Regulation S-K

Last Update: April 29, 2020

These Compliance & Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of Regulation S-K. Some of these C&DIs were first published in prior Division publications and have been revised in some cases.

The bracketed date following each C&DI is the latest date of publication or revision. We have not changed the date of the C&DIs that reflect only non-substantive changes.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Section 101. Regulation S-K — General Guidance

None

Section 102. Item 10 — General

Question 102.01

Question: Could a company with a fiscal year ended December 31, 2018 be both a "smaller reporting company," as defined in Item 10(f), and an "accelerated filer," as defined in Rule 12b-2 under the Exchange Act, for filings due in 2019, if it was an accelerated filer with respect to filings due in 2018 and had a public float of $80 million on the last business day of its second fiscal quarter of 2018?

Answer: Yes. A company must look to the definitions of "smaller reporting company" and "accelerated filer" to determine if it qualifies as a smaller reporting company and non-accelerated filer for each year. This company will qualify as a smaller reporting company for filings due in 2019 because on the last business day of its second fiscal quarter of 2018 it had a public float below $250 million. However, because the company was an accelerated filer with respect to filings due in 2018, it is required to have less than $50 million in public float on the last business day of its second fiscal quarter in 2018 to exit accelerated filer status for filings due in 2019, as provided in paragraph (3)(ii) of the definition of "accelerated filer" in Rule 12b-2. This company had a public float of $80 million on the last business day of its second fiscal quarter of 2018, and therefore is unable to transition to non-accelerated filer status. As this example illustrates, a company can be both an accelerated filer and a smaller reporting company at the same time. Such a company may use the scaled disclosure rules for smaller reporting companies in its annual report on Form 10-K, but the report is due 75 days after the end of its fiscal year and must include the Sarbanes-Oxley Section 404 auditor attestation report described in Item 308(b) of Regulation S-K. [November 7, 2018]

Question 102.02

Question: Will a company that does not qualify as a smaller reporting company for filings due in a particular year be able to qualify as a smaller reporting company if its public float or annual revenues later decrease?

Answer: Once a reporting company determines that it does not qualify as a smaller reporting company, it will remain unqualified unless when making a subsequent annual determination either:

- It determines that its public float is less than $200 million; or
- It determines that:
    - for any threshold that it previously exceeded, it is below the subsequent annual determination threshold (public float of less than $560 million and annual revenues of less than $80 million); and
    - for any threshold that it previously met, it remains below the initial determination threshold (public float of less than $700 million or no public float and annual revenues of less than $100 million). *See* Amendments to the Smaller Reporting Company Definition - Compliance Guide for more information.

Example: A company has a December 31 fiscal year end. Its public float as of June 28, 2019 was $710 million and its annual revenues for the fiscal year ended December 31, 2018 were $90 million. It therefore does not qualify as a smaller reporting company. At the next determination date, June 30, 2020, it will remain unqualified unless it determines that its public float as of June 30, 2020 was less than $560 million and its annual revenues for the fiscal year ended December 31, 2019 remained less than $100 million. [November 7, 2018]

Question 102.03

Question: Under the definition of "smaller reporting company" in Item 10(f) of Regulation S-K, does the corporate parent of a majority-owned subsidiary have to satisfy the public float or revenue requirements of the definition in order for the majority-owned subsidiary to qualify as a smaller reporting company?

Answer: Yes, the definition of "smaller reporting company" excludes a majority-owned subsidiary if its corporate parent does not also meet the requirements of a smaller reporting company. [July 3, 2008]

Question 102.04

Question: Under the definition of "smaller reporting company" in Item 10(f) of Regulation S-K, must the corporate parent of a majority-owned subsidiary be required to file reports under Section 13(a) or Section 15(d) of the Exchange Act in order for the majority-owned subsidiary to qualify as a smaller reporting company?

Answer: No. [July 3, 2008]

Question 102.05

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a "non-GAAP financial measure" for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a "non-GAAP financial measure" under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

Section 103. Item 101 — Description of Business

Question 103.01

Question: Does Item 101 require a discussion of the entry into a new segment after the close of the fiscal year for which the Form 10-K is being prepared?

Answer: No. [July 3, 2008]

Section 104. Item 102 — Description of Property

None

Section 105. Item 103 — Legal Proceedings

Question 105.01

Question: Are costs anticipated to be incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601) (otherwise known as the "Superfund" law), pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally considered "sanctions" within Instruction 5(C) to Item 103?

Answer: No. The Division's former view that all environmental legal proceedings involving $100,000 or more instituted by a governmental authority are subject to the disclosure provisions of Instruction 5(C) to Item 103 of Regulation S-K, regardless of whether the money involved is characterized as damages (as in the Superfund cases) or fines, has been superseded by Footnote 30 of Release No. 33-6835 (May 18, 1989) and the letter to Thomas A. Cole (Jan. 17, 1989). Footnote 30 and the Cole letter clarify that, while there are many ways a Superfund "potential monetary sanction" may be triggered, including the stipulated penalty clause in a remedial agreement, the costs anticipated to be incurred under Superfund, pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally are not "sanctions" within Instruction 5(C) to Item 103. [July 3, 2008]

Question 105.02

Question: Does the reference in Instruction 5 to Item 103 to an administrative or judicial proceeding arising under "local provisions" require disclosure of environmental actions brought by a foreign government?

Answer: Yes. The reference in Instruction 5 to an administrative or judicial proceeding arising under "local provisions" is sufficiently broad to require disclosure of environmental actions brought by a foreign government. [July 3, 2008]

Question 105.03

Question: Should a proceeding against an officer of the registrant, which could require the registrant to indemnify the officer for damages, be considered a proceeding in which the officer has a material interest adverse to the registrant that should be disclosed pursuant to Instruction 4 to Item 103?

Answer: The mere possibility that a registrant may be required to indemnify an officer for a material claim would not trigger disclosure pursuant to Instruction 4 to Item 103. Under state corporation law, indemnification is potentially available to any officer in any suit or proceeding in which the officer is named by reason of the fact that the person is an officer of the registrant. Whether or not an officer's material interest is "adverse" to the registrant depends on the facts and circumstances of each proceeding. [July 3, 2008]

Section 106. Item 201 — Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters

Question 106.01

Question: Is the Item 201(d) disclosure required in Part II of Form 10-K, given that Item 5 of Form 10-K indicates that the registrant is required to furnish the information required under Item 201, or should the Item 201(d)

disclosure be included (or incorporated by reference) in Part III of Form 10-K given that Item 12 indicates that the registrant is required to furnish the information required under Item 201(d)?

Answer: The Item 201(d) disclosure should be included in Part III, Item 12 of Form 10-K. An issuer may rely on General Instruction G.3 to Form 10-K to incorporate by reference the Item 201(d) disclosure from its proxy statement or information statement, even if the issuer did not submit a compensation plan for security holder action at its annual meeting of security holders. See American Bar Association (Jan. 30, 2004). [Mar. 13, 2007]

Question 106.02

Question: Is restricted stock that has been granted subject to forfeiture pursuant to an equity compensation plan reportable in the Item 201(d) Equity Compensation Plan Information table?

Answer: No. Once issued, the shares of restricted stock that have been granted subject to forfeiture are neither "to be issued upon exercise of outstanding options, warrants and rights" (column (a)) nor "available for future issuance" (column (c)). If the shares of restricted stock so granted are later forfeited, however, they would be reportable in column (c) until granted again. [Mar. 13, 2007]

Question 106.03

Question: Should shares that may be issued under performance share awards if specified targets are met and shares that are credited as phantom shares under a deferred compensation plan be reported in column (a) of the Equity Compensation Plan Information table as securities to be issued upon exercise of outstanding options, warrants and rights?

Answer: Yes. Shares that may be issued under performance share awards if specified targets are met (i.e., an award denominated in shares has been made, but no shares will be issued until the performance targets are met), and shares credited as phantom shares under a deferred compensation plan that will be issued as actual shares upon termination of employment, must be reported in column (a). A footnote to the table should describe the nature of the awards and explain that the weighted-average exercise price in column (b) does not take these awards into account. If the number of shares subject to these awards overstates expected dilution (such as where the award reflects the maximum number of shares to be awarded under best-case targets that are unlikely to be achieved), the footnote can address that situation. [Mar. 13, 2007]

Question 106.04

Question: A company maintains an employee stock purchase plan covered by Section 423 of the Internal Revenue Code, under which there are outstanding rights to purchase company common stock at a floating exercise price (85% of the lower of (i) market price at the start of the purchase period or (ii) market price at the future close of the purchase period). How should the company report the shares subject to these outstanding rights in the Equity Compensation Plan Information table?

Answer: Shares subject to these outstanding rights should be reported in column (c) of the Equity Compensation Plan Information table, together with other shares remaining issuable under the plan. A footnote should disclose the total number of shares remaining available, as well as the number of shares subject to purchase during any current purchase period. Shares subject to the outstanding rights should *not* be reported in column (a) as subject to outstanding options. [Mar. 13, 2007]

Question 106.05

Question: Column (a) of the Equity Compensation Plan Information table requires disclosure of the number of securities to be issued upon exercise of outstanding options, warrants and rights, and column (b) requires disclosure of the weighted-average exercise price of these outstanding instruments. If some of a company's outstanding rights can be exercised for no consideration, and therefore their inclusion substantially reduces the weighted-average exercise price, how does the company disclose this information in the table?

Answer: In this circumstance, the company should include footnote disclosure of this fact and the footnote should include the weighted-average exercise price of the outstanding instruments excluding those that can be exercised for no consideration. [Mar. 13, 2007]

Question 106.06

Question: May a registrant plot monthly or quarterly returns in the performance graph required by Item 201(e)?

Answer: A registrant may plot monthly or quarterly returns provided that each return is plotted at the same interval, and the annual changes in cumulative total return are reflected clearly. [Mar. 13, 2007]

Question 106.07

Question: How should a registrant that presents in the performance graph a self-constructed peer or market capitalization index weight the returns of the component entities of that index?

Answer: A registrant that presents a self-constructed peer or market capitalization index should weight the returns of the component entities of that index according to their market capitalization as of the beginning of each period for which a return is indicated. [Mar. 13, 2007]

Question 106.08

Question: May a registrant-constructed peer or market capitalization index exclude the registrant?

Answer: Yes. [Mar. 13, 2007]

Question 106.09

Question: May issuers choose between using the price shown in the registration statement for an initial public offering, the opening price on the first trading day, or the closing market price on the first trading day when preparing the performance graph?

Answer: No. The issuer should use the closing market price at the end of the first trading day. [Mar. 13, 2007]

Question 106.10

Question: Is the performance graph required to be included in Form 10-K, given that Item 5 of Form 10-K indicates that the registrant is required to furnish the information required under Item 201?

Answer: No. Instruction 7 to Item 201(e) specifies that the performance graph need not be provided in any filings other than an annual report to security holders required by Exchange Act Rule 14a-3 or Exchange Act Rule 14c-3 that precedes or accompanies a registrant's proxy statement or information statement relating to an annual meeting of security holders at which directors are to be elected (or a special meeting or written consents in lieu of such meeting). [Mar. 13, 2007]

Question 106.11

Question: If a company includes the performance graph in its Form 10-K, can the company omit the performance graph from its annual report to shareholders required under Exchange Act Rule 14a-3 or Rule 14c-3?

Answer: The performance graph is required to be in the annual report to shareholders pursuant to Exchange Act Rule 14a-3 or Rule 14c-3, so unless the company is using a "Form 10-K wrap" approach to satisfy the requirements of Rule 14a-3 or Rule 14c-3, the inclusion of the performance graph in the Form 10-K would not satisfy these requirements. [Mar. 13, 2007]

Question 106.12

Question: May a registrant include the performance graph in the proxy statement?

Answer: Yes, provided that the performance graph is also included in the annual report that accompanies or precedes the proxy statement and therefore complies with Exchange Act Rules 14a-3 or 14c-3. [Mar. 13, 2007]

Section 107. Item 202 — Description of Registrant's Securities

Question 107.01

Question: Items 202(a)(1)(x) and (xi) require disclosure of certain restrictions on ownership of the registrant's securities. Are the purchase and sale restrictions imposed by Section 16 of the Exchange Act the types of restrictions required to be disclosed under these items?

Answer: No. [July 3, 2008]

Section 108. Item 301 — Selected Financial Data

Question 108.01

Question: Item 301 of Regulation S-K requires a foreign private issuer to disclose the exchange rate into U.S. currency of the foreign currency in which the financial statements are denominated. For purposes of this requirement, Item 301 provides that the rate of exchange means the noon buying rate in New York City for cable transfers in foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York. The Federal Reserve Bank of New York has recently ceased publishing these exchange rates on its web site. What source of exchange rate information must be used for purposes of Item 301?

Answer: Although the Federal Reserve Bank of New York is no longer publishing the foreign exchange rates on its web site, it is still certifying them for customs purposes. The Board of Governors of the Federal Reserve Bank publishes these exchange rates on a weekly basis on its web site at http://www.federalreserve.gov/releases/h10/Update. You should use this source of exchange rate information for purposes of Item 301 of Regulation S-K. [Apr. 24, 2009]

Section 109. Item 302 — Supplementary Financial Information

None

Section 110. Item 303 — Management's Discussion and Analysis of Financial Condition and Results of Operations

Question 110.01

[Withdrawn, November 7, 2018]

Question 110.02

Question: A registrant providing financial statements covering three years in a filing relies on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years and includes the required statement that identifies the location of such discussion in a prior filing. Does the statement identifying the disclosure in a prior filing incorporate such disclosure by reference into the current filing?

Answer: No. A statement merely identifying the location in a prior filing where the omitted discussion can be found does not incorporate such disclosure into the filing unless the registrant expressly states that the information is incorporated by reference. See Securities Act Rule 411(e) and Exchange Act Rule 12b-23(e). [Jan. 24, 2020]

Question 110.03

Question: May a registrant rely on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years from its current MD&A if it believes a discussion of that year is necessary?

Answer: No. Item 303(a) requires that the registrant provide such information that it believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. A registrant must assess its information about the earliest of three years and, if it is required by Item 303(a), include it in the current disclosure or expressly incorporate by reference its discussion from a previous filing. [Jan. 24, 2020]

Question 110.04

Question: A registrant has an effective registration statement that incorporates by reference its Form 10-K for the fiscal year ended December 31, 2018. In its Form 10-K for the fiscal year ended December 31, 2019, the registrant will omit the discussion of its results for the fiscal year ended December 31, 2017 pursuant to Instruction 1 to Item 303(a) and include a statement identifying the location of the discussion presented in its Form 10-K for the fiscal year ended December 31, 2018. The filing of the Form 10-K for the fiscal year ended December 31, 2019 will operate as the Section 10(a)(3) update to the registration statement. After the company files the Form 10-K for the fiscal year ended December 31, 2019, will the company's discussion of its results for the fiscal year ended December 31, 2017 be incorporated by reference in the registration statement?

Answer: No. The filing of the Form 10-K for the fiscal year ended December 31, 2019 establishes a new effective date for the registration statement. As of the new effective date, the registration statement incorporates by reference only the Form 10-K for the fiscal year ended December 31, 2019, which does not contain the company's discussion of results for the fiscal year ended December 31, 2017 unless, as indicated in Question 110.02, the information is expressly incorporated by reference. [Jan. 24, 2020]

Section 111. Item 304 — Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

Question 111.01

Question: If a registrant's principal accountant resigns, declines to stand for re-election or is dismissed, Items 304(a)(1)(iv) and (v) require the registrant to disclose any disagreements and reportable events during the registrant's two most recent fiscal years and any "subsequent interim period" preceding the resignation, declination or dismissal. For purposes of this requirement, what period of time does "subsequent interim period" cover?

Answer: The "subsequent interim period" is the period from the end of the registrant's most recent fiscal year through the date of the former principal accountant's resignation, declination to stand for re-election or dismissal. This period is not limited to the end of the most recent fiscal quarterly period. Similarly, the "subsequent interim period" referred to in Item 304(a)(2), which requires disclosure of the engagement of a new principal accountant, is the period from the end of the registrant's most recent fiscal year through the date on which the new principal accountant is engaged. [Jan. 14, 2011]

Question 111.02

Question: Item 304(a)(1)(iv) requires affirmative disclosure if there are no disagreements. If a registrant has no reportable events, is the registrant required to disclose that fact?

Answer: No. [Jan. 14, 2011]

Question 111.03

Question: During the two most recent fiscal years and subsequent interim period, the principal accountant advised the registrant that internal controls necessary to develop reliable financial statements did not exist, and the remediation of the internal control deficiency or deficiencies occurred before the end of the subsequent interim period. Is the registrant still required to disclose, pursuant to Item 304(a)(1)(v)(A), that the former principal accountant advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist?

Answer: Yes. The fact that the remediation occurred before the end of the subsequent interim period does not relieve the registrant of its disclosure obligation pursuant to Item 304(a)(1)(v)(A). [Jan. 14, 2011]

Question 111.04

Question: Under Item 304(a)(1)(v)(A), is a registrant required to disclose whether, during the two most recent fiscal years and any subsequent interim period, the former principal accountant advised that there was a "material weakness" or "significant deficiency" in internal control over financial reporting, as those terms are defined in Rule 1-02(a)(4) of Regulation S-X?

Answer: A "material weakness" is defined as "a deficiency, or combination of deficiencies, in internal control over financial reporting…such that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis." Advising the registrant that there is a material weakness in internal control over financial reporting is, for purposes of Item 304(a)(1)(v)(A), equivalent to advising the registrant that the "internal controls necessary for the registrant to develop reliable financial statements do not exist." Consequently, if the former principal accountant advised the registrant that there was a material weakness, then the registrant has a reportable event under Item 304(a)(1)(v)(A).

By contrast, if the former principal accountant advised the registrant that one or more significant deficiencies in internal control over financial reporting existed, but did not also advise that there was a material weakness, then that would not be a reportable event under Item 304(a)(1)(v)(A). However, the factors that led to a significant deficiency could result in the conclusion that there are other reportable events that require disclosure. For example, the former principal accountant may have determined that, because of the significant deficiency, there was a need to significantly expand the scope of the audit, which could, in appropriate circumstances, create a reportable event under Item 304(a)(1)(v)(C). [Jan. 14, 2011]

Question 111.05

Question: A registrant's principal accountant issued an audit report on the registrant's financial statements in the last two fiscal years containing an explanatory paragraph regarding a registrant's ability to continue as a going concern. Is this required to be disclosed under Item 304(a)(1)(ii)?

Answer: Yes. The explanatory paragraph represents a modification of the principal accountant's audit report for an uncertainty, thereby requiring disclosure under Item 304(a)(1)(ii). [Jan. 14, 2011]

Question 111.06

Question: A registrant's principal accountant issued a report on the registrant's internal control over financial reporting in the last two fiscal years containing an explanatory paragraph, adverse opinion or a disclaimer of opinion. Is this required to be disclosed under Item 304(a)(1)(ii)?

Answer: No. Item 304(a)(1)(ii) refers only to the principal accountant's "report on the financial statements." Registrants can voluntarily disclose information about reports on internal control over financial reporting; however, if such reports contain an adverse opinion with respect to the effectiveness of internal control over financial reporting, then that would be reportable pursuant to Item 304(a)(1)(v)(A). See Question 111.04. [Jan. 14, 2011]

Question 111.07

Question: If a principal accountant resigns, declines to stand for re-election or is dismissed because its registration with the PCAOB has been revoked, should the registrant disclose this fact when filing an Item 4.01 Form 8-K to report a change in certifying accountant?

Answer: Yes. Disclosure of the revocation of the accountant's PCAOB registration is necessary to understanding the required disclosure with respect to whether the former accountant resigned, declined to stand for re-election or was dismissed. [Jan. 14, 2011]

Section 112. Item 305 — Quantitative and Qualitative Disclosures about Market Risk

Question 112.01

Question: Is a registrant required to include Item 305 market risk disclosure in its Form 10-Q?

