is your company's compensation philosophy?
- What are the goals of the company's compensation programs?
- What are the company's broad objectives for its compensation programs?
- How does the company establish compensation?
- How does the company judge whether the compensation programs have met their goal(s)?
- When is the compensation philosophy reviewed?
- When was the compensation philosophy last reviewed? What was the result of that review?

Benchmarking

If a company benchmarks its total compensation or any material element of compensation, then it must identify the benchmark and, if applicable, its components including component companies.

Key Questions

- Does the company benchmark all or any element of compensation?
- If it does, why does it benchmark?
- What companies does it benchmark compensation against?
- How and why were these companies selected for benchmarking?
- How does the company compare to the benchmark companies on general business comparative data (revenues, market capitalization, number of employees, etc.)?

- How does the company compare to the benchmark companies on business performance metrics (total shareholder return and appropriate operational performance metrics) for the past 1-, 3-, and 5-year periods?
- What is the competitive pay objective (*e.g.*, 50th percentile) relative to the benchmark companies and how does actual pay compare to the pay objectives?

Compensation Policies

Adding a section to the CD&A that details a company's material, general compensation policies probably will be necessary given the broad requirements set out for the CD&A. Alternatively, to save space in the proxy, companies may wish to try and include their material, general compensation policies in their Compensation Committee's charter and incorporate them by reference into the CD&A.

Key Questions

- What are the material compensation policies applicable to the company's executives?
- Who developed these compensation policies? Management or the Compensation Committee?
- Why has the company established these compensation policies?
- How were these compensation policies established?
- How does the company evaluate whether these compensation policies are effective?
- When are the compensation policies reviewed? By whom? What happened as a result of the last review?
- Examples of general policies that might be detailed include:
    - Total Compensation Policy
    - Benchmarking of Compensation Policy
    - In-Service Compensation Policy
        - Base Salary Policy
        - Short-Term Incentive Compensation/Annual Bonus Policy
        - Long-Term Incentive Compensation Policy
        - Benefits and Perquisites Policy
        - Deferred Compensation Policy
        - Equity Grant Policy
    - Allocation of Compensation Between Different Elements Policy
    - Mix of Compensation and Relationship between fixed and at-risk compensation Policy
    - Cash versus Equity Policy
    - Performance-Based Compensation Policy (individual, corporate, business unit/line of business performance)
    - Post-Termination Compensation Policy
    - Compensation Committee Use and Disclosure of Conclusions Regarding Tally Sheets Policy
    - Tax Gross-Up Policy
    - Equity Dilution Policy – Annual Run-Rate and Total Overhang
    - Stock Option/Stock Appreciation Right Repricing Policy
    - Dividends on Equity Awards Policy
    - Stock Ownership Policy
    - Stock Retention Policy, *e.g.*,Hold-Until-Retirement Policy
    - Wealth Accumulation Policy
    - Internal Pay Equity Policy
    - Employment Agreement Policy
    - Severance and Change-in-Control Policy
    - Tax Deductibility Policy
    - Accounting for Compensation Policy
    - Shareholder Approval Policy
    - Compensation Disclosure Policy
    - Impact of Financial Restatements on Compensation Policy
    - Executives Serving on Other Boards of Directors Policy

Compensation Programs Design Section

This section must discuss what the compensation programs are designed to reward. For example, attracting, retaining and motivating employees, or reward achievements that will bring the company success, such as achievement of the company's strategic goals, or perhaps the compensation programs are designed to reward an increase in the company's stock price which benefits shareholders.

The committee may also wish to address what it thinks of the design and level of compensation paid, *i.e.*, are the amounts appropriate, are they furthering the company's compensation philosophy or strategic business goals?

Impact of Performance on Compensation

This section should discuss the impact of the actual performance under the company's material performance measures on compensation to be paid, to be awarded, or how it might factor into future grants.

Key Questions

- What performance metrics are used? Why?
- What performance targets are used? Why?
- If the performance targets are not disclosed, how difficult will it be for the executive or how likely will it be for the company to achieve the undisclosed target levels or performance goals?
- What is the relationship between performance and compensation? If performance increases or decreases by a certain percent, what impact is there on compensation? Is the impact on compensation to the same degree as the performance? How was the relationship between performance and compensation determined?
- Are the utilized performance metrics appropriate for the company's industry?

Elements of Compensation Section

This section must detail all the elements of compensation for the NEOs, describe why the company chooses to use each element, how the company determines the amount for each element, and how decisions regarding each element fit into the company's overall compensation objectives and affect decisions regarding other elements.