Answer: A registrant does not have to include Item 305 disclosure in its Form 10-Q unless there is a material change to the Item 305 information disclosed in its most recently filed Form 10-K. [July 3, 2008]

Section 113. Item 306 [*Reserved*]

None

Section 114. Item 307 — Disclosure Controls and Procedures

None

Section 115. Items 308 and 308T — Internal Control over Financial Reporting

Question 115.01

Question: Is a Form 11-K required to include internal control reports?

Answer: No. Item 308 does not apply to Form 11-K. [July 3, 2008]

Question 115.02

Question: In annual reports for fiscal years ending on or after December 15, 2007 but before December 15, 2009, non-accelerated filers are required to provide management's report on internal control over financial reporting pursuant to Item 308T of Regulation S-K. The report is deemed not to be "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. Does a non-accelerated filer's failure to provide management's report in its Form 10-K under Item 308T(a) affect its form eligibility or the ability to use Rule 144?

Answer: It is the Division's view that the failure to provide this management report renders the annual report materially deficient. As a result, if management did not complete the evaluation and provide the report as required by Item 308T(a), the company would not be timely or current in its Exchange Act reporting. This would result in the company not being eligible to file new Form S-3 or Form S-8 registration statements and the loss of the availability of Rule 144. Because the filing of the Form 10-K constitutes the Section 10(a)(3) update for any effective Forms S-3 or S-8, the company also would be required to suspend any sales under already effective registration statements.

However, if the company subsequently amends its Form 10-K to provide management's report on whether or not internal control is effective, the company can file new Forms S-8 and resume making sales under already effective Forms S-8, and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied). This would be the case regardless of whether management reached an effective or ineffective conclusion about its internal control. Although amending the Form 10-K to provide management's report may result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. [July 3, 2008]

Section 116. Item 401 — Directors, Executive Officers, Promoters and Control Persons

Question 116.01

Question: Should the Item 401(b) information presented in the Form 10-K be furnished for current officers, rather than for those officers who held such positions during the last fiscal year?

Answer: Yes. [July 3, 2008]

Question 116.02

Question: Does Item 401(e) information with respect to executive officers need to be included in proxy statements if it is included separately in the Form 10-K?

Answer: No. Although Instruction 3 to Item 401(b) does not refer to Item 401(e), which requires disclosure about business experience, Item 401(e) information need not be included in the proxy statement if it is presented in the Form 10-K. [July 3, 2008]

Question 116.03

Question: Is Item 401(f) applicable to persons in the "significant employee" category of Item 401(c)?

Answer: Item 401(f) is not applicable to persons in the "significant employee" category of Item 401(c), unless such persons are de facto executive officers. [July 3, 2008]

Question 116.04

Question: Is Item 401(f)(1) disclosure required for legal proceedings in foreign countries?

Answer: Yes. Item 401(f)(1) requires disclosure regarding petitions filed under the "[f]ederal bankruptcy laws or any state insolvency law." This item should be interpreted to require disclosure regarding comparable events in foreign countries (except in the unusual situation where it is not material). For example, disclosure should be provided when a director of a U.S. public company is also the CEO of a non-U.S. company and a receiver is appointed for the non-U.S. company. [July 3, 2008]

Question 116.05

Question: For each director and nominee, Item 401(e)(1) requires disclosure of such person's "specific experience, qualifications, attributes or skills" that led the board to conclude that such person should serve as a director at the time that a filing containing the disclosure is made. May a company provide these disclosures on a group basis if the directors or nominees share similar characteristics, such as all of them are audit committee financial experts or all of them are current or former CEOs of major companies?

Answer: No. The disclosure of each director or nominee's experience, qualifications, attributes or skills must be provided on an individual basis. For each person, a company must disclose why the person's *particular* and *specific* experience, qualifications, attributes or skills led the board to conclude that such person should serve as a director of the company, in light of the company's business and structure, at the time that a filing containing the disclosure is made. For example, it would not be sufficient to disclose simply that a person should serve as a director because he or she is an audit committee financial expert. Instead, a company should describe the particular and specific experience, qualifications, attributes or skills that led the board to conclude that this particular person should serve as a director at the time that a filing containing the disclosure is made. [Jan. 20, 2010]

Question 116.06

Question: Under Item 401(e)(1), how should a company with a classified board disclose why a director's particular and specific experience, qualifications, attributes or skills led the board to conclude that the person should serve as a director at the time that a filing containing the disclosure is made, if the director is not up for re-election at the upcoming shareholders' meeting?

Answer: Because the composition of the entire board is important information for shareholder voting decisions, the purpose of this disclosure requirement is to elicit current information about all directors on the board, including on classified boards. For each director who is not up for re-election, the evaluation of the director's particular and specific experience, qualifications, attributes or skills and the conclusion as to why the director should continue serving on the board, should be as of the time that a filing containing the disclosure is made. For some boards of directors, particularly those that do not conduct annual self-evaluations, this may require implementing additional

disclosure controls and procedures to ensure that such information about directors who are not up for re-election at the upcoming shareholders' meeting is recorded, processed, summarized and reported within the time periods specified in the Commission's rules and forms. [Jan. 20, 2010]

Question 116.07

Question: Instruction 3 to Item 401(a) provides that if the information called for by paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates. Is Item 401(e) disclosure required with respect to any director to whom this Instruction applies?

Answer: No. Item 401(e) disclosure is not required for any director for whom the company is not required to provide Item 401(a) disclosure. [Feb. 16, 2010]

Question 116.08

Withdrawn July 8, 2011

Question 116.09

Question: Is a company required to include Item 401(e) information about a director's business experience if the director is appointed by holders of a class of preferred stock?

Answer: Yes. In this situation, the company may either provide the same information about this director as it would directors nominated by the board or disclose that the preferred shareholder has advised the company that the shareholder has appointed this director because of [the Item 401(e) information provided to the company by the shareholder that the company would then include in its filing]. [Mar. 4, 2011]

Question 116.10

Question: Pursuant to Instruction 3 of Item 401(a), an issuer omits from its proxy statement Item 401(a) and Item 401(e) information with respect to directors whose terms will not continue after the annual shareholders' meeting. Is this information nevertheless required to be included in a Form 10-K that incorporates its Part III information by reference from the proxy statement?

Answer: No. If an issuer provides its Form 10-K, Part III information by incorporation by reference from the proxy statement and the issuer files its definitive proxy statement within 120 days of its fiscal year-end, then the issuer may rely on Instruction 3 to Item 401(a) to omit, from both the proxy statement and the Form 10-K, Item 401(a) and Item 401(e) information with respect to directors whose terms will not continue after the annual shareholders' meeting. If an issuer includes Item 401(a) and Item 401(e) information directly in Part III of Form 10-K, the issuer must provide such information about all current directors, including those directors whose terms will not continue after the annual shareholders' meeting. [July 8, 2011]

Question 116.11

Question: In connection with preparing Item 401 disclosure relating to director qualifications, certain board members or nominees have provided for inclusion in the company's disclosure certain self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background. What disclosure of self-identified diversity characteristics is required under Item 401 or, with respect to nominees, under Item 407?

Answer: Item 401(e) requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director. Item 407(c)(2)(vi) requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees. To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural

background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

Section 117. Item 402(a) — Executive Compensation; General

Question 117.01

Question: When a company that is in the process of restating its financial statements has not filed its Form 10-K for the fiscal year ended December 31, 2005, must the company comply with the 2006 Executive Compensation Rules when it ultimately files the Form 10-K for the fiscal year ended December 31, 2005?

Answer: The company is not required to comply with the 2006 Executive Compensation rules in the Form 10-K for the fiscal year ended December 31, 2005. [Jan. 24, 2007]

Question 117.02

Question: If a company files a preliminary proxy statement under Exchange Act Rule 14a-6 which omits the executive and director compensation disclosure required by Item 402 of Regulation S-K, would the staff request a revised preliminary proxy statement and deem that the 10-calendar day waiting period specified in Rule 14a-6 does not begin to run until the required information is filed?

Answer: Yes. However, given that the executive and director compensation rules were substantially revised in 2006, in a situation where a company that is complying with the 2006 rules for the first time files a preliminary proxy statement excluding the required executive and director compensation disclosure, the staff will not request a revised preliminary proxy statement nor deem the 10-calendar day waiting period specified in Rule 14a-6 to be tolled, so long as: (1) the omitted executive and director compensation disclosure is included in the definitive proxy statement; (2) the omitted disclosure does not relate to the matter or matters that caused the company to have to file preliminary proxy materials; and (3) the omitted disclosure is not otherwise made available to the public prior to the filing of the definitive proxy statement. [Feb. 12, 2007]

Question 117.03

Question: During 2009, a company recovers (or "claws-back") a portion of an executive officer's 2008 bonus. How does this affect the company's 2009 Item 402 disclosure for that executive officer?

Answer: The portion of the 2008 bonus recovered in 2009 should not be deducted from 2009 bonus or total compensation for purposes of determining, pursuant to Items 402(a)(3)(iii) and (iv), whether the executive is a named executive officer for 2009. If the executive is a named executive officer for 2009, the Summary Compensation Table should report for the 2008 year, in the Bonus column (column (d)) and Total column (column (j)), amounts that are adjusted to reflect the "claw-back," with footnote disclosure of the amount recovered. As the instruction to Item 402(b) provides, if "necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers," the Compensation Discussion and Analysis should discuss the reasons for the "claw-back" and how the amount recovered was determined. [Aug. 14, 2009]

Question 117.04

Question: During 2009, a company grants an equity award to an executive officer. The same award is forfeited during 2009 because the executive officer leaves the company. Should the grant date fair value of this award be included for purposes of determining 2009 total compensation and identifying 2009 named executive officers?

Answer: Yes. [Jan. 20, 2010]

Question 117.05

Question: A registrant with a calendar fiscal year end has filed a Securities Act registration statement (or post-effective amendment) for which it seeks effectiveness after December 31, 2009 but before its 2009 Form 10-K is due. Must it include Item 402 disclosure for 2009 in the registration statement before it can be declared effective?

Answer: If the registration statement is on Form S-1, then it must include Item 402 disclosure for 2009 before it can be declared effective. This is because 2009 is the last completed fiscal year. Part I, Item 11(l) of Form S-1 specifically requires Item 402 information in the registration statement, which includes Summary Compensation Table disclosure for each of the registrant's last three completed fiscal years and other disclosures for the last completed fiscal year. General Instruction VII of Form S-1, which permits a registrant meeting certain requirements to incorporate by reference the Item 11 information, does not change this result because the registrant has not yet filed its Form 10-K for the most recently completed fiscal year.

On the other hand, Form S-3's information requirements are satisfied by incorporating by reference filed and subsequently filed Exchange Act documents; for example, there is no specific line item requirement in Form S-3 for Item 402 information. Accordingly, a non-automatic shelf registration statement on Form S-3 can be declared effective before the Form 10-K is due. Securities Act Forms C&DI 123.01 addresses the situation in which a company requests effectiveness for a non-automatic shelf registration statement on Form S-3 during the period between the filing of the Form 10-K and the definitive proxy statement. [Feb. 16, 2010]

Question 117.06

Question: An individual who was the company's principal financial officer for part of the last completed fiscal year was serving the company as an executive officer in a different capacity at the end of that year, and was among the company's three most highly compensated executive officers. Does the company include this individual as a named executive officer pursuant to Item 402(a)(3)(iii), as one of its three most highly compensated executive officers other than the principal executive officer and principal financial officer who were serving as executive officers at the end of the last completed fiscal year?

Answer: No. The company includes this individual as a named executive officer pursuant to Item 402(a)(3)(ii), as an individual who served as principal financial officer during the fiscal year. The company identifies its three most highly compensated executive officers pursuant to Item 402(a)(3)(iii) from among individuals serving as executive officers at the end of the last completed fiscal year who did not serve as its principal executive officer or principal financial officer at any time during that year. [June 4, 2010]

Question 117.07

Question: Item 402(a)(6)(ii) provides that "registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees." Does this provision also apply to a disability plan that satisfies these nondiscrimination conditions?

Answer: Yes. To the extent that the disability plan provides benefits not related to termination of employment, a registrant may rely on Item 402(a)(6)(ii) to omit information regarding the disability plan. To the extent that the disability plan provides benefits related to termination of employment, a registrant may rely on Instruction 5 to Item 402(j) to omit information regarding the disability plan. [July 8, 2011]

Section 118. Item 402(b) — Executive Compensation; Compensation Discussion and Analysis

Question 118.01

Question: Is the guidance regarding Compensation Discussion and Analysis disclosure concerning option grants that is provided in Section II.A.2 of Securities Act Release No. 8732A applicable to other forms of equity compensation?

Answer: The same disclosure provisions governing required disclosure about option grants also govern disclosure about restricted stock and other non-option equity awards. This includes the example of potential material information identified in Item 402(b)(2)(iv) of Regulation S-K, which indicates that it may be appropriate to discuss how the determination is made as to when awards are granted, including awards of equity-based compensation such as options. [Jan. 24, 2007]

Question 118.02

Question: In presenting Compensation Discussion and Analysis disclosure about prior option grant programs, plans or practices, are companies required to provide disclosures about programs, plans or practices that occurred outside the scope of the information contained in the tables and otherwise disclosed pursuant to Item 402 (including periods before and after the information contained in the tables and otherwise disclosed pursuant to Item 402)?

Answer: Yes, in certain cases, depending on a company's particular circumstances, disclosure may be required as contemplated by Instruction 2 to Item 402(b) of Regulation S-K. [Jan. 24, 2007]

Question 118.03

Question: Are companies required to include disclosure about programs, plans or practices relating to option grants in the Compensation Discussion and Analysis disclosure for their first fiscal year ending on or after December 15, 2006, or is this disclosure only required for future fiscal periods?

Answer: Companies are required to include disclosure about programs, plans or practices relating to option grants in the Compensation Discussion and Analysis disclosure for fiscal years ending on or after December 15, 2006, as well as any other periods where necessary as contemplated by Instruction 2 to Item 402(b) of Regulation S-K. [Jan. 24, 2007]

Question 118.04

Question: How does a company determine if it may omit disclosure of performance target levels or other factors or criteria under Instruction 4 to Item 402(b)?

Answer: A company should begin its analysis of whether it is required to disclose performance targets by addressing the threshold question of materiality in the context of the company's executive compensation policies or decisions. If performance targets are not material in this context, the company is not required to disclose the performance targets. Whether performance targets are material is a facts and circumstances issue, which a company must evaluate in good faith.

A company may distinguish between *qualitative/subjective* individual performance goals (e.g., effective leadership and communication) and *quantitative/objective* performance goals (e.g., specific revenue or earnings targets). There is no requirement that a company provide quantitative targets for what are inherently subjective or qualitative assessments — for example, how effectively the CEO demonstrated leadership.

When performance targets are a material element of a company's executive compensation policies or decisions, a company may omit targets involving confidential trade secrets or confidential commercial or financial information *only if* their disclosure would result in competitive harm. A company should use the same standard for evaluating whether target levels (and other factors or criteria) may be omitted as it would use when making a confidential treatment request under Securities Act Rule 406 or Exchange Act Rule 24b-2; however, no confidential treatment request is required to be submitted in connection with the omission of a performance target level or other factors or criteria.

To reach a conclusion that disclosure would result in competitive harm, a company must undertake a competitive harm analysis taking into account its specific facts and circumstances and the nature of the performance targets. In the context of the company's industry and competitive environment, the company must analyze whether a competitor or contractual counterparty could extract from the targets information regarding the company's business

or business strategy that the competitor or counterparty could use to the company's detriment. A company must have a reasoned basis for concluding, after consideration of its specific facts and circumstances, that the disclosure of the targets would cause it competitive harm. The company must make its determination based on the established standards for what constitutes confidential commercial or financial information, the disclosure of which would cause competitive harm. These standards have largely been addressed in case law, including *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); and *Critical Mass Energy Project v. NRC*, 931 F.2d 939 (D.C. Cir. 1991), *vacated & reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991), *grant of summary judgment to agency aff'd en banc*, 975 F.2d 871 (D.C. Cir. 1992). To the extent that a performance target level or other factor or criteria otherwise has been disclosed publicly, a company cannot rely on Instruction 4 to withhold the information.

The competitive harm standard is the only basis for omitting performance targets if they are a material element of the registrant's executive compensation policies or decisions.

Because Compensation Discussion and Analysis will be subject to staff review, a company may be required to demonstrate that withholding target information meets the confidential treatment standard, and will be required to disclose the information if that standard is not met. Finally, a company that relies on Instruction 4 to omit performance targets is required by the instruction to discuss how difficult it will be for the executive or how likely it will be for the company to achieve the undisclosed target level or other factor or criteria. [July 3, 2008]

Question 118.05

Question: Item 402(b)(2)(xiv) provides, as an example of material information to be disclosed in the Compensation Discussion and Analysis, depending on the facts and circumstances, "[w]hether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark and, if applicable, its components (including component companies)." What does "benchmarking" mean in this context?

Answer: In this context, benchmarking generally entails using compensation data about other companies as a reference point on which — either wholly or in part — to base, justify or provide a framework for a compensation decision. It would not include a situation in which a company reviews or considers a broad-based third-party survey for a more general purpose, such as to obtain a general understanding of current compensation practices. [July 3, 2008]

Question 118.06 *[same as Question 133.08]*

Question: Regarding the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, on what basis should a company differentiate between the requirements of Item 407(e)(3)(iii) and Item 402(b)'s Compensation Discussion and Analysis disclosure?

Answer: The information regarding "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation" required by Item 407(e)(3)(iii) is to be provided as part of the company's Item 407(e)(3) compensation committee disclosure. See Release 33-8732A at Section V.D, Corporate Governance Disclosure. If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should discuss that role in the Compensation Discussion and Analysis section. [July 3, 2008]

Question 118.07

Question: In Compensation Discussion and Analysis (CD&A), is a company required to discuss executive compensation, including performance target levels, to be paid in the current year or in future years?

Answer: No. The CD&A covers only compensation "awarded to, earned by, or paid to the named executive officers." Although Instruction 2 to Item 402(b) provides that the CD&A should also cover actions regarding executive compensation that were taken after the registrant's last fiscal year's end, such disclosure requirement is

limited to those actions or steps that could "affect a fair understanding of the named executive officer's compensation for the last fiscal year." [Mar. 4, 2011]

Question 118.08

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to non-GAAP financial information that does not relate to the disclosure of target levels, but is nevertheless included in Compensation Discussion & Analysis ("CD&A") or other parts of the proxy statement - for example, to explain the relationship between pay and performance?

Answer: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K.

In these pay-related circumstances only, the staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information. [July 8, 2011]

Question 118.09

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e) of Regulation S-K; however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to the disclosure of the actual results of the non-GAAP financial measure that is used as a target?

Answer: Yes, provided that this disclosure is made in the context of a discussion about target levels. [May 16, 2013]

Section 119. Item 402(c) — Executive Compensation; Summary Compensation Table

Question 119.01

Question: If a person that was not a named executive officer in fiscal years 1 and 2 became a named executive officer in fiscal year 3, must compensation information be disclosed in the Summary Compensation Table for that person for all three fiscal years?

Answer: No, the compensation information only for fiscal year 3 need be provided in the Summary Compensation Table. [Jan. 24, 2007]

Question 119.02

Question: Should a discretionary cash bonus that was not based on any performance criteria be reported in the Bonus column (column (d)) of the Summary Compensation Table pursuant to Item 402(c)(2)(iv) or in the Non-equity Incentive Plan Compensation column (column (g)) pursuant to Item 402(c)(2)(vii)?