Elements of In-Service Compensation

This subsection should address all the elements of compensation payable to executives during their employment by the company, including:

- Base Salary of the NEOs;
- Annual Bonus / Short-Term Incentive;
- Long-Term Incentives – equity awards and non-equity incentive awards
- Personal benefits and perquisites
- Employee Stock Purchase Plans / Employee Stock Ownership Plans,
- Other material elements of compensation not otherwise specified above, and
- Whether employment agreements are utilized, and, if so, the material details of such agreements (in plain English).

Key Questions

- What is the composition of current compensation packages for executives while employed by the company?
- How and why was this design selected?
- How does each element relate to the other elements, the total compensation package, the company's performance, and the company's compensation policies and programs?
- Why does the company choose to use each such element of compensation?
- Are these elements and the mix of elements appropriate for the company given its performance, industry, current challenges and environment?
- What is the process for review of the various elements of compensation?
- How does performance ultimately impact the compensation that will be paid?
- What performance metrics and weightings are utilized, if any?
- How do individual, business unit, and corporate performance and weightings impact compensation?
- Can the Compensation Committee exercise any positive or negative discretion in relation to compensation? If so, describe.
- What awards are used for annual incentives? Why? Any overlap with long-term incentives' performance goals?
- What awards are used for long-term incentives? Why?
- How are award sizes determined?
- What types of awards are available under the company's compensation plans?
- Were the plans approved by shareholders? If not, why not? If so, when?
- What is the timing of grants of incentive awards relative to the release of material, non-public information?
- How does the company establish the exercise/base price of stock options/SARs? How does this compare to the closing market price on the date of grant?
- When are actions taken to approve incentive grants relative to their grant date?
- What personal benefits and perquisites are offered to executives? Why and how were these selected? When are they reviewed?
- Does the company utilize employment agreements? If so, which executives have them? Why were employment agreements used?
- Does the company utilize any termination of employment (e.g., severance) or change-in-control agreements with executives? If so, which executives have them? Why were such agreements used?

Elements of Post-Termination Compensation

This subsection should address all the material elements of post-termination payments and benefits for each possible triggering (termination) event, including retirement, change-in-control, severance, for cause, or other (death, disability, voluntary, etc.) event. For each event, the CD&A needs to discuss:

- Whether the event and the payments and benefits payable are covered by a written or verbal agreement
- The impact of the event on current cash compensation
- The impact of the event on deferred compensation
- The impact of the event on outstanding equity compensation
- The impact of the event on benefits and perquisites
- Whether the executives receiving payments and/or benefits upon the triggering event would be subject to any restricted covenants and agreements, which such covenants, and their duration.
- Covenants and agreements from executives

Key Questions

- What retirement benefits are provided to executives? Why were these benefits selected?
- Are executives provided with supplemental retirement benefits (SERPs)? If so, why and what do they provide, especially in relation to what is offered to the broad-based employee population?
- If offered, are supplemental benefits funded? If so, how and why was the particular funding mechanism selected?
- Does the company provide change-in-control or severance protection to executives or directors? If so, why?
- Does the company use written agreements to provide change-in-control or severance protection or benefits to executives or directors?
- If the company provides change-in-control or severance benefits/protection to executives or directors, when are these benefits reviewed? By whom? What was the result of the last review?
- Are executives or directors subject to restrictive covenants (non-solicit, non-compete, non-disparagement, etc.)? If so, why? How do these restrictive covenants relate to any compensation or benefits payable or to be payable upon certain triggering events?

Stock Ownership/Retention Guidelines Section

This section would detail any company policies or guidelines related to required executive ownership of company stock and/or stock retention guidelines applicable to equity awards to executives.

Key Questions

- Does the company have stock ownership guidelines? Why or why not?
- If so, to whom do the stock ownership guidelines apply?
- What are the required stock ownership guideline amounts for the NEOs?
- What counts toward the stock ownership guidelines, *e.g.*, restricted stock, RSUs, vested SARs (all underlying shares or just those that represent the appreciation), vested stock options (all underlying shares or just those in excess of the exercise price), performance shares, etc.?
- When are the stock ownership guidelines reviewed? When was the last time the guidelines were reviewed? What happened as a result of the review?
- When is the stock ownership of executives reviewed? When was the executives' stock ownership reviewed? Were the executives in compliance with the guidelines?
- How long do executives have to comply with the stock ownership guidelines?
- What is the consequence if an executive fails to timely comply with the stock ownership guidelines?

Stock Options and Other Equity Grants

- Does the company have a stock retention policy? Why or why not?
- If so, to whom does the stock retention policy apply?
- How does the stock retention policy work? Is there any maximum stock ownership amount after which the retention policy does not apply?
- How long must shares be retained, *e.g.*, fixed number of years, until retirement/termination, etc.?
- Does the company have a policy requiring the retention of shares until retirement for executive officers? Why or why not?
- When was the last time the shares held by executives were reviewed? Had they retained all the shares they were supposed to have retained? If not, which executives were not in compliance?
- What is the consequence for failing to retain the necessary shares under the share retention policy?
- Does the company have a policy that addresses hedging of company stock ownership by executives? If so, what is the policy?