Answer: The bonus should be reported in the Bonus column (column (d)). In order to be reported in the Non-equity Incentive Plan Compensation column (column (g)) pursuant to Item 402(c)(2)(vii), the bonus would have to be pursuant to a plan providing for compensation intended to serve as incentive for performance to occur over a

specified period that does not fall within the scope of Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), *Share-Based Payment* ("FAS 123R"). The outcome with respect to the relevant performance target must be substantially uncertain at the time the performance target is established and the target is communicated to the executives. The length of the performance period is not relevant to this analysis, so that a plan serving as an incentive for a period less than a year would be considered an incentive plan under Item 402(a)(6)(iii). Further, amounts earned under a plan that meets the definition of a non-equity incentive plan, but that permits the exercise of negative discretion in determining the amounts of bonuses, generally would still be reportable in the Non-equity Incentive Plan Compensation column (column (g)). The basis for the use of various targets and negative discretion may be material information to be disclosed in the Compensation Discussion and Analysis. If, in the exercise of discretion, an amount is paid over and above the amounts earned by meeting the performance measure in the non-equity incentive plan, that amount should be reported in the Bonus column (column (d)). [Jan. 24, 2007]

Question 119.03

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 grant date fair value of the equity award, 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. [May 17, 2013]

Question 119.04

Withdrawn Mar. 1, 2010

Question 119.05

Withdrawn Mar. 1, 2010

Question 119.06

Question: Instruction 3 to Item 402(c)(2)(viii) provides that where the amount of the change in the actuarial present value of the accumulated pension benefit computed pursuant to Item 402(c)(2)(viii)(A) is negative, the amount should be disclosed by footnote but should not be reflected in the sum reported in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column (column (h)). When a company aggregates all of the decreases and increases in the value of a named executive officer's individual pension plans, should the company subtract negative values from positive values or should any individual plan decreases be treated as a zero?

Answer: In applying this instruction, a company may subtract negative values when aggregating the changes in the actuarial present values of the accumulated benefits under the plans, and apply the "no negative number" position of the instruction for the final number after aggregating all plans. Under this approach, if one plan had a $500 increase and another plan had a $200 decrease, then the net change in the actuarial present value of the accumulated pension benefits would be $300. [Jan. 24, 2007]

Question 119.07

Question: Item 402(c)(2)(ix)(A) and Instruction 4 to that item require a company to report as "All Other Compensation" perquisites and personal benefits if the total amount exceeds $10,000, and to identify each such item by type, regardless of the amount. If the $10,000 threshold is otherwise exceeded, must a company list by type those perquisites and personal benefits as to which there was no aggregate incremental cost to the company, or as to which the executive officer fully reimbursed the company for such cost?

Answer: If a perquisite or other personal benefit has no aggregate incremental cost, it must still be separately identified by type. Any item for which an executive officer has actually fully reimbursed the company should not be considered a perquisite or other personal benefit and therefore need not be separately identified by type. In this regard, for example, if a company pays for country club annual dues as well as for meals and incidentals and an executive officer reimburses the cost of meals and incidentals, then the company need not report meals and incidentals as perquisites, although it would continue to report the country club annual dues. If there was no such reimbursement, then the company would need to also report the meals and incidentals as perquisites. [July 3, 2008]

Question 119.08

Question: Item 402(c)(2)(ix)(C) indicates that stock purchased at a discount needs to be disclosed unless that discount is available generally to all security holders or to all salaried employees. The compensation cost, if any, is computed in accordance with FAS 123R. Footnote 221 to Securities Act Release No. 8732A seems to indicate that sometimes under FAS 123R there is no compensation cost. Does the footnote indicate that 423 plans must be disclosed?

Answer: No. Typically 423 plans need to be broad based and non-discriminatory to qualify for preferential tax treatment, which would be within the exception, even if they require some minimum of work hours — such as 10 hours a week — in order to be in the plan or the discount is larger than the 5% example in the footnote. The footnote explains that even if there is some discount, there may not be compensation cost under the accounting standard. [Jan. 24, 2007]

Question 119.09

Question: Item 402(c)(2)(ix)(G) requires disclosure of the dollar value of any dividends when those amounts were not factored into the grant date fair value required to be reported in the Grants of Plan-Based Awards Table. With regard to the treatment of dividends, dividend equivalents or other earnings on equity awards, is disclosure required in the All Other Compensation column (column (i)) if disclosure was not previously provided in the Grants of Plan-Based Awards Table for that named executive officer?

Answer: The company should analyze whether the dividends, dividend equivalents or other earnings would have been factored into the grant date fair value in accordance with FAS 123R. In this regard, the disclosure turns on how the rights to the dividends are structured and whether or not that brings them within the scope of FAS 123R for the purpose of the grant date fair value calculation. [Jan. 24, 2007]

Question 119.10

Question: Are deferred compensation payouts, lump sum distributions under Section 401(k) plans and earnings on 401(k) plans required to be disclosed in the Summary Compensation Table?

Answer: Non-qualified deferred compensation payouts are not disclosed in the Summary Compensation Table, but are rather disclosed in the Aggregate Withdrawals/ Distributions column (column (e)) of the Nonqualified Deferred Compensation Table. Lump sum distributions from 401(k) plans are not disclosed in the Summary Compensation Table, because the compensation that was deferred into the 401(k) plan was already disclosed in the Summary Compensation Table, as would be any company matching contributions. Earnings on 401(k) plans are not disclosed in the Summary Compensation Table because the disclosure requirement only extends to above-market or preferential earnings on non-qualified deferred compensation. [Jan. 24, 2007]

Question 119.11

Withdrawn Mar. 1, 2010

Question 119.12

Withdrawn Mar. 1, 2010

Question 119.13

Question: Item 402(c)(2)(ix)(D) requires disclosure in the "All Other Compensation" column of the amount paid or accrued to any named executive officer pursuant to any plan or arrangement in connection with any termination of such executive officer's employment with the company or its subsidiaries, or a change in control of the company. For this purpose, what standard applies for determining whether such an amount is reportable because it is accrued?

Answer: Instruction 5 to Item 402(c)(2)(ix) states that for purposes of Item 402(c)(2)(ix)(D) an accrued amount is an amount for which payment has become due. If the named executive officer's performance necessary to earn an amount is complete, it is an amount that should be disclosed. For example, if the named executive officer has completed all performance to earn an amount, but payment is subject to a six-month deferral in order to comply with Internal Revenue Code Section 409A, the amount would be an accrued amount subject to Item 402(c)(2)(ix)(D) disclosure. In contrast, if an amount will be payable two years after a termination event if the named executive officer cooperates with (or complies with a covenant not to compete with) the company during that period, the amount is not reportable under Item 402(c)(2)(ix)(D) because the executive officer's performance is still necessary for the payment to become due. As noted in Footnote 217 to Securities Act Release No. 8732A, such amounts that are payable in the future, as well as amounts reportable under Item 402(c)(2)(ix)(D), are reportable under Item 402(j). [Aug. 8, 2007]

Question 119.14

Question: Where the instructions to the Summary Compensation Table requiring footnote disclosure do not specifically limit the footnote disclosure to compensation for the company's last fiscal year, as do Instructions 3 and 4 to Item 402(c)(2)(ix), must the footnote disclosure cover the other years reported in the Summary Compensation Table?

Answer: If the instruction does not specifically limit footnote disclosure to compensation for the company's last fiscal year, footnote disclosure for the other years reported in the Summary Compensation Table would be required only if it is material to an investor's understanding of the compensation reported in the Summary Compensation Table for the company's last fiscal year. [July 3, 2008]

Question 119.15

Withdrawn Mar. 1, 2010

Question 119.16

Question: May a company provide the assumption information required by Instruction 1 to Item 402(c)(2)(v) and (vi) for equity awards granted in the company's most recent fiscal year by reference to the Grants of Plan-Based Awards Table if the company chooses to report that assumption information in that table?

Answer: Yes. [Mar. 1, 2010]

Question 119.17

Question: In 2008, a company enters into a retention agreement in which it agrees to pay the CEO a cash retention bonus, conditioned on the CEO remaining employed by the company through December 31, 2010. The cash retention bonus is not a non-equity incentive plan award, as defined in Item 402(a)(6)(iii). When is the cash retention bonus reportable in the company's Summary Compensation Table? When should it be discussed in Compensation Discussion and Analysis?

Answer: The cash retention bonus is reportable in the Summary Compensation Table for the year in which the performance condition has been satisfied. The same analysis applies to any interest the company is obligated to pay on the cash retention bonus, assuming the interest is not payable unless and until the performance condition has been satisfied. Before the performance condition has been satisfied, Instruction 4 to Item 402(c) would not require it to be reported in the Summary Compensation Table as a bonus that has been earned but deferred, and the bonus would not be reportable in the Nonqualified Deferred Compensation Table. However, the company should discuss the cash retention bonus in its Compensation Discussion and Analysis for 2008 and subsequent years through completion of the performance necessary to earn it. [July 3, 2008]

Question 119.18

Question: A person who was a named executive officer in year 1, but not in year 2, will again be a named executive officer in year 3. Must compensation information for this person be disclosed in the Summary Compensation Table for all three fiscal years?

Answer: Yes. [May 29, 2009]

Question 119.19

Question: A person who is a named executive officer for year 1 is entitled to a gross-up payment in respect of taxes on perquisites or other compensation provided during the year. The tax gross-up payment is not payable by the company until year 2. Is the tax gross-up payment reportable in the Summary Compensation Table in year 1?

Answer: Yes. To provide investors with a clearer view of all costs to the company associated with providing the perquisites or other compensation for which tax gross-up payments are being made, Item 402(c)(2)(ix)(B) disclosure of the tax gross-up payment should be included in the Summary Compensation Table for the same year as the related perquisites or other compensation. [May 29, 2009]

Question 119.20

Question: Instruction 3 to the Stock Awards and Option Awards columns specifies that the value reported for awards subject to performance conditions excludes the effect of estimated forfeitures. Does the grant date fair value reported for awards subject to time-based vesting also exclude the effect of estimated forfeitures?

Answer: Yes. The amount to be reported is the grant date fair value. FASB ASC Paragraph 718-10-30-27 provides, in relevant part, that "service conditions that affect vesting are not reflected in estimating the fair value of an award at the grant date because those conditions are restrictions that stem from the forfeitability of instruments to which employees have not yet earned the right." [Jan. 20, 2010]

Question 119.21

Question: In April 2010, a company grants an equity award to an executive officer, and the terms of the award do not provide for acceleration of vesting if the executive officer leaves the company. The grant date fair value of the award is $1,000. In November 2010, the executive officer will leave the company, and the company modifies the officer's same equity award to provide for acceleration of vesting upon departure. The fair value of the modified award, computed under FASB ASC Topic 718, is $800, reflecting a decline in the company's stock price. What dollar amount is included in 2010 total compensation for purposes of identifying 2010 named executive officers

and reported in the executive officer's 2010 stock column with respect to this award if he will be a named executive officer? How would the company report the equity award if the award modification and executive's departure occur in 2011?

Answer: Consistent with Instruction 2 to Item 402(c)(2)(v) and (vi), the incremental fair value of the modified award, computed as of the modification date in accordance with FASB ASC Topic 718, as well as the grant date fair value of the original award must be reported in the 2010 stock column. Applying the guidance in paragraph 55-116 of FASB ASC Section 718-20-55, incremental fair value is computed as follows: the fair value of the modified award at the date of modification minus the fair value of the original award at the date of modification equals the incremental fair value of the modified award. In this fact pattern, the fair value of the original award at the date of modification is zero, because the executive officer left the company in November and the original award would not have vested. Therefore, the incremental fair value of the modified award is $800. As a result, the total amount reported is $1,800, which reflects the two compensation decisions the company made for this award in 2010. The same amount is included in 2010 total compensation for purposes of identifying the company's 2010 named executive officers pursuant to Items 402(a)(3)(iii) and (iv).

If the award modification and executive's departure occur in 2011, the company would report $1,000 in the 2010 stock column for the grant date fair value of the original award. In the 2011 stock column, the company would report $800 for the incremental fair value of the modified award. [Feb. 16, 2010]

Question 119.22

Question: During 2010, a company grants an annual incentive plan award to a named executive officer. Because no right to stock settlement is embedded in the terms of the award, the award is not within the scope of FASB ASC Topic 718. Therefore, it is a non-equity incentive plan award as defined in Rule 402(a)(6)(iii). The named executive officer elects to receive the award in stock. Instruction 2 to Item 402(c)(2)(iii) and (iv) does not apply because the award is an incentive plan award rather than a bonus. Should the company report the award in the stock awards column (column (e)) or in the non-equity incentive plan award column (column (g)) in its 2010 Summary Compensation Table? How should the award be reported in the Grants of Plan-Based Awards Table?

Answer: The company should report the award in the non-equity incentive plan award column (column (g)) of the Summary Compensation Table, reflecting the compensation the company awarded, with footnote disclosure of the stock settlement. Similarly, in the Grants of Plan-Based Awards Table, the company should report the award in the estimated future payouts under non-equity incentive plan awards columns (columns (c)-(e)). The stock received upon settlement should not also be reported in the Grants of Plan-Based Awards Table because that would double count the award. [Feb. 16, 2010]

Question 119.23

Question: During 2010, a company grants annual incentive plan awards to its named executive officers. The awards permit the named executive officers to elect payment of the award for 2010 performance in company stock rather than cash, with the election to be made during the first 90 days of 2010. Such company stock will have a grant date fair value equal to 110% of the award that would be paid in cash. One named executive officer elects stock payment, and the others do not. How is the award reported for the named executive officer who elects stock payment? How is the award reported for the named executive officers who receive cash payment?

Answer: For the named executive officer who elects stock payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as an equity incentive award. This is the case even if the amount of the award is not determined until early 2011 because all company decisions necessary to determine the value of the award are made in 2010. For the named executive officers who receive cash payment, the award is reported in the 2010 Summary Compensation Table and Grants of Plan-Based Awards Table as a non-equity incentive plan award. [Feb. 16, 2010]

Question 119.24

Question: In 2010, a company grants an executive officer an equity incentive plan award with a three-year performance period that begins in 2010. The equity incentive plan allows the compensation committee to exercise its discretion to reduce the amount earned pursuant to the award, consistent with Section 162(m) of the Internal Revenue Code. Under FASB ASC Topic 718, the fact that the compensation committee has the right to exercise "negative" discretion may cause, in certain circumstances, the grant date of the award to be deferred until the end of the three-year performance period, after the compensation committee has determined whether to exercise its negative discretion. If so, when and how should this award be reported in the Summary Compensation Table and Grants of Plan-Based Awards Table? In what year should this award be included in total compensation for purposes of determining if the executive officer is a named executive officer?

Answer: Use of grant date fair value reporting in Item 402 generally assumes that, as stated in FASB ASC Topic 718, "[t]he service inception date usually is the grant date." The service inception date may precede the grant date, however, if the equity incentive plan award is authorized but service begins before a mutual understanding of the key terms and conditions is reached. 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. The amount reported in both tables should be the fair value of the award at the service inception date, based upon the then-probable outcome of the performance conditions. This same amount should be included in total compensation for purposes of determining whether the executive officer is a named executive officer for the year in which the service inception date occurs. [Mar. 1, 2010]

Question 119.25

Question: A company grants annual non-equity incentive plan awards to its executive officers in January 2010. The awards' performance criteria are communicated to the executives at that time and are based on the company's financial performance for the year. Executives will not know the total amount earned pursuant to the award until the end of the year, when the compensation committee can determine whether or to what extent the performance criteria have been satisfied.

After the end of the year, the amounts earned pursuant to the awards are determined and communicated to the executive officers. One executive decides not to receive any payment of earnings pursuant to the award. For that executive, should the award be included in total compensation for purposes of determining if the executive is a named executive officer for 2010? Should the award be reported in the Grants of Plan-Based Awards Table and the Summary Compensation Table for 2010?

Answer: Yes. The executive officer's decision not to accept payment of the award does not change the fact that award was granted in and earned for services performed during 2010. Accordingly, the grant of the award should be included in the Grants of Plan-Based Awards Table, which will reflect the compensation committee's decision to grant the award in 2010. The earnings pursuant to the award, even though declined, should be included in total compensation for purposes of determining if the executive is a named executive officer for 2010 and reported in the Summary Compensation Table. The company should disclose the executive's decision not to accept payment of the award, which it can do either by adding a column to the Summary Compensation Table next to column (g), "Nonequity Incentive Plan Compensation," reporting the amount of nonequity incentive plan compensation declined, or by providing footnote disclosure to the Summary Compensation Table. Moreover, in Compensation Discussion and Analysis, the company should consider discussing the effect, if any, of the executive's decision on how the company structures and implements compensation to reflect performance. [Mar. 12, 2010]

Question 119.26

Question: A company has a practice of granting discretionary bonuses to its executive officers. Before the board of directors takes action to grant such bonuses for 2010, an executive officer advises the board that she will not accept a bonus for 2010. Should the company report in column (d) of the Summary Compensation Table the bonus award it would have granted her and include that amount in total compensation for purposes of determining if she is a named executive officer for 2010?

Answer: No, because the executive declined the bonus before it was granted, and therefore, no bonus was granted. [Mar. 12, 2010]

Question 119.27

Question: In 2010, Company A acquires Company B and, as part of the merger consideration, agrees to assume all outstanding Company B options. The Company B options have not been modified other than to adjust the exercise price to reflect the merger exchange ratio. For Company B executives who are now Company A executives: Should the Company B options that were granted in 2010 be included in total compensation for purposes of determining if an executive is a named executive officer of Company A for 2010 and reported in the Summary Compensation Table and Grants of Plan-Based Awards Table for 2010? Should Company A report the Company B options in its Outstanding Equity Awards at Fiscal Year-End Table and Options Exercised and Stock Vested Table, as applicable, for 2010 and in subsequent years?

Answer: Because the assumed Company B options are part of the merger consideration, they do not reflect any 2010 executive compensation decisions by Company A. Therefore, Company A should not include Company B options granted in 2010 in total compensation for purposes of determining its 2010 named executive officers, and should not report the Company B options in its 2010 Summary Compensation Table and Grants of Plan-Based Awards Table. Because the Company B options are now Company A options, Company A should report them in its Outstanding Equity Awards at Fiscal Year-End Table and Options Exercised and Stock Vested Table, as applicable, for 2010 and subsequent years, with footnote disclosure describing the assumption of Company B options. [June 4, 2010]

Question 119.28

Question: At the beginning of Year 1, the compensation committee sets the threshold, target and maximum levels for the number of shares that may be earned for Year 1 under the company's performance-based equity incentive plan. Incentive awards are paid in the form of restricted shares, which are issued early in Year 2 after the compensation committee has certified the company's Year 1 performance results. Can the amount reported in the Stock Awards column reflect the grant date fair value of the number of restricted shares actually issued for Year 1, rather than the amount that reflects the probable outcome of the performance conditions as of the grant date, as prescribed by Instruction 3 to Item 402(c)(2)(v) and (vi)?

Answer: No. The grant date fair value for stock and option awards subject to performance conditions must be reported 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 restricted shares actually awarded for Year 1 - is known by the time of the filing of the proxy statement. [July 8, 2011]

Section 120. Item 402(d) — Executive Compensation; Grants of Plan-Based Awards Table

Question 120.01

Question: If an equity incentive plan award is denominated in dollars, but payable in stock, how is it disclosed in the Grants of Plan-Based Awards Table since the headings for equity-based awards (columns (f), (g) and (h)) only refer to numbers and not dollars?

Answer: The award should be disclosed in the Grants of Plan-Based Awards Table by including the dollar value and a footnote to explain that it will be paid out in stock in the form of whatever number of shares that amount

translates into at the time of the payout. In this limited circumstance, and if all the awards in this column are structured in this manner, it is acceptable to change the captions for columns (f) through (h) to show "($)" instead of "(#)." [Aug. 8, 2007]

Question 120.02

Question: If all of the non-equity incentive plan awards were made for annual plans, where the awards have already been earned, may the company change the heading over columns (c), (d) and (e) of the Grants of Plan-Based Awards Table that refers to "Estimated future payouts under non-equity incentive plan awards?"

Answer: Yes, if the awards were made in the same year they were earned and the earned amounts are therefore disclosed in the Summary Compensation Table, the heading over columns (c), (d) and (e) may be changed to "Estimated possible payouts under non-equity incentive plan awards." [Jan. 24, 2007]

Question 120.03

Renumbered as Question 122.04

Question 120.04

Renumbered as Question 122.05

Question 120.05

Withdrawn Mar. 1, 2010

Question 120.06

Question: Under a long-term incentive plan, a named executive officer receives an award for a target number of shares at the start of a three-year period, with one-third of this amount allocated to each of three single-year performance periods. How is grant date fair value determined for purposes of the disclosure required in column (l) of the table?

Answer: The grant date and grant date fair value are determined as provided in FAS 123R. Under paragraph A. 67 of FAS 123R, if all of the annual performance targets are set at the start of the three-year period, that is the grant date for the entire award. The grant date fair value for all three tranches of the award would be measured at that time, and would be reported in column (l). If each annual performance target is set at the start of each respective single-year performance period, however, paragraph A.68 of FAS 123R provides that each of those dates is a separate grant date for purposes of measuring the grant date fair value of the respective tranche. In this circumstance, only the grant date fair value for the first year's performance period would be measured and reported in column (l). [May 29, 2009]

Question 120.07

Question: During the fiscal year, an outstanding equity incentive plan award held by a named executive officer is amended or otherwise modified, resulting in incremental fair value under FAS 123R. Must the incremental fair value be reported in column (l) of the table?

Answer: Yes. This is required by Item 402(d)(2)(viii) and Instruction 7 to Item 402(d). [May 29, 2009]

Section 121. Item 402(e) — Executive Compensation; Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table

None

Section 122. Item 402(f) — Executive Compensation; Outstanding Equity Awards at Fiscal Year-End Table

Question 122.01

Question: A company has an equity incentive plan pursuant to which it grants awards that will vest, if at all, based on total shareholder return over a 3-year period. Awards were granted in 2005 ("2005 Awards") and will vest based on the company's total shareholder return from 1/1/05 through 12/31/07. 2006 was the second year of the 3-year performance period. Performance during 2005 was well above the maximum level. Performance during 2006 was below the threshold level. The combined performance for 2005 and 2006 would result in a payout at target if the performance period had ended on 12/31/06. Is it permissible to base disclosure on the actual multi-year performance to date (through the end of the last completed fiscal year)?

Answer: Yes. The number of shares or units reported in columns (d) or (i), and the payout value reported in column (j), should be based on achieving threshold performance goals, except that if performance during the last completed fiscal year (or, if the payout is based on performance to occur over more than one year, the last completed fiscal years over which performance is measured) has exceeded the threshold, the disclosure shall be based on the next higher performance measure (target or maximum) that exceeds the last completed fiscal year's performance (or, if the payout is based on performance to occur over more than one year, the last completed fiscal years over which performance is measured). [Aug. 8, 2007]

Question 122.02

Question: Instruction 2 to Item 402(f)(2) requires footnote disclosure of the vesting dates of the awards reported in the Outstanding Equity Awards at Fiscal Year-End Table. Can a company comply with this instruction by including a column in this table showing the grant date of each award reported and including a statement of the standard vesting schedule that applies to the reported awards?

Answer: Yes, provided, however, that if there is any different vesting schedule applicable to any of the awards, then the table would also need to include disclosure about any such vesting schedule. [July 3, 2008]

Question 122.03

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]

Question 122.04

Question: Should a company include in the Outstanding Equity Awards at Fiscal Year-End Table in-kind earnings on restricted stock awards that have earned share dividends or share dividend equivalents?

Answer: Yes. Outstanding in-kind earnings at the end of the fiscal year should be included in the table. However, in-kind earnings that vested during the fiscal year, or in-kind earnings that are already vested when the dividends are declared, instead should be reported in the Option Exercises and Stock Vested Table under Item 402(g) of Regulation S-K. [Jan. 24, 2007]

Question 122.05

Question: Instruction 3 to Item 402(f)(2) states that the issuer should report the market value of equity incentive plan awards using the closing market price at the end of the last completed fiscal year. The next sentence, however, states that the number of shares or units reported should be based on achieving threshold performance goals, "except that if the previous fiscal year's performance" has exceeded the threshold, disclosure is based on the next higher measure. Is the "previous fiscal year" the same year as the last completed fiscal year, or the year that preceded the last completed fiscal year?

Answer: For this purpose, the "previous fiscal year" means the same year as the "last completed fiscal year." [Aug. 8, 2007]

Section 123. Item 402(g) — Executive Compensation; Option Exercises and Stock Vested Table

Question 123.01

Question: When reporting on the exercise or settlement of a stock appreciation right in the Number of Shares Acquired on Exercise column (column (b)) of the Option Exercises and Stock Vested Table, should a company report the net number of shares received upon exercise, or the gross number of shares underlying the exercised stock appreciation right?

Answer: As would be the case with the cashless exercise of options, the total number of shares underlying the exercised stock appreciation right should be reported in column (b), rather than just the amount representing the increase of the stock price since the grant of the award. A footnote or narrative accompanying the table could explain and quantify the net number of shares received. [Jan. 24, 2007]

Section 124. Item 402(h) — Executive Compensation; Pension Benefits

Question 124.01

Question: Instruction 2 to Item 402(h)(2) indicates that the company must use the same assumptions used for financial reporting purposes under generally accepted accounting principles, except for the retirement age assumption, when computing the actuarial present value of a named executive officer's accumulated benefit under each pension plan. May the company deviate from the assumptions used for accounting purposes given the individual circumstances of the named executive officer or the plan?

Answer: No. [Jan. 24, 2007]

Question 124.02

Question: Instruction 2 to Item 402(h)(2) specifies that in calculating the actuarial present value of a named executive officer's accumulated pension benefits, the assumed retirement age is to be the normal retirement age as defined in the plan, or, if not defined, the earliest time at which the named executive officer may retire without any benefit reduction. While many plans have a specifically defined retirement age, some plans also have a provision that allows participants to retire at an earlier age without any benefit reduction. In this case, which age should the company use in making its calculation?

Answer: When a plan has a stated "normal" retirement age and also a younger age at which retirement benefits may be received without any reduction in benefits, the younger age should be used for determining pension benefits. The older age may be included as an additional column. [Jan. 24, 2007]

Question 124.03

Question: How do you measure the actuarial present value of the accumulated benefit of a pension plan in the situation where a particular benefit is earned at a specified age? For instance, if a named executive officer at age 40 is granted an award if he stays with his company until age 60, how should the company measure this benefit when the executive is age 50 and the normal retirement age under the plan is age 65?

Answer: The computation should be based on the accumulated benefit as of the pension measurement date, assuming that the named executive continues to live and will work at the company until retirement and thus will reach age 60 and receive the award. [Jan. 24, 2007]

Question 124.04

Question: Should assumptions regarding pre-retirement decrements be factored into the calculation of the actuarial present value of a named executive officer's accumulated benefit under a pension plan?

Answer: For purposes of calculating the actuarial present value for the Pension Benefits Table, the registrant should assume that each named executive officer will live to and retire at the plan's normal retirement age (or the earlier retirement age if the named executive officer may retire with unreduced benefits) and ignore for the purposes of the calculations what actuaries refer to as pre-retirement decrements. Therefore, the assumptions used for financial statement reporting purposes that should be used for calculating the actuarial present value are the discount rate, the lump sum interest rate (if applicable), post-retirement mortality, and payment distribution assumptions. Any contingent benefits arising upon death, early retirement or other termination of employment events should be disclosed in the post-employment narrative disclosure required under Item 402(j) of Regulation S-K. [Jan. 24, 2007]

Question 124.05

Question: A cash balance pension plan is a defined benefit plan in which the retiree's benefits may be determined by the amount represented in a hypothetical "account" for that participant. The "accrued benefit" is the amount credited to a participant's cash balance account as of any date, which the participant has the right to receive as a lump sum upon termination of employment. Can a company report, as the present value of the accumulated benefit for a cash balance plan, the "accrued benefit"?

Answer: No. The same as for other defined benefit plans, the amount disclosable in the Pension Benefits Table as the present value of accumulated benefit for a cash balance plan is the actuarial present value of the named executive officer's accumulated benefit under the plan, computed as of the same plan measurement date used for purposes of the company's audited financial statements for the last completed fiscal year. [Aug. 8, 2007]

Section 125. Item 402(i) — Executive Compensation; Nonqualified Defined Contribution and Other Nonqualified Deferred Compensation Plans

Question 125.01

Question: The instruction to Item 402(i)(2) of Regulation S-K requires footnote disclosure quantifying the extent to which amounts reported in the table were reported as compensation in the Summary Compensation Table in the last completed fiscal year and in previous fiscal years. What should be noted by footnote when amounts were not previously reported (either because of the transition guidance in Securities Act Release No. 8732A or when a named executive officer appears in the table for the first time)?

Answer: The purpose of the instruction is to facilitate an understanding that non-qualified deferred compensation is reported elsewhere within the executive compensation disclosure over time. Amounts only need to be disclosed by footnote if they were actually previously reported in the Summary Compensation Table. [Jan. 24, 2007]

Question 125.02

Question: Item 402(i)(2)(iv) requires disclosure of the dollar amount of aggregate interest or other earnings accrued during the registrant's last fiscal year. What items, other than interest, are "earnings" for this purpose?

Answer: "Earnings" include dividends, stock price appreciation (or depreciation), and other similar items. The purpose of the table is to show changes in the aggregate account balance at fiscal year end for each named executive officer. Thus, "earnings" 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. [Aug. 8, 2007]

Question 125.03

Question: Item 402(i)(1) calls for the Nonqualified Deferred Compensation Plan Table to provide the specified information "with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified." Does this item mean that this information should be provided on a plan-by-plan basis?

Answer: Yes. [July 3, 2008]

Question 125.04

Question: Item 402(i)(2)(iii) calls for disclosure of aggregate company contributions to each nonqualified deferred compensation plan during the company's last fiscal year. For an excess plan related to a qualified plan, the contributions earned in 2008, which are reportable in the All Other Compensation column of the 2008 Summary Compensation Table, are not credited to the executive's account until January 2009. Are those contributions considered company contributions "during" 2008?

Answer: Yes. [July 3, 2008]

Question 125.05

Question: An equity award has vested, and the plan under which it was granted provides for the deferral of its receipt. Item 402(i)(1) calls for the Nonqualified Deferred Compensation Plan Table to provide the specified information "with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified." Does this item require the deferred receipt of the vested equity award to be included in the Nonqualified Deferred Compensation Plan Table?

Answer: Yes. This is the case whether the deferral is at the election of the named executive officer or pursuant to the terms of the equity award or plan. [Aug. 14, 2009]

Section 126. Item 402(j) — Executive Compensation; Potential Payments Upon Termination or Change-in-Control

Question 126.01

Question: In the event that options are accelerated upon a termination or change-in- control, for purposes of Item 402(j) disclosure should the value of the accelerated options be calculated using the "spread" between exercise and market price (as of fiscal year end) or the FAS 123R value recognized in connection with the acceleration?

Answer: For purposes of Item 402(j), the company should use the "spread" to calculate the value of the award. Since Item 402(j) requires quantification of what a named executive officer would have received assuming the event took place on the last business day of the registrant's last completed fiscal year, disclosure of the "spread" at that date is consistent with Instruction 1 to 402(j), which prescribes using the closing market price per share of the registrant's securities on last business day of the registrant's last completed fiscal year. [Aug. 8, 2007]

Question 126.02

Question: A company's employee stock option plan provides for full and immediate vesting of all outstanding unvested awards upon a change-in-control of the company and this provision is included in each option recipient's award agreement (whether the recipient is an executive officer or an employee). Instruction 5 to Item 402(j) provides that a company need not provide information with respect to contracts, agreements, plans, or arrangements to the extent they are available generally to all salaried employees and do not discriminate in scope, terms, or operation, in favor of executive officers of the company. Can the company rely on Instruction 5 to omit

disclosure of these awards when quantifying the estimated payments and benefits that would be provided to named executive officers upon a change-in-control?

Answer: No. The Instruction 5 standard that the "scope" of arrangements not discriminate in favor of executive officers would not be satisfied where the option awards to executives are in amounts greater than those provided to all salaried employees. [Aug. 8, 2007]

Section 127. Item 402(k) — Executive Compensation; Compensation of Directors

Question 127.01

Question: Is director compensation disclosure required under Item 402(k) of Regulation S-K for a person who served as a director for part of the last completed fiscal year, even if the person was no longer a director at the end of the last completed fiscal year?

Answer: Yes. If a person served as a director during any part of the last completed fiscal year the person must be included in the Director Compensation Table. [Jan. 24, 2007]

Question 127.02

Question: Is director compensation disclosure required under Item 402(k) of Regulation S-K for a person who served as a director during the last completed fiscal year but will not stand for re-election the next year?

Answer: Yes. If a person served as a director during any part of the last completed fiscal year the person must be included in the Director Compensation Table. [Jan. 24, 2007]

Question 127.03

Question: Does the Instruction to Item 402(k)(2)(iii) and (iv) require footnote disclosure, for each director, of the grant date fair value of each equity award outstanding or only of the awards granted during the company's last completed fiscal year?

Answer: Like the corresponding disclosure for named executive officers in the Grants of Plan-Based Awards Table, this Director Compensation Table requirement applies only to stock and option awards granted during the company's last completed fiscal year. [Aug. 8, 2007]

Question 127.04

Question: Does the Instruction to Item 402(k)(2)(iii) and (iv) requirement to provide footnote disclosure, for each director, of the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end include exercised options or vested stock awards?

Answer: No. Like the corresponding disclosure for named executive officers in the Outstanding Equity Awards at Fiscal Year-End Table, this Director Compensation Table requirement applies only to unexercised option awards (whether or not exercisable) and unvested stock awards (including unvested stock units). [Aug. 8, 2007]

Question 127.05

Question: Can a charitable matching program that is available to all employees be excluded from the disclosure required of "director legacy or charitable awards programs" under Item 402(k)(2)(vii)(G) based on the exclusion for "information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees" in the Item 402(a)(6)(ii) definition of "plan"?

Answer: No. A charitable matching program available to all employees must be included in the Director Compensation Table. The Director Compensation Table disclosure applies to "the annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs." Any

company-sponsored charitable award program in which a director can participate would be a "similar charitable award program." [Aug. 8, 2007]

Section 128. Items 402(l) to (r) — Executive Compensation; Smaller Reporting Companies

None

Section 128A - Item 402(s) Narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management

Question 128A.01

Question: The requirement to provide narrative disclosure of the registrant's compensation policies and practices as they relate to the registrant's risk management is in Item 402(s), rather than included as part of Compensation Discussion and Analysis in Item 402(b). Where should a registrant present Item 402(s) disclosure in its filings?

Answer: The new rules do not specify where the disclosure should be presented. However, to ease investor understanding, the staff recommends that Item 402(s) disclosure be presented together with the registrant's other Item 402 disclosure. The staff would have concerns if the Item 402(s) disclosure is difficult to locate or is presented in a fashion that obscures it. [Jan. 20, 2010]

Section 128B — Item 402(t) Golden Parachute Compensation

Question 128B.01

Question: Instruction 1 to Item 402(t)(2) provides that Item 402(t) disclosure will be required for those executive officers who were included in the most recently filed Summary Compensation Table. If a company files its annual meeting proxy statement in March 2011 (including the 2010 Summary Compensation Table), hires a new principal executive officer in May 2011 and prepares a merger proxy in September 2011, may the company rely on this instruction to exclude the new principal executive officer from the merger proxy's say on golden parachute vote and Item 402(t) disclosure?

Answer: No. Instruction 1 to Item 402(t) specifies that Item 402(t) information must be provided for the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of Regulation S-K. Instruction 1 to Item 402(t)(2) applies only to those executive officers who are included in the Summary Compensation Table under Item 402(a)(3)(iii), because they are the three most highly compensated executive officers other than the principal executive officer and the principal financial officer. Under Items 402(a)(3)(i) and (ii), the principal executive officer and the principal financial officer are, per se, named executive officers, regardless of compensation level. Consequently, Instruction 1 to Item 402(t)(2) is not instructive as to whether the principal executive officer or principal financial officer is a named executive officer. This position also applies to Instruction 2 to Item 1011(b), which is the corresponding instruction in Regulation M-A. [Feb. 11, 2011]

Section 128C — Item 402(u) Pay Ratio Disclosure

Question 128C.01

Question: If a registrant does not use annual total compensation calculated using Item 402(c)(2)(x) of Regulation S-K ("annual total compensation") to identify the median employee, how should a registrant select another consistently applied compensation measure ("CACM") to identify the median employee?

Answer: Item 402(u) requires registrants to identify the median employee using annual total compensation or another CACM, such as information derived from the registrant's tax and/or payroll records. Because of concerns about the expected compliance costs if registrants had been required to calculate annual total compensation for all employees, the Commission permitted registrants to use a CACM other than annual total compensation as a reasonable alternative to identifying the median employee. Any measure that reasonably reflects the annual

compensation of employees could serve as a CACM. The appropriateness of any measure will depend on the registrant's particular facts and circumstances. As the Commission stated in the interpretive release, "a registrant may use internal records that reasonably reflect annual compensation to identify the median employee, even if those records do not include every element of compensation, such as equity awards widely distributed to employees." [October 18, 2016; updated September 21, 2017]

Question 128C.02

Question: May a registrant exclusively use hourly or annual ***rates*** of pay as its CACM?

Answer: No. Although an hourly or annual pay rate may be a component used to determine an employee's overall compensation, the use of the pay rate alone generally is not an appropriate CACM to identify the median employee. Using an hourly rate without taking into account the number of hours actually worked would be similar to making a full-time equivalent adjustment for part-time employees, which is not permitted. Similarly, using an annual ***rate*** only, without regard to whether the employees worked the entire year and were actually paid that amount during the year, would be similar to annualizing pay, which the rule only permits in limited circumstances. [October 18, 2016]

Question 128C.03

Question: When a registrant uses a CACM to identify the median employee, what time period may it use? Must the period include the date on which the employee population is determined? Must it always be for an annual period? May it use the prior fiscal year?

Answer: To calculate the required pay ratio, a registrant must first select a date, which must be within three months of the end of its fiscal year, to determine the population of its employees from which to identify the median. Once the employee population is determined, the registrant must then identify the median employee from that population using either annual total compensation or another CACM. In applying the CACM to identify the median employee, a registrant is not required to use a period that includes the date on which the employee population is determined nor is it required to use a full annual period. A CACM may also consist of annual total compensation from the registrant's prior fiscal year so long as there has not been a change in the registrant's employee population or employee compensation arrangements that would result in a significant change of its pay distribution to its workforce. [October 18, 2016]

Question 128C.04

Question: When someone is furloughed on the date that the registrant uses to determine the population of its employees from which it is required to identify the median, must the registrant include the furloughed person in the employee population used to identify the median employee, and, if included in the population, how should the furloughed employee's compensation be calculated?

Answer: Item 402(u) does not define or even address furloughed employees. Because a furlough could have different meanings for different employers, registrants will need to determine whether furloughed workers should be included as employees based on the facts and circumstances. If the furloughed worker is determined to be an employee of the registrant on the date the employee population is determined, his or her compensation should be determined by the same method as for a non-furloughed employee. Item 402(u)(3) of Regulation S-K identifies four classes of employees: full-time, part-time, temporary and seasonal. The registrant must determine in which class the employee belongs on that date and determine that individual's compensation using annual total compensation or another CACM in accordance with Instruction 5 of Item 402(u). That instruction states that a registrant may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the registrant for less than the full fiscal year or who were on an unpaid leave of absence during the period. In contrast, a registrant may not annualize the total compensation for employees in temporary or seasonal positions. A registrant may not make a full-time equivalent adjustment for any employee. [October 18, 2016]

Question 128C.05

[Withdrawn, September 21, 2017]

Question 128C.06

Question: Given the significant flexibility provided to registrants in Item 402(u) to identify the median employee, would the staff object if a registrant describes the pay ratio as an estimate?

Answer: No. As the Commission stated in the interpretive release, due to the use of estimates, assumptions, adjustments, and statistical sampling permitted by the rule, pay ratio disclosures may involve a degree of imprecision. Therefore, the staff would not object if a registrant states in any required disclosure that the pay ratio is a reasonable estimate calculated in a manner consistent with Item 402(u). [September 21, 2017]

Section 129. Item 403 — Security Ownership of Certain Beneficial Owners and Management

Question 129.01

Question: If a director's term will not continue beyond the annual meeting, must that director's equity security holdings be disclosed pursuant to Item 403(b)?

Answer: Item 403(b), by its terms, requires the disclosure of shareholdings of all directors named in the registrant's proxy statement, including directors' qualifying shares, even if the terms of some directors will not continue beyond the annual meeting. [Mar. 13, 2007]

Question 129.02

Question: Are phantom stock units held in a nonqualified deferred compensation plan reportable in the table required by Item 403(b)?