Impact of Regulatory Requirements Section

This section should detail the impact of accounting rules, securities rules, and tax rules, including the tax code requirements regarding the company's ability to deduct compensation paid in excess of $1 million paid to a NEO, on the company's compensation policies, programs and actions.

Key Questions

- In making compensation design and award decisions, what role does the company's ability to deduct compensation in accordance with Internal Revenue Code Section 162(m) play?
- How much compensation paid during the last year was not Internal Revenue Code Section 162(m) qualified? Approximately what value was lost to the company as a result of the inability to deduct this amount for tax purposes?
- Why does the company qualify/not qualify particular elements of compensation under Internal Revenue Code Section 162(m)?
- What role does Internal Revenue Code Section 409A play in compensation design and award decisions?
- What impact does the expensing of equity awards (including stock options) under FAS 123R have on the company's compensation decisions?
- What impact do the accounting rules applicable to non-equity incentive compensation plans (cash plans) have on the company's decisions and design related to such compensation?
- What impact does the determination of the NEOs under the new proxy disclosure rules have on the company's compensation decisions and designs, *e.g.*, payment of bonuses, setting of salaries, etc.?
- What impact do the new proxy disclosure rules have on the company's compensation decisions and designs?
- Do any other regulatory requirements impact the company's compensation programs, designs or decisions (*e.g.*, government contractors are unable to be reimbursed for stock options/SARs used to compensation employees)? If so, how?

Conclusion Section

This section should detail the conclusions reached by the company about the appropriateness and justification for the individual elements of compensation as well as the total compensation delivered to each of the NEOs.

Key Questions

- What conclusions has the company reached with respect to each element of compensation and the total compensation delivered to each NEO? Are these amounts reasonable? Appropriate? In the best interests of the company and shareholders? Why?
- Why does the company believe each element of compensation is needed? In explaining this, some factors to consider include:
  - How do accumulated amounts impact decisions or the need for these compensation elements, e.g. how does accumulated wealth of an NEO factor into the company's analysis of each element of compensation for that NEO, especially the need for continuing annual equity awards and any post-termination provisions, including retirement, SERPs, severance, change-in-control, and gross-ups?
  - The competitive market for executive talent that might try and lure away NEOs, especially if competitive market data or benchmarks are used in setting or evaluating compensation.
  - How each element of compensation, both targeted and delivered amounts, impacts the company's motivation or retention of each NEO.
  - How the total of all elements of compensation, both targeted and delivered amounts, impacts the company's motivation or retention of each NEO.
- How does the company justify the amount of each element of compensation delivered to the NEOs?
- How does the company justify the amount of total compensation delivered to the NEOs?

Our Value Proposition – *EXEQUITY* provides our clients with the highest quality, independent executive compensation and HR merger and acquisition services:

- Our professionals led the Executive Compensation Center of Technical Expertise and the Global Mergers and Acquisitions practice at one of the largest HR consulting firms.
- Our professionals have over 50 years of collective legal and HR consulting experience and have led over 300 transactions for some of the largest and most acquisitive organizations.

Our Executive Compensation Services – *EXEQUITY* provides independent executive compensation assistance to Compensation Committees and management. Our executive compensation services include:

- Strategic pay program design and implementation.
- Assessment of competitive levels of pay.
- Help with technical implications of executive pay, such as: proxy disclosure, tax issues, accounting implications, and securities laws.
- Development of retention incentive programs to help retain critical executive talent.
- Design of appropriate severance coverage (change-in-control and general severance).
- Help with understanding likely shareholder reactions to executive pay (including ISS modeling of proposed plans).

***ProxEASE™* Parachute Modeler** – The new proxy disclosure rules mandate comprehensive disclosure of the payments that would have to be made to each Named Executive Officer upon a termination of employment.

Preparing these disclosures will require application of some of the most complex calculations contained in the Tax Code, the "golden parachute" rules.

The *ProxEASE™* Parachute Modeler is the only internet-based modeler that automates the golden parachute calculation process. Through the use of an interactive questionnaire, the model will assist you in gathering the data necessary to prepare parachute calculations and will run the calculations easily, efficiently, and accurately. In addition, *EXEQUITY's* experts are available to help you satisfy the proxy disclosure requirements.

Please contact one of our principals to learn more about the *ProxEASE™* Parachute Modeler, including how to subscribe or become an authorized reseller.

If you have any questions about this *Client Briefing*, please contact
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