Answer: If the units could be settled in stock at the holder's election, so that if the holder were terminated currently he or she would get the underlying stock without the need to satisfy any additional vesting requirements, the registrant should report the total number of shares and percent of class beneficially owned, including the shares and percent of class beneficially owned due to the potential exercise of rights acquired under the phantom stock units. This is because the holder would have the right to acquire the underlying stock within 60 days (see Exchange Act Rule 13d-3). In addition to including the shares underlying the units in the total number of shares and percent of class beneficially owned, the phantom stock units also should be presented in a manner that distinguishes them from stock owned outright - e.g., pursuant to a clear and succinct footnote explanation. In contrast, if the phantom stock units can be settled in stock only at the company's discretion, they should not be reported in the total number of shares and percent of class beneficially owned, because the holder does not have a right to acquire the underlying stock within 60 days. Similarly, if the phantom stock units can be settled solely in cash, they should not be reported because the holder has no right to acquire the underlying stock. [Mar. 13, 2007]

Question 129.03

Question: If a named executive officer died since the beginning of the registrant's last fiscal year, must the deceased named executive officer be included in the Item 403(b) ownership table?

Answer: No. Although Item 403(b) requires disclosure for each of the named executive officers, as defined in Item 402(a)(3), a named executive officer who died since the beginning of the registrant's last fiscal year would not need to be included in the Item 403(b) ownership table. [Mar. 13, 2007]

Question 129.04

Question: Does the Item 403(b) requirement to indicate, by footnote or otherwise, the amount of shares that are pledged as security apply to a "negative pledge" of the company's stock by a director, nominee or named executive officer? (A "negative pledge" is a covenant granted by a borrower to a lender in which a promise is made

not to convey the shares to a third party or to otherwise encumber them. Assuming a default by the borrower, the "negative pledge" would not transfer title by operation of law, but would instead require a foreclosure.)

Answer: Yes, because shares subject to a "negative pledge" may be subject to material risk or contingencies that do not apply to other shares beneficially owned by these persons, and such shares are pledged as security by operation of the negative pledge covenant. [Mar. 13, 2007]

Question 129.05

Question: Does the requirement in Item 403(c) to disclose "any arrangement . . . including any pledge . . . which may at a subsequent date result in a change in control of the registrant" apply to a "negative pledge" of the company's stock by a principal shareholder, as described in Question 129.04 above?

Answer: In the ordinary course, such an arrangement would not be disclosable under Item 403(c). However, the registrant should consider whether any circumstances, such as insolvency of the borrower or takeover activity with respect to the registrant, would render a change in control arising from such an arrangement foreseeable and, hence, disclosable under Item 403(c). [Mar. 13, 2007]

Section 130. Item 404 — Transactions with Related Persons, Promoters and Certain Control Persons

Question 130.01

Question: If a company with a class of securities registered under the Exchange Act that is current in its Exchange Act reports files a Form S-1 that does not incorporate information by reference, must Item 404(a) disclosure be provided for fiscal years ending before December 15, 2006 if the company already provided Item 404 disclosure for these years under the pre-2006 Item 404 requirements in a Commission filing?

Answer: No. Companies do not have to "restate" Item 404(a) disclosure under the 2006 Item 404 requirements if it was previously reported under the pre-2006 requirements. [Mar. 13, 2007]

Question 130.02

Question: If a company files a registration statement for an initial public offering on Form S-1, or files a Form 10 to register a class of securities under the Exchange Act, must the company provide Item 404(a) disclosure pursuant to the 2006 Item 404 requirements for fiscal years ending before December 15, 2006?

Answer: Yes. Disclosure must be provided in these filings pursuant to the 2006 Item 404 requirements for the period specified in Instruction 1 to Item 404. [Mar. 13, 2007]

Question 130.03

Question: Item 404(a) requires, in pertinent part, disclosure of any transaction since the beginning of the registrant's last fiscal year between the registrant and any 5 percent shareholder where the amount involved exceeds $120,000 and the 5 percent shareholder has a direct or indirect material interest in the transaction. Is disclosure required of such a transaction that occurred since the beginning of the registrant's last fiscal year, but prior to the date the person became a 5 percent shareholder?

Answer: Disclosure is required if the transaction: (a) was continuing (such as through the ongoing receipt of payments) after the date the person became a 5 percent shareholder; or (b) resulted in the person becoming a 5 percent shareholder. If the transaction concluded before the person became a 5 percent shareholder, disclosure would not be required. [Mar. 13, 2007]

Question 130.04

Question: How does a company value unexercised, in-the-money stock options for purposes of determining whether the $120,000 threshold of Item 404(a) has been met?

Answer: The value of unexercised, in-the-money options should be determined for Item 404(a) purposes by determining the difference between the fair market value of the securities underlying the options and the exercise or base price of the options. Use of the Black-Scholes or binomial option pricing method also would be appropriate, provided that such use and the underlying assumptions are clearly disclosed and the value thus calculated is greater than zero and is otherwise reasonably related to the unrealized gain. [Mar. 13, 2007]

Question 130.05

Question: Is the condition that loans be made on substantially the same terms as for "comparable loans with persons not related to the lender" in Instruction 4.c.ii. to Item 404(a) satisfied if a bank makes loans available on the same terms to all of its employees, the vast majority of whom are not "related persons" as defined in Item 404, but the same terms are not offered to non-employees?

Answer: No. The term "persons not related to the lender" means persons with no relationship at all with the lender other than the lending relationship, such as regular customers. Employees are considered related to the lender by virtue of their employment relationship. [Mar. 13, 2007]

Question 130.06

Question: Must a company include disclosure regarding policies for the review, approval or ratification of related person transactions under Item 404(b)(1) even when the company does not have to report any transactions under Item 404(a)?

Answer: Yes. Item 404(b)(1) requires disclosure regarding policies for the review, approval or ratification of the types of related person transactions that would be disclosed under Item 404(a). [Mar. 13, 2007]

Question 130.07

Question: Is a smaller reporting company required to describe its policies and procedures for review, approval or ratification of transactions with related persons as specified by Item 404(b) of Regulation S-K if a schedule or form being used for a filing requires the company to furnish the information required by Item 404(b)?

Answer: No. Smaller reporting companies are not required to furnish Item 404(b) disclosure in these circumstances. Smaller reporting companies comply with the requirements of Item 404 by furnishing the information called for by Item 404(d) of Regulation S-K, the paragraph of Item 404 labeled "Smaller reporting companies," which does not require Item 404(b) disclosure. [July 3, 2008]

Section 131. Item 405 — Compliance with Section 16(a) of the Exchange Act

None

Section 132. Item 406 — Code of Ethics

None

Section 133. Item 407 — Corporate Governance

Question 133.01

Question: If a non-listed issuer has independence definitions that are more stringent than those of a national securities exchange, may that issuer provide disclosure based on its own independence definitions in accordance with Item 407(a)(1)(i), rather than provide the disclosure required by Item 407(a)(1)(ii)?

Answer: The non-listed issuer must provide the disclosure required by Item 407(a)(1)(ii). If the non-listed issuer believes that its own independence definitions are more stringent than those of the exchange identified in the required Item 407(a)(1)(ii) disclosure, it may, in addition, disclose that belief and provide the disclosures called for by Item 407(a)(1)(i) based on its own definitions, provided that it also complies with Item 407(a)(2) regarding disclosure of its own definitions of independence. [Mar. 13, 2007]

Question 133.02

Question: May a company indicate that the nominating committee's processes, policies, or minimum director nominee qualifications are included in the company's governance policies posted on the company's website, rather than including descriptions of the nominating committee's processes, policies, or minimum nominee qualifications in the proxy statement?

Answer: No. Item 407(c)(2) requires that the descriptions of the processes, policies, and nominee qualifications be included in the proxy statement, and no mechanism for reference to website posting of this information is provided for with respect to the Item 407(c)(2) disclosure. [Mar. 13, 2007]

Question 133.03

Question: Item 407(c)(2)(vii) requires the identification of the category of persons or entities that recommended each nominee for director, other than executive officers or nominees that are directors who are standing for re-election. If a director who did not stand for election by shareholders last year (but rather had been named as a director by the board during the year) is to be nominated for election by shareholders for the first time, is disclosure under Item 407(c)(2)(vii) required for that nominee?

Answer: Yes. The nominee for director would not be considered as standing for "re-election"; therefore, disclosure of the category of persons or entities that recommended the nominee is required by Item 407(c)(2)(vii). [Mar. 13, 2007]

Question 133.04

Question: Does Item 407(d)(3)(i)(D) require the audit committee to state whether it recommended inclusion of the audited financial statements in the Form 10-K for periods prior to the last completed fiscal year?

Answer: No. Item 407(d)(3)(i)(D) requires the audit committee to state whether it recommended inclusion of the audited financial statements in the Form 10-K. This statement need not cover financial statements for periods prior to the last completed fiscal year. [Mar. 13, 2007]

Question 133.05

Question: Should all compensation consultants engaged by the company that played a role in determining or recommending the amount or form of executive or director compensation be disclosed, or only those that consulted with the board of directors or the compensation committee?

Answer: All compensation consultants with any role in determining or recommending the amount or form of executive or director compensation must be disclosed under Item 407(e)(3)(iii). [Mar. 13, 2007]

Question 133.06

Question: Is the consent of a compensation consultant required under Securities Act Rule 436 if a compensation consultant is identified in accordance with Item 407(e)(3)(iii) in a filing that is incorporated by reference into a Securities Act registration statement?

Answer: No. Item 407(e)(3) requires a "narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation including … (iii) [a]ny role of compensation consultants in determining or recommending the amount or form of executive and director compensation." Identifying a compensation consultant and the role that the compensation consultant had in determining or recommending the amount or form of executive and director compensation does not result in the compensation consultant being deemed an "expert" for the purposes of the Securities Act, or mean that the compensation consultant has expertized any portion of the disclosure regarding executive and director compensation or compensation committee processes. Therefore, a consent would not be required. [Mar. 13, 2007]

Question 133.07

Question: Which names of directors must be included below the disclosure required in the Compensation Committee Report by Item 407(e)(5)?

Answer: Item 407(e)(5)(ii) requires that the name of each member of the compensation committee (or other board committee performing equivalent functions, or in the absence of any such committee, the entire board of directors) must appear below the required disclosure in the Compensation Committee Report. The members of the compensation committee (or the full board) who participated in the review, discussions and recommendation with respect to the Compensation Discussion and Analysis must be identified. New members who did not participate in such activities and departed members who are no longer directors need not be included. Members who resigned from the compensation committee during the course of the year, but remain directors of the issuer, may need to be named under the disclosure in the Compensation Committee Report pursuant to Item 407(e)(5)(ii). [Mar. 13, 2007]

Question 133.08 *[same as Question 118.06]*

Question: Regarding the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, on what basis should a company differentiate between the requirements of Item 407(e)(3)(iii) and Item 402(b)'s Compensation Discussion and Analysis disclosure?

Answer: The information regarding "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation" required by Item 407(e)(3)(iii) is to be provided as part of the company's Item 407(e)(3) compensation committee disclosure. See Release 33-8732A at Section V.D, Corporate Governance Disclosure. If a compensation consultant plays a material role in the company's compensation-setting practices and decisions, then the company should discuss that role in the Compensation Discussion and Analysis section. [July 3, 2008]

Question 133.09

[Withdrawn, November 7, 2018]

Question 133.10

Question: Are the "additional services" provided by executive compensation consultants that are subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B) limited to services for non-executives?

Answer: No. [Jan. 20, 2010]

Question 133.11

Question: If a compensation consultant's role is limited to consulting on broad-based plans that do not discriminate in favor of executive officers or directors and to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the consultant does not provide advice, then such services do not need to be disclosed under Item 407(e)(3)(iii), so long as these are the *only* services provided by the consultant. If the consultant's role extends beyond these two types of services, then disclosure of all of the consultant's services, including consulting on broad-based plans and providing non-customized information, will be required under Item 407(e)(3)(iii), subject to the disclosure threshold in this item. Are the fees for these two types of services considered to be for "determining or recommending the amount or form of executive and director compensation" or are such fees considered to be for "additional services"?

Answer: The answer depends on the facts and circumstances of each service. Fees for consulting on broad-based, non-discriminatory plans in which executive officers or directors participate and for providing information relating to executive and director compensation, such as survey data (in each case, that would otherwise qualify for the exclusion from disclosure if they are the only services provided), are considered to be fees for "determining or recommending the amount or form of executive and director compensation" for purposes of reporting fees under the rule. However, "consulting" on broad-based non-discriminatory plans does not also include any related services, such as benefits administration, human resources services, actuarial services and merger integration

services, all of which are "additional services" subject to the disclosure requirements of Items 407(e)(3)(iii)(A) and (B). In addition, if the non-customized information relates to matters other than executive and director compensation, then the fees for such information would be for "additional services." [Jan. 20, 2010]

Question 133.12

Question: Under Item 407(e)(3)(iii)(A)-(B), compensation consultant fees are required to be disclosed if the consultant provides advice on executive and director compensation and also provides "additional services" in an amount in excess of $120,000 during the last completed fiscal year. Is there any limitation on the types of services that are included as "additional services"? If, in addition to services, the consultant also sells products to the company, do the revenues generated from such sales also have to be disclosed?

Answer: There is no limitation on the types of services that are included in "additional services." If the consultant also sells products to the company, then the revenues generated from such sales should be included in "aggregate fees for any additional services provided by the compensation consultant or its affiliates." [Mar. 12, 2010]

Question 133.13

Question: In connection with preparing Item 401 disclosure relating to director qualifications, certain board members or nominees have provided for inclusion in the company's disclosure certain self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background. What disclosure of self-identified diversity characteristics is required under Item 401 or, with respect to nominees, under Item 407?

Answer: Item 401(e) requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director. Item 407(c)(2)(vi) requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees. To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

Section 134. Item 501 — Forepart of Registration Statement and Outside Front Cover Page of Prospectus

Question 134.01

Question: Is Item 501(b)(8)(iii)'s requirement to disclose the presence or absence of arrangements to place funds in escrow applicable only when the best-efforts offering is conditioned on a minimum number of securities being sold?

Answer: Yes. [July 3, 2008]

Question 134.02

Question: When should the legend specified in Item 501(b)(10) be included on a prospectus?

Answer: The legend specified in Item 501(b)(10) should be printed on all preliminary prospectuses used before the effective date of the registration statement and, in accordance with Item 501(b)(11), in any prospectus

contained in an effective registration statement omitting Rule 430A information that is used after effectiveness and prior to the pricing. [July 3, 2008]

Question 134.03

Question: How should the prospectus date and "Subject to Completion" legend required by Items 501(b)(9) and (10) of Regulation S-K be placed on the cover page of the prospectus?

Answer: The placement of the prospectus date and "Subject to Completion" legend on the prospectus cover page should be such that the information is presented in a clear, concise, and understandable manner. [July 3, 2008]

Question 134.04

Question: Instruction 1 to Item 501(b)(3) requires a preliminary prospectus for an initial public offering of securities, other than debt securities, to include a bona fide estimate of the range of the maximum offering price. Are there constraints on how wide the disclosed price range may be?

Answer: Yes. For initial public offerings, a price range in excess of $2, for offerings up to $10 per share, or in excess of 20% of the high end of the range, for offerings over $10 per share, will not be considered bona fide. For example, if the high end of the range is $20, then the price range may be as wide as $16 to $20. If an auction clearing price will be used as the primary factor in establishing the final offering price, a price range in excess of $4, for offerings up to $20 per share, or in excess of 20% of the high end of the range, for offerings over $20 per share, will not be considered bona fide. [May 16, 2013]

Section 135. Item 502 — Inside Front and Outside Back Cover Pages of Prospectus

None

Section 136. Item 503 — Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges

Question 136.01

Question: When is the ratio of earnings to fixed charges required in registration statements?

Answer: The ratio of earnings to fixed charges required by Item 503(d) is required for registration statements relating to both short and long term debt. However, if the ratio already is contained in a Form 10-K filed by the issuer, it can be incorporated by reference into the registration statement, provided the registration form permits such incorporation and the issuer is eligible to incorporate the information by reference. [July 3, 2008]

Section 137. Item 504 — Use of Proceeds

None

Section 138. Item 505 — Determination of Offering Price

None

Section 139. Item 506 — Dilution

None

Section 140. Item 507 — Selling Security Holders

Question 140.01

Question: Does the term "security holders" in Item 507 refer to beneficial holders?

Answer: Yes. The term "security holders," as used in Item 507, means beneficial holders, not nominee holders or other such holders of record. [July 3, 2008]

Question 140.02

Question: If a selling security holder is not a natural person, how does a registrant satisfy the obligation in Item 507 of Regulation S-K to disclose the nature of any position, office, or other material relationship that the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates?

Answer: In addition to disclosing any material relationships between the registrant and the selling security holder entity, the registrant must disclose the Item 507 information about any persons (entities or natural persons) who have control over the selling entity and who have had a material relationship with the registrant or any of its predecessors or affiliates within the past three years. In such case, the registrant must identify each such person and describe the nature of any relationships. [July 26, 2016]

Question 140.03

Question: How should registration statements for secondary offerings reflect the addition of selling shareholders or the substitution of new selling shareholders for already named selling shareholders?

Answer: If the company is eligible to rely on Rule 430B when the registration statement was originally filed, the company may add or substitute selling shareholders to a registration statement related to a specific transaction by prospectus supplement. The supplement is filed under Rule 424(b)(7).

If the company is not eligible to rely on Rule 430B when the registration statement is initially filed, it must file a post-effective amendment to add selling shareholders to a registration statement related to a specific transaction that was completed prior to the filing of the resale registration statement. A Rule 424(b) prospectus supplement may be used to post-effectively update the selling shareholder table to reflect a transfer from a previously identified selling shareholder. The new investor's shares must have been acquired or received from a selling shareholder previously named in the resale registration statement and the aggregate number of securities or dollar amount registered cannot change. [Apr. 24, 2009]

Section 141. Item 508 — Plan of Distribution

Question 141.01

Question: Does Item 508(a) of Regulation S-K, which calls for disclosure of the identity of "principal underwriters" and their material relationships with the registrant, require disclosure as to each member of the selling group?

Answer: No. The disclosure is limited to those underwriters who are in privity of contract with the issuer with respect to the offering. [July 3, 2008]

Section 142. Item 509 — Interests of Named Experts and Counsel

None

Section 143. Item 510 — Disclosure of Commission Position on Indemnification for Securities Act Liabilities

None

Section 144. Item 511 — Other Expenses of Issuance and Distribution

None

Section 145. Item 512 — Undertakings

Question 145.01

Question: Must a registration statement on Form S-8, covered by Rule 415, include all applicable undertakings in Item 512 of Regulation S-K, including specifically those in Items 512(a), (b) and (h)?

Answer: Yes. However, the Form S-8 does not have to include the undertakings contained in Items 512(a)(5)(i), 512(a)(5)(ii), and 512(a)(6). [July 3, 2008]

Question 145.02

Question: Should a Form S-3 for an automatic shelf registration statement include the Item 512(h) undertaking or the indemnification disclosure required by Item 510 of Regulation S-K?

Answer: A Form S-3 for an automatic shelf registration statement, other than for a dividend reinvestment plan, should include the Item 512(h) undertaking rather than the indemnification disclosure required by Item 510, even though the registrant will not request acceleration of effectiveness. For automatic shelf registration statements relating to dividend reinvestment plans, the Item 510 disclosure should be included in lieu of the Item 512(h) undertaking. [July 3, 2008]

Question 145.03

Question: Item 512(a) of Regulation S-K, which is applicable to Rule 415 offerings, sets forth three circumstances requiring a post-effective amendment: Section 10(a)(3) updating, fundamental changes and material changes to the plan of distribution. Can a Rule 424(b) supplement be used for these purposes if the offering is registered on Form S-3 or Form F-3?

Answer: Yes. In a Form S-3 or Form F-3, issuers may satisfy the Item 512(a) undertaking by incorporating by reference from Exchange Act reports containing the required information or by filing a Rule 424(b) prospectus. [July 3, 2008]

Section 146. Item 601 — Exhibits

Question 146.01

Question: Instruction 1 to Item 601(a) of Regulation S-K provides that when filing amendments to registration statements, a registrant need not include copies of exhibits which have been modified only to correct minor typographical errors or to put in pricing terms. May the incomplete exhibits already on file that do not reflect the pricing or typographical modifications noted above be incorporated by reference in any subsequent filing?

Answer: No. Instruction 1 also states that incomplete exhibits already on file that do not reflect these modifications may not be incorporated by reference in any subsequent filing. [July 3, 2008]

Question 146.02

Question: Under Item 601(a)(2), must the exhibit index for each year's Form 10-K list each of the exhibits required in the Form 10-K, even if some of the exhibits have previously been filed?

Answer: Yes. Of course, the previously filed exhibits may be incorporated by reference from the prior year's Form 10-K or another appropriate document. [July 3, 2008]

Question 146.03

Question: Must a Form 10-Q include the full exhibit index specified by Item 601(a)(2)?

Answer: No. The exhibit index in a Form 10-Q can be limited to those exhibits actually filed as part of, or incorporated by reference into, the Form 10-Q. [July 3, 2008]

Question 146.04

Question: If a registrant is party to an oral contract that would be required to be filed as an exhibit pursuant to Item 601(b)(10) if it were written, should the registrant provide a written description of the contract similar to that

required for oral contracts or arrangements pursuant to Item 601(b)(10)(iii)?

Answer: Yes. [July 3, 2008]

Question 146.05

Question: If a company enters into a new material contract, when should the contract be filed as an exhibit to a Form 10-Q or Form 10-K?

Answer: Instruction 2 to Item 601(b)(10) indicates that Exhibit 10 material contracts need to be filed with the periodic report covering the period during which the contract is executed or becomes effective. [July 3, 2008]

Question 146.06

Question: A company entered into a material agreement. However, the agreement was no longer material to the company by the end of the reporting period during which the contract was entered into. Must the agreement be filed as an exhibit to the periodic report?

Answer: Yes. Item 601(a)(4) provides that if a material contract "is executed or becomes effective during the reporting period," then it shall be filed as an exhibit. [July 3, 2008]

Question 146.07

Question: When may consents that are filed with an Exchange Act document be incorporated by reference into a Securities Act registration statement?

Answer: Item 601(b)(23)(ii) of Regulation S-K and Securities Act Rule 439(a) permit the incorporation by reference of consents filed with Exchange Act reports only into an already effective Securities Act registration statement. Consents may not be incorporated by reference into a registration statement that becomes effective after the filing of the consent with an Exchange Act document. [July 3, 2008]

Question 146.08

Question: An issuer is filing a special financial report on Form 10-K. Must the issuer file with the report the certification required by Item 601(b)(31)?

Answer: Yes. However, the issuer may omit paragraphs 4 and 5 of the certification because the report will contain only audited financial statements and not Item 307 or Item 308 of Regulation S-K disclosures. [July 3, 2008]

Question 146.09

Question: How should a smaller reporting company that relies on Item 402(m)(2) of Regulation S-K rather than Item 402(a)(3) to determine its "named executive officers" comply with Item 601(b)(10)(iii)(A) of Regulation S-K, which describes management contracts and compensatory plans, contracts and arrangements in which named executive officers participate that must be filed as exhibits to registration statements and reports?

Answer: Although Item 601(b)(10)(iii)(A) refers only to the Item 402(a)(2) definition of "named executive officer," if a smaller reporting company applied Item 402(m)(2) to determine the named executive officers in its registration statement or report and provides the disclosure permitted under Items 402(m) through 402(r) instead of the disclosure required under Items 402(a) through 402(k), the smaller reporting company need only file as exhibits those plans, contracts and arrangements in which named executive officers as determined under Item 402(m)(2) participate. [July 3, 2008]

Question 146.10

Question: Should a copy of the employee benefit plan under which the registered securities will be issued be filed as an exhibit to the registration statement on Form S-8?

Answer: Yes. [July 3, 2008]

Question 146.11

Question: Does a written arrangement whereby officers are provided company cars and other perquisites have to be filed as a "material contract"?

Answer: If the perquisite is separately identified and quantified in the proxy statement, then the written arrangement pursuant to which the officer receives the perquisite need not be filed as a "material contract." [July 3, 2008]

Question 146.12

Question: Even though interactive data exhibits are not required for initial public offerings, can a filer voluntarily submit an interactive data exhibit for an IPO on Form S-1?

Answer: Yes. If the filer chooses to submit an interactive data exhibit with an IPO on Form S-1, however, it must include the exhibit as soon as the registration statement contains a price or price range and subsequent amendments also must include the interactive data exhibit if the financial statements are changed. [May 29, 2009]

Question 146.13

Question: If a Form 8-K contains audited annual financial statements that are a revised version of financial statements previously filed with the Commission and have been revised to reflect the effects of certain subsequent events, such as discontinued operations, a change in reportable segments or a change in accounting principle, then under Item 601(b)(101)(i) of Regulation S-K, the filer must submit an interactive data file with the Form 8-K for those revised audited annual financial statements. Paragraph 6(a) of General Instruction C of Form 6-K contains a similar requirement. Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K permit a filer to voluntarily submit an interactive data file with a Form 8-K or 6 K, respectively, under specified conditions. Is a filer permitted to voluntarily submit an interactive data file with a Form 8-K or 6-K for other financial statements that may be included in the Form 8-K or 6-K, but for which an interactive data file is not required to be submitted? For example, if the Form 6-K contains interim financial statements other than pursuant to the nine-month updating requirement of Item 8.A.5 of Form 20-F?

Answer: Yes, if the filer otherwise complies with Item 601(b)(101)(ii) of Regulation S-K and Paragraph 6(b) of General Instruction C of Form 6-K, as applicable. [Sep. 14, 2009]

Question 146.14

Question: How does a filer determine when it is required to submit interactive data and to "detail tag" the financial statement footnotes and schedules in its interactive data?

Answer: A filer first assesses its filing status at the end of each fiscal year (by looking to its public float as of the end of the most recently completed second quarter) and then follows the phase-in provisions for that status in the filings it makes during the immediately following fiscal year.

For example, as of December 31, 2009, a calendar-year domestic filer is a large accelerated filer with a public float under $5 billion on the last business day of its second quarter ended June 30, 2009. For purposes of its 2010 filings, the filer will follow the submission requirements of Item 601(b)(101)(i)(B) of Regulation S-K and the detail tagging requirements of Rule 405(f)(2) of Regulation S-T. Accordingly, the filer is required to submit interactive data with its Forms 10-Q for the quarters ended June 30 and September 30, 2010 but need not detail tag the financial statement footnotes and schedules until its Form 10-Q for the quarter ended June 30, 2011, assuming that, as of December 31, 2010, it is a large accelerated filer with a public float under $5 billion on the last business day of its second quarter ended June 30, 2010.

If the filer, as of December 31, 2010, is no longer a large accelerated filer, for purposes of its 2011 filings, it will follow the submission requirements of Item 601(b)(101)(i)(C) of Regulation S-K and the detail tagging requirements of Rule 405(f)(3) of Regulation S-T. Accordingly, the filer would not be required to submit interactive data with its Form 10-K for the year ended December 31, 2010 or Form 10-Q for the quarter ended March 31,

2011, but it would be required to submit interactive data with its Forms 10-Q for the quarters ended June 30 and September 30, 2011. The filer would not be required to detail tag the financial statement footnotes and schedules until its Form 10-Q for the quarter ended June 30, 2012.

Conversely, if the filer, as of December 31, 2010, is a large accelerated filer with a public float *over* $5 billion on the last business day of its second quarter ended June 30, 2010, it will follow the submission requirements of Item 601(b)(101)(i)(A) of Regulation S-K and the detail tagging requirements of Rule 405(f)(1) of Regulation S-T. Accordingly, the filer would be required to submit interactive data with its Form 10-K for the year ended December 31, 2010 and Forms 10-Q for the quarters ended March 31, June 30 and September 30, 2011 and to detail tag the financial statement footnotes and schedules in the interactive data it submits with all of these forms, even though the filer is in its first year of interactive data reporting. A filer that is required to begin detail tagging within its first year of interactive data reporting may apply for a continuing hardship exemption pursuant to Rule 202 of Regulation S-T if it cannot detail tag without undue burden or expense. Such applications will be considered on a case-by-case basis. [Sept. 17, 2010]

Question 146.15

Question: In detail tagging financial statement footnotes and schedules in its interactive data file, a filer must, among other things, "block-text" tag "[e]ach significant accounting policy within the significant accounting policies footnote" under Rule 405(d)(2) of Regulation S-T. Must the filer also block-text tag significant accounting policies that are described in footnotes outside of a significant accounting policies footnote, either because the significant accounting policies footnote is not the only footnote that describes significant accounting policies or because there is no significant accounting policies footnote?

Answer: Yes. [Sept. 17, 2010]

Question 146.16

Question: In detail tagging financial statement footnotes and schedules in its interactive data file, a filer must also, among other things, tag separately "[e]ach amount (i.e., monetary value, percentage, and number)" within each footnote and financial statement schedule under Rules 405(d)(4)(i) and 405(e)(2)(i), respectively, of Regulation S-T. Are there any monetary values, percentages or numbers in footnotes and financial statement schedules that do not need to be tagged separately?

Answer: Yes. Examples of the types of monetary values, percentages and numbers that the staff has agreed are not within the purpose of the current interactive data requirements and, as a result, need not be tagged separately to comply with Rules 405(d)(4)(i) and 405(e)(2)(i) include:

- attributed increased sales to the $1.99 pancake special (the increased sales figure itself would need to be tagged);
- sales of 1% fat milk (the sales figure itself would need to be tagged);
- docket number 34-4589;
- 22nd district court;
- FASB Accounting Standards Codification Section 605-40-15;
- altitude of 27,000 feet;
- drilling 700 feet;
- open new stores no less than 2 miles from existing stores;
- founded a new subsidiary in 2009;
- each restaurant now offers at least 20 entrees under 500 calories; and

- number of the footnote itself. [Sept. 17, 2010]

Question 146.17

Question: A reporting issuer plans to rely on Securities Act Rule 430A to omit pricing information from its prospectus until after effectiveness of the registration statement. Unlike a non-reporting issuer, it is not required to disclose, pursuant to Item 501(b)(3) of Regulation S-K, a bona fide estimate of the range of the maximum offering price. As Item 601(b)(101)(i) provides that an interactive data file is "required for a registration statement under the Securities Act only if the registration statement contains a price or price range," must the issuer provide an interactive data file as an exhibit to the registration statement?

Answer: Yes. Item 601(b)(101)(i) does not provide an exemption from the interactive data requirements for reporting issuers that plan to rely on Rule 430A. In general, disclosure that satisfies the requirements in Item 501(b)(3) of Regulation S-K to state the "offering price" will be considered a "price or price range" for purposes of the interactive data rules, and thus trigger the requirement to submit interactive data. Accordingly, registration statements for shelf offerings, at-the-market offerings, exchange offers and secondary offerings must comply with the interactive data filing requirement even though they generally do not include a specific offering price at the time of effectiveness, unless the financial statements are incorporated by reference into the registration statement. [May 16, 2013]

Section 147. Item 701 — Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

Question 147.01

Question: Does Item 701(f) require a registrant to report how it anticipates using the proceeds of an offering?

Answer: No. The reporting of use of proceeds requires the reporting of actual expenditures of the funds. Merely earmarking funds for future use should not be reported. [July 3, 2008]

Section 148. Item 702 — Indemnification of Directors and Officers

None

Section 149. Item 703 — Purchases of Equity Securities by the Issuer and Affiliated Purchasers

Question 149.01

Question: Item 703 requires tabular disclosure regarding any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer's equity securities that are registered by the issuer under Exchange Act Section 12. In connection with an employee benefit plan, an employee exercises an option using a process known as "net" option exercise. Is this transaction a repurchase by the issuer that the issuer must disclose under Item 703?

Answer: No. If, however, any shares are withheld in addition to the shares necessary to pay taxes or satisfy the exercise price, the company must disclose the repurchase of the additional shares under Item 703. Similarly, if the option exercise price is paid with company stock that the option holder otherwise owns, the company must report the repurchase of the stock under Item 703. [July 3, 2008]

Question 149.02

Question: Is disclosure required by Item 703 of Regulation S-K if a holder of restricted stock subject to vesting conditions forfeits the stock upon failure to satisfy vesting condition if he or she was granted them for no consideration?

Answer: No. [July 3, 2008]

Section 150. Items 801 and 802 — Industry Guides

None

Section 151. Items 901 through 915 — Roll-up Transactions

Question 151.01

Question: Are the roll-up rules in the Item 900 Series of Regulation S-K applicable to transactions exempt from registration under the Securities Act?

Answer: Pursuant to Item 901(c)(2)(ii), a "roll-up transaction" does not include transactions in which the securities to be issued or exchanged are not required to be, and are not, registered under the Securities Act. The roll-up rules are not applicable except from an anti-fraud perspective. See Release No. 33-6922 (Oct. 30, 1991). [July 3, 2008]

Section 152. Items 1000-1016 – Regulation M-A

None

Section 153. Items 1100-1123 – Regulation AB

None

Section 154. Items 1201-1208 — Disclosure by Registrants Engaged in Oil and Gas Producing Activities

Question 154.01

Question: For a recently drilled well, where there is only a limited amount of production data and the production rate is expected to decline in a hyperbolic manner but the evidence to date indicates only an exponential decline, can you assume that the production rate will eventually begin to decline in a hyperbolic manner and claim that as proved reserves?

Answer: Yes, but only at such time when additional production data, such as from offset wells, exists demonstrating that there will be a change in the manner of decline from exponential to hyperbolic. [Oct. 26, 2009]

Question 154.02

Question: Should reserve quantities attributable to equity method investees be combined with reserve quantities attributable to consolidated entities for purposes of identifying countries containing 15% or more of the registrant's reserves under Item 1202 of Regulation S-K.

Answer: Yes. [Oct. 26, 2009]

Question 154.03

Question: If an issuer engages a third party to prepare or audit its reserve estimates, or to conduct a process review, of a limited amount of its reserves, does it need to file the third party's report under Item 1202(a)(8) of Regulation S-K?

Answer: If the issuer discloses in its filing that it engaged a third party to prepare or audit its reserve estimates, or to conduct a process review, of a limited amount of its reserves, then the issuer must file the third party's report. [Oct. 26, 2009]

Section 155. Subpart 1300 (Items 1300-1305) — Disclosure by Registrants Engaged in Mining Operations

Question 155.01

Question: For purposes of filing an Exchange Act annual report, when must a registrant engaged in mining operations comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K?

Answer: A registrant engaged in mining operations must comply with Subpart 1300's disclosure rules beginning with its Exchange Act annual report for the first fiscal year beginning on or after January 1, 2021. Until then, staff will not object if the company relies on the guidance provided in Guide 7 and by the Division of Corporation Finance staff for the purpose of filing an Exchange Act annual report. [April 29, 2020]

Question 155.02

Question: For purposes of filing a Securities Act registration statement, may the registrant satisfy its obligation to include mining property disclosure pursuant to Subpart 1300 of Regulation S-K by incorporating such disclosure by reference to its Exchange Act annual report for the appropriate period, even if such annual report was not required to comply with the new mining property disclosure rules in Subpart 1300 of Regulation S-K?

Answer: Yes. Until annual financial statements for the first fiscal year beginning on or after January 1, 2021 are required to be included in the registration statement, the staff will not object if a Securities Act registration statement incorporates by reference disclosure prepared in accordance with Guide 7 from an Exchange Act annual report for the appropriate period filed by a registrant engaged in mining operations if otherwise permitted to do so by the Commission's rules on incorporation by reference. *See, e.g.,* Securities Act Rule 411 (17 CFR 230.411), which provides that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. [April 29, 2020]

Question 155.03

Question: For purposes of filing an Exchange Act or Securities Act registration statement that does not incorporate by reference mining property disclosure from a registrant's Exchange Act annual report, when must a registrant engaged in mining operations comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K?

Answer: An Exchange Act or Securities Act registration statement that does not incorporate by reference mining property disclosure from an Exchange Act annual report filed by a registrant engaged in mining operations must comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K on or after the first day of the first fiscal year beginning on or after January 1, 2021. For example, a calendar year-end company would be required to comply with the new mining property disclosure rules when filing an Exchange Act registration statement or a Securities Act registration statement that does not incorporate by reference disclosure from a registrant's Exchange Act annual report on or after January 1, 2021, while a registrant with a June 30th fiscal year-end would be required to comply with the new mining property disclosure rules when filing an Exchange Act registration statement or a Securities Act registration statement that does not incorporate by reference disclosure from a registrant's Exchange Act annual report on or after July 1, 2021. [April 29, 2020]

INTERPRETIVE RESPONSES REGARDING PARTICULAR SITUATIONS

Section 201. Regulation S-K — General Guidance

None

Section 202. Item 10 — General

202.01 In calculating an issuer's annual revenues to determine whether the issuer qualifies as a "smaller reporting company" as defined in Item 10(f)(1)(ii) of Regulation S-K, the issuer should include all annual revenues on a consolidated basis. As such, a holding company with no public float as of the last business day of its second fiscal quarter would qualify as a smaller reporting company only if it had less than $100 million in consolidated annual

revenues in the most recently completed fiscal year for which audited financial statements are available (i.e., as of the fiscal year end preceding that second fiscal quarter). [November 7, 2018]

Section 203. Item 101 — Description of Business

203.01 In the narrative description of business, a registrant is required to specify "the number of persons employed by the registrant." In industries where registrants' general practice is to hire independent contractors (sometimes called "contract employees" or "freelancers") rather than "employees" to perform the work of the company, this disclosure should indicate the number of persons retained as independent contractors, as well as the number of regular employees. [July 3, 2008]

Section 204. Item 102 — Description of Property

None

Section 205. Item 103 — Legal Proceedings

205.01 The bank subsidiary of a one bank holding company initiates a lawsuit to collect a debt that exceeds 10% of the current assets of the bank and its holding company parent. Due to the unusual size of the debt, Item 103 requires disclosure of the lawsuit, even though the collection of debts is a normal incident of the bank's business. [July 3, 2008]

205.02 Contrary to Release No. 33-5170 (July 19, 1971), it is no longer the practice of the Division to require registrants automatically to furnish, as supplemental information, either a description of civil rights litigation omitted from a newly-filed disclosure document or the reasons for the omission. [July 3, 2008]

Section 206. Item 201 — Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters

206.01 An equity compensation plan has received Bankruptcy Court approval, but not shareholder approval. Such a plan should be reported in the "not approved by security holders" category for the purposes of the Equity Compensation Plan Information table. A footnote may be added to disclose the Bankruptcy Court approval. [Mar. 13, 2007]

206.02 A compensation plan that permits awards to be settled in either cash or stock must be disclosed under Item 201(d). A plan that permits awards to be settled only in cash need not be disclosed under Item 201(d), because the purpose of Item 201(d) is to show dilution and cash-only plans are not dilutive. However, pursuant to Item 10 of Schedule 14A, if a company is seeking shareholder approval of any plan pursuant to which cash (or non-cash) compensation may be paid or distributed, the company is required to include in its proxy statement Item 201(d) disclosure with respect to its plans under which company equity securities are authorized for issuance. [Mar. 13, 2007]

206.03 Instruction 1 to Item 201(d) provides that no disclosure is required with respect to any employee benefit plan that is intended to meet the qualification requirements of Internal Revenue Code Section 401(a). The same treatment would apply to a foreign employee benefit plan that is similar in substance to a Section 401(a) qualified plan in terms of being broad-based, compensatory and non-discriminatory. The same analysis applies for purposes of determining whether a plan must be filed as an exhibit pursuant to Item 601(b)(10)(iii)(B) of Regulation S-K, based on the exclusion provided by Item 601(b)(10)(iii)(C)(4) of Regulation S-K. [Mar. 13, 2007] *[same as C&DI 246.11]*

206.04 A company has stock appreciation rights that are exercisable for an amount of its common stock with a value equal to the increase in the fair market value of the common stock from the date the stock appreciation rights were granted. For these instruments, the company may use the fair market value of its common stock at fiscal year end for the purposes of reporting the number of shares to be issued upon exercise of the stock appreciation rights

pursuant to Item 201(d)(2)(i). The company should also describe this assumption in a footnote to the Equity Compensation Plan Information table. [Mar. 13, 2007]

206.05 As a general rule, when a registrant changes the entities comprising a self-constructed index from the index used in the prior year, the reasons for the change must be explained and the total return must be compared with that of both the newly constructed index and the prior index. See Item 201(e)(4) and Release No. 34-32723 (Aug. 6, 1993) at IV.B.1. Two limited exceptions are set forth in Release No. 34-32723. Presentation on the old basis is not required: (i) if an entity is omitted solely because it is no longer in the line of business or industry; or (ii) the changes in the composition of the index are the result of application of pre-established objective criteria. In these two cases, a specific description of, and the bases for, the change must be disclosed, including the names of the companies deleted from the new index. [Mar. 13, 2007]

206.06 If a company becomes listed on an exchange that is different from the exchange it was listed on in the prior year, the change needs to be reflected in the performance graph if the company also changes its broad market indices as a result. For example, if a company that had been listed on the American Stock Exchange becomes listed on a different exchange and now plans to use the S&P 500 as its broad market index rather than the American Stock Exchange Composite Index, the company must provide a narrative explanation of the change in indices and compare returns based upon the old and new index on the graph. [Mar. 13, 2007]

206.07 In lieu of data for the last trading day prior to the end of a given fiscal year, a registrant may use data for the last day in that year made available by a third-party index provider. [Mar. 13, 2007]

206.08 A registrant created by a spin-off may begin its Performance Graph presentation on the effective date of the registration of its common stock under Section 12 of the Exchange Act. [Mar. 13, 2007]

206.09 A registrant that spins off a portion of its business should treat that transaction as a special dividend, make the appropriate adjustments to its shareholder return data, and disclose the occurrence of the transaction and resultant adjustments in its performance graph. [Mar. 13, 2007]

206.10 A merger or other acquisition involving the registrant, where the registrant remains in existence and its common stock remains outstanding, does not change the presentation of the registrant's performance graph. [Mar. 13, 2007]

206.11 A registrant with several distinct lines of business may construct a composite peer group index composed of entities from different industry groups, representing each of the registrant's lines of business (with the lines of business weighted by revenues or assets). The basis and amount of the weighting should be disclosed. Alternatively, the registrant may plot a separate peer index line for each of its lines of business. [Mar. 13, 2007]

206.12 If a company selects its own peer group and subsequently changes the group, an additional line showing the newly selected index should be added to the performance graph. [Mar. 13, 2007]

206.13 Companies that have a short fiscal year (for example, following an initial public offering, as the result of a spin-off, or after emerging from bankruptcy) must do a stock performance graph for the short year unless the short year is 30 days or less. [Mar. 13, 2007]

206.14 A company is preparing its first proxy statement following its emergence from bankruptcy. The new class of stock that was issued under the bankruptcy plan started trading in Mar. 2006. The measurement period for the graph is from Mar. 2006 through December 2006. However, the company may plot the graph on a monthly basis and can continue the graph beyond December 2006 as long as the December 2006 plotting point is clearly shown. The same principle applies to initial public offerings and spin-off situations with a short fiscal year. [Mar. 13, 2007]

206.15 A "published industry or line-of-business index" is one that is "accessible to the registrant's security holders" and, if prepared by the registrant or an affiliate, is also "widely recognized and used." Certain guidance concerning the use of trade group indices and of composite indices composed of more than one published index is given in Release No. 34-32723 (Aug. 6, 1993) at Section IV.B.2. Self-constructed indices (which term includes those prepared by a third party for the registrant and which are not "published") are not prohibited or discouraged

by Item 201(e), they just must be weighted by market capitalization (as are most published indices) and include identification of the component issuers. See Instruction 5 to Item 201(e). [Mar. 13, 2007]

Section 207. Item 202 — Description of Registrant's Securities

None

Section 208. Item 301 — Selected Financial Data

None

Section 209. Item 302 — Supplementary Financial Information

None

Section 210. Item 303 — Management's Discussion and Analysis of Financial Condition and Results of Operations

None

Section 211. Item 304 — Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

211.01 Item 304(a)(1)(iv) uses the phrase "the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal," whereas Item 304(a)(1) uses the phrase, "the registrant's two most recent fiscal years or any subsequent interim period." The Division staff has been asked whether the period referenced in Item 304(a)(1)(iv) is coterminous with the period referenced in Item 304(a)(1), or instead refers to a period of such duration preceding the accountant's resignation or dismissal, as the language would literally suggest. The Division staff takes the position that Item 304(a)(1)(iv) refers to the time period preceding the resignation or dismissal. [July 3, 2008]

Section 212. Item 305 — Quantitative and Qualitative Disclosures About Market Risk

None

Section 213. Item 306 [*Reserved*]

None

Section 214. Item 307 — Disclosure Controls and Procedures

214.01 As discussed in Question and Answer 3 (FAQ 3) of "Management's Report on Internal Control over Financial Reporting and Certification of Disclosure Controls in Exchange Act Periodic Reports — Frequently Asked Questions (revised Sept. 24, 2007)," issued by the Office of the Chief Accountant and the Division of Corporation Finance, under limited and specified circumstances, the staff will not object to management excluding an acquired business from management's assessment of the registrant's internal control over financial reporting. FAQ 3 relates only to omitting an assessment of an acquired business's internal control over financial reporting from the assessment of the registrant's internal control over financial reporting. By its terms, it does not address management's evaluation of disclosure controls and procedures. In light of the overlap between a company's disclosure controls and procedures and its internal control over financial reporting, in those situations in which a registrant may properly rely on FAQ 3, management's evaluation of disclosure controls and procedures may exclude an assessment of those disclosure controls and procedures of the acquired entity that are subsumed by internal control over financial reporting. In addition, consistent with FAQ 3, we would expect the registrant to indicate the significance of the acquired business to the registrant's consolidated financial statements. [July 3, 2008]

214.02 A royalty trust attempted to limit its conclusion regarding the effectiveness of its disclosure controls and procedures by stating that it relied on the working interest owners for disclosure in the document. Although a royalty trust can explain its reliance on working interest owners, it cannot thereby limit the scope of its conclusion. [July 3, 2008]

Section 215. Items 308 and 308T — Internal Control over Financial Reporting

215.01 Notwithstanding the introductory note to Item 308T, which states that it applies only to annual reports, any Form 10-Q that is required to include Item 308T disclosure pursuant to Item 4T of Form 10-Q must include the disclosure required by Item 308T(b). Quarterly reports need not include Item 308T(a) disclosure. [July 3, 2008]

215.02 The guidance provided in Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Frequently Asked Questions No. 3 does not relate to reverse acquisitions between an issuer and a private operating company, and the surviving issuer in a reverse acquisition is not a "newly public company" as that term is used in Exchange Act Release No. 54942 (Dec. 15, 2006). However, the staff acknowledges that it might not always be possible to conduct an assessment of the private operating company or accounting acquirer's internal control over financial reporting in the period between the consummation date of a reverse acquisition and the date of management's assessment of internal control over financial reporting required by Item 308(a) of Regulation S-K. We also recognize that in many of these transactions, such as those in which the legal acquirer is a non-operating public shell company, the internal controls of the legal acquirer may no longer exist as of the assessment date or the assets, liabilities, and operations may be insignificant when compared to the consolidated entity. In the instances described above, the staff would not object if the surviving issuer were to exclude management's assessment of internal control over financial reporting in the Form 10-K covering the fiscal year in which the transaction was consummated. However, when the transaction is consummated shortly after year-end and surviving issuer is required to file an amended Form 8-K to update its financial statements for its most recent year-end, that filing is equivalent to the first annual report subsequent to the consummation of the transaction and future annual reports should not exclude management's report on internal control over financial reporting. Similar conclusions may also be reached in transactions involving special-purpose acquisition companies.

In lieu of management's report, the issuer should disclose why management's assessment has not been included in the report, specifically addressing the effect of the transaction on management's ability to conduct an assessment and the scope of the assessment if one were to be conducted.

In addition, the staff notes that a reverse acquisition between two operating companies may often present facts that would preclude an issuer from concluding that management's assessment may be excluded from the issuer's Form 10-K. Consequently, issuers in this situation are encouraged to discuss with the staff whether it is appropriate to exclude management's report on internal control over financial reporting.

Notwithstanding management's exclusion of its report, the issuer must include the internal control over financial reporting language in the introductory portion of paragraph 4 of the Section 302 certification, as well as paragraph 4(b), because the issuer is subject to Section 404(a) of the Sarbanes-Oxley Act. [Apr. 24, 2009]

Section 216. Item 401 — Directors, Executive Officers, Promoters and Control Persons

216.01 Item 401(d) requires disclosure where a director's wife is the first cousin of an executive officer of the same company since the director and executive officer are related by marriage "not more remote than first cousin." [July 3, 2008]

216.02 A director of a public company is the general partner (and 50% owner) of limited partnership A which, in turn, is the general partner of limited partnership B, now in bankruptcy. Disclosure of the bankruptcy is required in the public company's filings under Item 401(f)(l), because the director's general partnership in, and percentage ownership of, A are evidence of control of A, the general partner of B. [July 3, 2008]

216.03 The president of a company about to go public is convicted within the past year of misdemeanor criminal offenses, involving two small checks of $30 and $50, respectively. Counsel argues that disclosure is not required under Item 401(f) because of the exclusion of Item 401(f)(2) for "traffic violations and other minor offenses." The Division staff disagrees, taking the position that such disclosure is "material to an evaluation of the ability or integrity of any . . . executive officer of the registrant" (emphasis added). [July 3, 2008]

216.04 Item 401(f) would require the disclosure by an issuer of an order temporarily restraining another corporation from pursuing a tender offer where a director of the issuer, who is the president of the other corporation, has been specifically named in the order. [July 3, 2008]

Section 217. Item 402(a) — Executive Compensation; General

217.01 Whether a spin-off is treated like the IPO of a new "spun-off" registrant for purposes of Item 402 disclosure depends on the particular facts and circumstances. When determining whether disclosure of compensation before the spin-off is necessary, the "spun-off" registrant should consider whether it was a reporting company or a separate division before the spin-off, as well as its continuity of management. For example, if a parent company spun off a subsidiary which conducted one line of the parent company's business, and before and after the spin-off the executive officers of the subsidiary: (1) were the same; (2) provided the same type of services to the subsidiary; and (3) provided no services to the parent, historical compensation disclosure likely would be required. In contrast, if a parent company spun off a newly formed subsidiary consisting of portions of several different parts of the parent's business and having new management, it is more likely that the spin-off could be treated as the IPO of a new "spun-off" registrant. [Jan. 24, 2007]

217.02 Following a merger among operating companies, there is no concept of "successor" compensation. Therefore, the surviving company in the merger need not report on compensation paid by predecessor corporations that disappeared in the merger. Similarly, a parent corporation would not pick up compensation paid to an employee of its subsidiary prior to the time the subsidiary became a subsidiary (i.e., when it was a target). Moreover, income paid by such predecessor companies need not be counted in computing whether an individual is a named executive officer of the surviving corporation. A different result may apply, however, in situations involving an amalgamation or combination of companies. A different result also applies where an operating company combines with a shell company, as defined in Securities Act Rule 405, as provided in Interpretive Response 217.12, below. [Aug. 8, 2007]

217.03 A subsidiary of a public company is going public. The officers of the subsidiary previously were officers of the parent, and in some cases all of the work that they did for the parent related to the subsidiary. The registration statement of the subsidiary would not be required to include compensation previously awarded by the parent corporation. The subsidiary would start reporting as of the IPO date. [Jan. 24, 2007]

217.04 Instruction 1 to Item 402(a)(3) states that the generally required compensation disclosure regarding highly compensated executive officers need not be set forth for an executive officer (other than the principal executive officer or principal financial officer) whose total compensation for the last fiscal year, reduced by the amount required to be disclosed by Item 402(c)(2)(viii), did not exceed $100,000. A reporting company that recently changed its fiscal year end from December 31st to June 30th is preparing its transition report for the 6-month period ended June 30th, having filed its Form 10-K for the fiscal year ended 6 months earlier on December 31st. The reporting company generally has a group of executive officers that earn in excess of $100,000 each year. In addition, during the 6-month period, the company made an acquisition that resulted in new executive officers that, on an annual basis, will earn more than $100,000. During the 6-month period, however, none of these existing or new officers earned more than $100,000 in total compensation. The company asked whether disclosure under Item 402 regarding these officers therefore would not be required in the report being prepared for the 6-month period. The Division staff advised that no disclosure need be provided with respect to executive officers that started employment with the company during the 6-month period and did not, during that period of employment, earn more than $100,000. With respect to executive officers that were employed by the company both during and before the 6-month period, however, Item 402 disclosure would have to be provided for those who earned in

excess of $100,000 during the one-year period ending June 30th (the same ending date as the six-month period, but extending back over 6 months of the preceding fiscal year). [Jan. 24, 2007]

217.05 If a company changes its fiscal year, report compensation for the "stub period," and do not annualize or restate compensation. In addition, report compensation for the last three full fiscal years, in accordance with Item 402 of Regulation S-K. For example, in late 1997 a company changed its fiscal year end from June 30 to December 31. In the Summary Compensation Table, provide disclosure for each of the following four periods: July 1, 1997 to December 31, 1997; July 1, 1996 to June 30, 1997; July 1, 1995 to June 30, 1996; and July 1, 1994 to June 30, 1995. Continue providing such disclosure for four periods (three full fiscal years and the stub period) until there is disclosure for three full fiscal years after the stub period (December 31, 2000 in the example). If the company was not a reporting company and was to do an IPO in February 1998, it would furnish disclosure for both of the following periods in the Summary Compensation Table: July 1, 1997 to December 31, 1997; and July 1, 1996 to June 30, 1997. [Jan. 24, 2007]

217.06 Compensation of both incoming and departing executives should not be annualized. [Jan. 24, 2007]

217.07 A caller asked whether an executive officer, other than the principal executive officer or principal financial officer, could be considered a "named executive officer" if the executive officer became a non-executive employee during the last completed fiscal year and did not depart from the registrant. If an executive officer becomes a non-executive employee of a registrant during the preceding fiscal year, consider the compensation the person received during the entire fiscal year for purposes of determining whether the person is a named executive officer for that fiscal year. If the person thus would qualify as a named executive officer, disclose all of the person's compensation for the full fiscal year, i.e. compensation for when the person was an executive officer and for when the person was a non-executive employee. [Jan. 24, 2007]

217.08 A parent and its subsidiary are both Exchange Act reporting companies. Some of the executive officers of the parent may receive a portion of their compensation from the subsidiary corporation. The Division staff advised that if an executive spends 100% (or near 100%) of the executive's time for the subsidiary but is paid by the parent, then the compensation paid by the parent has to be reported in the executive compensation table of the subsidiary. However, if an allocation of the monies paid by the parent would be necessary because the executive officer splits time between the parent and the subsidiary, the payments allocable to services to the parent need not be included in the subsidiary's executive compensation table. In addition, in the event that the subsidiary pays a management fee to the parent for use of the executives, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. Compensation paid by the subsidiary to executives of the parent company must be included in the parent's executive compensation table if such payments are paid directly by the subsidiary. If the payments are part of a management contract, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. [July 3, 2008] *[same as C&DI 230.11]*

217.09 Parent and its consolidated subsidiary are public companies. X was CEO of parent for all of 2007, and was CEO of subsidiary for part of 2007. Y was an executive officer of the parent for 2007, and was CFO of the subsidiary for 2007. Even though parent made all salary and bonus payments to X and to Y, pursuant to intercompany accounting: 60% of X's 2007 salary and bonus was allocated to the subsidiary; and 85% of Y's 2007 salary and bonus was allocated to the subsidiary. If 100% of Y's salary and bonus are included, Y would be one of parent's three most highly compensated executive officers for 2007, but if the 85% allocable to subsidiary is excluded, Y would not be a parent NEO.

On these facts, the staff takes the view that 100% of the salary and bonus of each of X and Y should be counted in determining the parent's three most highly compensated executive officers and disclosed in the parent's Summary Compensation Table. Parent's NEO determinations and compensation disclosures should not be affected by whether its subsidiary is public or private. The staff also takes the view that subsidiary's Summary Compensation Table should report the respective percentages (60% for X and 85% for Y) of salary and bonus allocated to the subsidiary's books. Each Summary Compensation Table should include footnote disclosure noting the extent to which the same compensation is reported in both tables. [July 3, 2008]

217.10 A company's reimbursement to an officer of legal expenses with respect to a lawsuit in which the officer was named as a defendant, in her capacity as an officer, is not disclosable pursuant to Item 402 of Regulation S-K. [Jan. 24, 2007]

217.11 A caller inquired whether a filing that is made on January 2 must include compensation for the previous year ended December 31 when compensation information may not be incorporated by reference into the filing. The Division staff's position is that compensation must be included for such year because registrants should have those numbers available. However, if bonus or other amounts for the prior year have not yet been determined, this should be noted in a footnote together with disclosure regarding the date the bonus will be determined, any formula or criteria that will be used and any other pertinent information. When determined, the bonus or other amount must be disclosed in a filing under Item 5.02(f) of Form 8-K. Further, where the compensation disclosure depends upon assumptions used in the financial statements and those financial statements have not yet been audited, it is permissible for the company to note this fact in the compensation disclosure. [Jan. 24, 2007]

217.12 Shareholders of a shell company, as defined in Securities Act Rule 405, will vote on combining the shell company with an operating company. The combination will have the effect of making the operating company subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act. The disclosure document soliciting shareholder approval of the combination (whether a proxy statement, Form S-4, or Form F-4) needs to disclose: (1) Item 402 disclosure for the shell company before the combination; (2) Item 402 disclosure regarding the operating company that the operating company would be required to make if filing a 1934 Act registration statement, including Compensation Discussion and Analysis disclosure; and (3) Item 402 disclosure regarding each person who will serve as a director or an executive officer of the surviving company required by Item 18(a)(7)(ii) or 19(a)(7)(ii) of Form S-4, including Compensation Discussion and Analysis disclosure that may emphasize new plans or policies (as provided in the Release 33-8732A text at n. 97). The Form 10-K of the combined entity for the fiscal year in which the combination occurs would provide Item 402 disclosure for the named executive officers and directors of the combined entity, complying with Item 402(a)(4) of Regulation S-K and Instruction 1 to Item 402(c) of Regulation S-K. [Aug. 8, 2007]

217.13 Options or other rights to purchase securities of the parent or a subsidiary of the registrant should be reported in the same manner as compensatory options to purchase registrant securities. [Jan. 24, 2007]

217.14 Item 402(c)(2)(ix)(G) requires Summary Compensation Table disclosure of the dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to life insurance for the benefit of a named executive officer. Item 402(j) requires description and quantification of the estimated payments and benefits that would be provided in each covered termination circumstance, including the proceeds of such life insurance payable upon a named executive officer's death. However, if an executive officer dies during the last completed fiscal year, the proceeds of a life insurance policy funded by the registrant and paid to the deceased executive officer's estate need not be taken into consideration in determining the compensation to be reported in the Summary Compensation Table, or in determining whether the executive is among the registrant's up to two additional individuals for whom disclosure would be required under Item 402(a)(3)(iv). [May 29, 2009]

Section 218. Item 402(b) — Executive Compensation; Compensation Discussion and Analysis

None

Section 219. Item 402(c) — Executive Compensation; Summary Compensation Table

219.01 A registrant need not report earnings on compensation that is deferred on a basis that is not tax qualified as above-market or preferential earnings within the meaning of Item 402(c)(2)(viii)(B) where the return on such earnings is calculated in the same manner and at the same rate as earnings on externally managed investments to employees participating in a tax-qualified plan providing for broad-based employee participation. See n. 43 to Release No. 34-31327 (Oct. 16, 1992); American Society of Corporate Secretaries (Jan. 6, 1993). For example,

many issuers provide for deferral of salary or bonus amounts not covered by tax-qualified plans where the return on such amounts is the same as the return paid on amounts invested in an externally managed investment fund, such as an equity mutual fund, available to all employees participating in a non-discriminatory, tax-qualified plan (e.g., 401(k) plan). Although this position generally will be available for so-called "excess benefit plans" (as defined for Rule 16b-3(b)(2) purposes), it may not be appropriately applied in the case of a pure "top-hat" plan or SERP (Supplemental Employee Retirement Plan) that bears no relationship to a tax-qualified plan of the issuer. When in doubt, consult the staff. For a deferred compensation plan with a cash-based, interest-only return, earnings would not be reportable as "above-market" unless the rate of interest exceeded 120% of the applicable federal long-term rate, as stated in Instruction 2 to Item 402(c)(2)(viii). Non-qualified deferred compensation plan earnings that are "above-market or preferential" are reportable even if the deferred compensation plan is unfunded and thus subject to risk of loss of principal. [Jan. 24, 2007]

219.02 Item 402(c)(2)(ix)(G) requires disclosure in the "All Other Compensation" column of the dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value required to be reported for the stock or option award. If a company credits stock dividends on unvested restricted stock units, but does not actually pay them out until the restricted stock units vest, those dividends should be reported in the year credited, rather than the year vested (and actually paid). [Aug. 8, 2007]

219.03 Item 402(c)(2)(viii) of Regulation S-K and Item 402(h)(2)(iii) and (iv) of Regulation S-K require amounts that are computed as of the same pension plan measurement date used for financial reporting purposes with respect to the company's audited financial statements for the last completed fiscal year. The rules reference the same pension plan measurement date as is used for financial statement reporting purposes so that the company would not have to use different assumptions when computing the present value for executive compensation disclosure and financial reporting purposes. The pension plan measurement date for most pension plans is September 30, which, in the case of calendar-year companies, does not correspond with the company's fiscal year. This means that the pension benefit information will be presented for a period that differs from the fiscal year period covered by the disclosure. Under recent changes in pension accounting standards, the pension measurement date will be changed to be the same as the end of the company's fiscal year. In the year in which companies change their pension measurement date, they may use an annualized approach for the disclosure of the change in the value of the accumulated pension benefits in the Summary Compensation Table (thereby adjusting the 15 month period to a 12 month period) when the transition in pension plan measurement date occurs, so long as the company includes disclosure explaining it has followed this approach. The actuarial present value computed on the new measurement date should be reported in the Pension Benefits Table. [Jan. 24, 2007]

219.04 If the actuarial present value of the accumulated pension benefit for a named executive officer on the pension measurement date of the prior fiscal year was $1,000,000, and the present value of the accumulated pension benefit on the pension measurement date of the most recently completed fiscal year is $1,000,000, but during the most recently completed fiscal year the named executive officer earned and received an in-service distribution of $200,000, then $200,000 should be reported as the increase in pension value in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column (column (h)) of the Summary Compensation Table. [Jan. 24, 2007]

Section 220. Item 402(d) — Executive Compensation; Grants of Plan-Based Awards Table

220.01 Where a named executive officer exercises "reload" options and receives additional options upon such exercise, the registrant is required to report the additional options as an option grant in the Grants of Plan-Based Awards Table. In the Summary Compensation Table, the registrant would include the grant date fair value of the additional options in the aggregate amount reported. [Mar. 1, 2010]

220.02 If plans do not include thresholds or maximums (or equivalent items), the registrant need not include arbitrary sample threshold and maximum amounts. For example, for a non-equity incentive plan that does not specify threshold or maximum payout amounts (for example, a plan in which each unit entitles the executive to

$1.00 of payment for each $.01 increase in earnings per share during the performance period), threshold and maximum levels need not be shown as "0" and "N/A" because the payouts theoretically may range from nothing to infinity. Rather, an appropriate footnote should state that there are no thresholds or maximums (or equivalent items). [Jan. 24, 2007]

Section 221. Item 402(e) — Executive Compensation; Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table

None

Section 222. Item 402(f) — Executive Compensation; Outstanding Equity Awards at Fiscal Year-End Table

222.01 A company grants stock options that provide for immediate exercise in full as of the grant date, subject to the company's right to repurchase (at the exercise price) if the executive terminates employment with the company before a specified date. If the executive officer exercises the option before the repurchase restriction lapses, he or she effectively receives restricted stock subject to forfeiture until the repurchase restriction lapses. In this circumstance, the Outstanding Equity Awards table should show the shares received as stock awards that have not vested (columns (g) and (h)) until the repurchase restriction lapses, and the exercise should not be reported in the Option Exercises and Stock Vested Table. Instead, as the shares acquired by the executive officer cease to be subject to the repurchase provision, those shares should be reported as stock awards (columns (d) and (e)) in the Option Exercises and Stock Vested Table. If the executive officer exercises the option after the repurchase restriction lapses, it is reported in the same manner as a regular stock option. [Aug. 8, 2007]

Section 223. Item 402(g) — Executive Compensation; Option Exercises and Stock Vested Table

None

Section 224. Item 402(h) — Executive Compensation; Pension Benefits

None

Section 225. Item 402(i) — Executive Compensation; Nonqualified Defined Contribution and Other Nonqualified Deferred Compensation Plans

None

Section 226. Item 402(j) — Executive Compensation; Potential Payments Upon Termination or Change-in-Control

226.01 Item 402(j) requires quantitative disclosure of estimated payments and benefits, applying the assumptions that the triggering event took place on the last business day of the company's last completed fiscal year and the price per share of the company's securities is the closing market price as of that date. The date used for Item 402(j) quantification disclosure can affect the quantification of tax gross-ups with respect to the Internal Revenue Code Section 280G excise tax on excess parachute payments, such as by suggesting that benefits would be accelerated or by changing the five-year "base period" for computing the average annual taxable amount to which the parachute payment is compared. Where the last business day of the last completed fiscal year for a calendar year company is not December 31, the company may calculate the excise tax and related gross-up on the assumption that the change-in-control occurred on December 31, rather than the last business day of its last completed fiscal year, using the company stock price as of the last business day of its last completed fiscal year. The company may not substitute January 1 of the current year for the last business day of the company's last completed fiscal year, which would change the five-year "base period" to include the company's last completed fiscal year. [Aug. 8, 2007]

226.02 Following the end of the last completed fiscal year (2006), but before the proxy statement is filed, a named executive officer leaves the company (in early 2007). A Form 8-K disclosing this termination is filed, as required by Item 5.02(b) of Form 8-K. This named executive officer is not the principal executive officer or the principal financial officer and will not be a named executive officer for the current fiscal year (2007) based on Item 402(a)(3)(iv). The severance package that applied to the named executive officer's termination is not newly negotiated but instead has the same terms that otherwise would apply. In these limited circumstances, it is permissible to provide Item 402(j) disclosure for the named executive officer only for the triggering event that actually occurred (even though beyond the scope of Instruction 4 to Item 402(j) because it took place after the end of the last completed fiscal year), rather than providing the disclosure for several additional scenarios that no longer can occur. [Aug. 8, 2007]

226.03 A company will file a proxy statement for its regular annual meeting that also will solicit shareholder approval of a transaction in which the company would be acquired. The company has post-termination compensation arrangements that apply generally. Assuming that the acquisition is approved, however, all the named executive officers will be covered by termination agreements that that will be specific to the acquisition. The company cannot satisfy Item 402(j) by disclosing *only* the termination agreements that are specific to the pending acquisition for the following reasons: If the company's shareholders and/or any applicable regulatory authority do not approve the acquisition, the company's generally applicable post-termination arrangements will continue to apply. In addition, comparison of the acquisition-specific agreements with the generally applicable post-termination arrangements may be material. [Aug. 8, 2007]

Section 227. Item 402(k) — Executive Compensation; Compensation of Directors

227.01 Consulting arrangements between the registrant and a director are disclosable as director compensation under Item 402(k)(2)(vii), even where such arrangements cover services provided by the director to the issuer other than as director (e.g., as an economist). [Jan. 24, 2007]

227.02 A company has an executive officer (who is not a named executive officer) who is also a director. This executive officer does not receive any additional compensation for services provided as a director, and the conditions in Instruction 5.a.ii to Item 404(a) of Regulation S-K are satisfied. The compensation that this director receives for services as an executive officer does not need to be reported in the Director Compensation Table under Item 402(k) of Regulation S-K. The director may be omitted from the table, provided that footnote or narrative disclosure explains that the director is an executive officer, other than a named executive officer, who does not receive any additional compensation for services provided as a director. [Aug. 8, 2007]

227.03 A company has a director who also is an employee (but not an executive officer). Item 404(a) requires disclosure of the transaction pursuant to which the director is compensated for services provided as an employee. (Instruction 5 to Item 404(a) does not apply because the person is not an executive officer or does not have compensation reported for services as a director in the Director Compensation Table required by Item 402(k).) However, disclosure of this employee compensation transaction in the Director Compensation Table typically would result in a clearer, more concise presentation of the information. In this situation, if the employee compensation transaction is reported in the Director Compensation Table, it need not be repeated with the other Item 404(a) disclosure. Footnote or narrative disclosure to the Director Compensation Table should explain the allocation to services provided as an employee. [Aug. 8, 2007]

227.04 A current director previously was an employee of the company and receives a pension that was earned for services rendered as a company employee. If payment of the pension is not conditioned on his or her service as a director, the pension benefits do not need to be disclosed in the Director Compensation Table, whether or not the director receives compensation for services provided as a director. If service as a director generates new accruals to the pension, disclosure would be required in column (f) of the Director Compensation Table. [Aug. 8, 2007]

Section 228. Items 402(l) to (r) — Executive Compensation; Smaller Reporting Companies

None

Section 229. Item 403 — Security Ownership of Certain Beneficial Owners and Management

229.01 A limited partnership holds restricted voting securities in a company that plans to make a public offering of its securities. The limited partnership agreement requires the limited partnership to distribute the restricted securities to its general and limited partners within 60 days following such public offering. In light of the beneficial ownership provisions of Section 13(d), the beneficial ownership of shares to be held by the general and limited partners whose holdings will be in excess of 5 percent (or if such persons are directors or named executive officers) following such distribution should be included in the beneficial ownership table contained in the company's prospectus. [Mar. 13, 2007]

229.02 When asked whether an issuer would be required to consider Form 13-F reports of "investment discretion" in determining the identity of 5 percent beneficial owners under Item 403(a), the Division staff advised that the concept of "investment discretion" was not the same as "beneficial ownership," noting that investment managers subject to Form 13-F reporting would also have to file Schedule 13D or Schedule 13G if their interest in the securities constituted beneficial ownership. The Division staff emphasized the statement in Item 403 that the issuer could rely on Schedules 13D and 13G, but that such reliance could not be exclusive if it had knowledge (or has reason to believe that such information is not complete or accurate or that a statement or amendment that should have been filed was not) of any 5 percent beneficial owners who had not filed such reports. [Mar. 13, 2007]

229.03 The tax consequences under Section 409A of the Internal Revenue Code that apply if a "key employee" receives a stock distribution within six months after leaving the company do not affect the analysis as to whether the person has a right to acquire the stock within 60 days under Rule 13d-3(d)(1). This is because Section 409A results in a negative economic consequence rather than a prohibition upon receipt of the shares. [Mar. 13, 2007]

Section 230. Item 404 — Transactions with Related Persons, Promoters and Certain Control Persons

230.01 The term "any immediate family member," as used in Item 404, is defined to include, among others, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and stepchildren and stepparents. For purposes of this item, such relatives are deemed to be: (1) only those persons who are currently related to the primary reporting person (e.g., a person who is divorced from a director's daughter would no longer be a son-in-law whose transactions must be reported); and (2) only those persons who are related by blood or step relationship to the primary reporting person or his spouse (e.g., the sister of a director's spouse is considered a sister-in-law for purposes of this item; the sister's husband, however, is not considered a brother-in-law for purposes of this item). [Mar. 13, 2007]

230.02 A is an officer and director of Y corporation, a wholly-owned subsidiary of registrant X. A is not an officer or director of X and holds only a nominal amount of X's shares. Y does business in an amount in excess of $120,000 with B, A's brother. That relationship need not be disclosed in X's reports under Item 404(a), since A is not a person described in Instruction 1 to Item 404(a). [Mar. 13, 2007]

230.03 A corporation enters into a lease in an amount substantially in excess of $120,000 with a lessor completely unaffiliated with the corporation. The lease, however, is negotiated through a related person specified in Instruction 1 to Item 404(a), who is paid a commission that is less than $120,000 by the lessor for those services. Since the amount of that person's commission is dependent upon the value of the lease, that person is considered to have an interest in the lease transaction, and the transaction, together with the commission, should be reported if the interest is determined to be a direct or indirect material interest. [Mar. 13, 2007]

230.04 Y, the President and a director of Z Corporation, a supplier of the registrant, is a member of the registrant's board of directors. The registrant solicited bids from Z and various other companies on a supply contract involving an amount in excess of the $120,000 threshold of Item 404(a). The registrant plans to award the contract to Z,

even though this supplier did not submit the lowest bid in what purportedly was a competitive bidding contest. Under these circumstances, the registrant cannot avail itself of the exclusion in Instruction 7.a. to Item 404(a) for transactions where the rates or charges involved are determined by competitive bids. [Mar. 13, 2007]

230.05 Instruction 7.a. to Item 404(a) of Regulation S-K does not permit non-disclosure of an equipment lease transaction between a company owned by a director of a reporting company and the reporting company, simply because the reporting company solicited proposals from other unrelated persons and selected the director's company only after an internal analysis of the available terms. The procedure used was not deemed to be a competitive bid because it did not involve the formal procedures normally associated with competitive bidding situations. There were no specifications established for the lease being bid upon and there was no indication of the basis upon which a bid was accepted. [Mar. 13, 2007]

230.06 A contract between a reporting company and the fund manager of the company's pension plan, who is also a more than 5 percent beneficial owner under Rule 13d-3, should be disclosed under Item 404(a) where the amount involved in the contract exceeds $120,000. [Mar. 13, 2007]

230.07 X is a director of the registrant. X's child is employed by the registrant and receives yearly compensation exceeding $120,000. The child's compensation is not reported under Item 402 since the child is not one of the registrant's named executive officers, nor is the child an officer or director. The child's compensation is required to be disclosed under Item 404(a) because the child is a related person and has a material interest in his or her yearly compensation. [Aug. 14, 2009]

230.08 An agreement by a company with a related person to repurchase company shares from the related person's estate upon death with the proceeds of a life insurance policy paid for by the company should be disclosed pursuant to Item 404(a). [Mar. 13, 2007]

230.09 In connection with a move of company headquarters, a company purchased and resold the homes owned by all affected employees. The price paid was determined by an independent appraiser. The company was advised that the Division staff will raise no objection if the company discloses under Item 404(a) only the general features of the program (including how the price was determined) and the total amount spent by the company on the program. [Mar. 13, 2007]

230.10 Item 404(a) requires disclosure of nonaccrual, past due, restructured and potential problem loans from banks, savings and loan associations or broker-dealers extending credit under Federal Reserve Regulation T. Instruction 4.c. of Item 404(a) refers to Industry Guide 3, Statistical Disclosure by Bank Holding Companies, for determining if loans are nonaccrual, past due, restructured or potential problem loans. Guide 3 requires disclosure of loans in these categories the end of each "reported period." In a proxy statement, therefore, where the reported period is the last fiscal year, only those loans which were in these categories at the end of the last fiscal year are required to be reported. [Mar. 13, 2007]

230.11 A parent and its subsidiary are both Exchange Act reporting companies. Some of the executive officers of the parent may receive a portion of their compensation from the subsidiary corporation. The Division staff advised that if an executive spends 100% (or near 100%) of the executive's time for the subsidiary but is paid by the parent, then the compensation paid by the parent has to be reported in the executive compensation table of the subsidiary. However, if an allocation of the monies paid by the parent would be necessary because the executive officer splits time between the parent and the subsidiary, the payments allocable to services to the parent need not be included in the subsidiary's executive compensation table. In addition, in the event that the subsidiary pays a management fee to the parent for use of the executives, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. Compensation paid by the subsidiary to executives of the parent company must be included in the parent's executive compensation table if such payments are paid directly by the subsidiary. If the payments are part of a management contract, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. [July 3, 2008] *[same as C&DI 217.08]*

230.12 When the transaction under consideration is an employment arrangement, "the amount involved in the transaction" includes all compensation, not just the salary of the employee. [Aug. 8, 2007]

230.13 The compensation of an executive officer who is not a named executive officer is approved by the Board's compensation committee, and the executive officer's compensation is not disclosed under Item 404(a) pursuant to Instruction 5.a to Item 404(a). An immediate family member of this executive officer also is employed by the company. The immediate family member's compensation is disclosed under Item 404(a). In this regard, Instruction 5.a to Item 404(a) does not apply to the immediate family member because she was not an executive officer. [Aug. 8, 2007]

Section 231. Item 405 — Compliance with Section 16(a) of the Exchange Act

231.01 Item 405 requires the company to disclose delinquent filings required by Section 16(a) of the Exchange Act during the most recent fiscal year or prior years. An insider's Form 5 with respect to 2007, due in February 2008, was filed late. If this late Form 5 is disclosed in the company's Form 10-K for the year ended December 31, 2007 and the proxy statement for the 2008 annual meeting, this Item 405 disclosure need not be repeated in the company's Form 10-K for the year ended December 31, 2008 and the proxy statement for the 2009 annual meeting. [July 3, 2008]

Section 232. Item 406 — Code of Ethics

None

Section 233. Item 407 — Corporate Governance

233.01 The "total number of meetings of the board of directors" specified as the basis for calculation of director's attendance in Item 407(b)(1) does not include board action by written consent. [Mar. 13, 2007]

233.02 If the only disclosure that a registrant is required to provide pursuant to Item 407(e)(4) is the identity of the members of the compensation committee, because the registrant has no transactions or relationships that trigger a disclosure obligation, the registrant may omit the Item 407(e)(4) caption ("Compensation Committee Interlocks and Insider Participation"). [Mar. 13, 2007]

233.03 The Compensation Committee Report must be separately captioned to identify it clearly as specified in Item 407(e)(5). Where there are multiple committees on the board with responsibility for different components of compensation (e.g., a stock option committee) and those committees review and discuss the Compensation Discussion and Analysis with management and, based on that review and discussion, recommend the inclusion of the Compensation Discussion and Analysis in the registrant's filings, each of these committees has a disclosure obligation under Item 407(e)(5). [Mar. 13, 2007]

Section 234. Item 501 — Forepart of Registration Statement and Outside Front Cover Page of Prospectus

234.01 Counsel for a company named Geo-Search was informed that if the company registered under the Exchange Act, the Division staff would not suggest a name change solely because there is an existing registrant named Geosearch. [July 3, 2008]

234.02 The cover page of a prospectus relating to a secondary equity offering, registered for the shelf pursuant to Rule 415, need not contain the tabular or other presentation required by Item 501(b)(3) where the offering will not be underwritten, the securities will be offered at the market, and brokerage commissions will be negotiated at the time of the offering. The reason is that no meaningful figures as to "price to the public" and "underwriter's discounts" would be available. [July 3, 2008]

Section 235. Item 502 — Inside Front and Outside Back Cover Pages of Prospectus

None

Section 236. Item 503 — Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges

None

Section 237. Item 504 — Use of Proceeds

None

Section 238. Item 505 — Determination of Offering Price

None

Section 239. Item 506 — Dilution

None

Section 240. Item 507 — Selling Security Holders

240.01 Item 507 of Regulation S-K requires certain disclosure concerning each selling shareholder for whose account the securities being registered are to be offered. The Division staff has permitted this disclosure to be made on a group basis, as opposed to an individual basis, where the aggregate holding of the group is less than 1% of the class prior to the offering. Where the aggregate holding of the group is less than 1% of the class but for a few major shareholders, the disclosure for the members of the group other than the major shareholders also may be made on a group basis. [July 3, 2008]

240.02 Revised and moved to Question 140.03 [Aug. 14, 2009]

240.03 An investment advisor manages security holder accounts in the advisor's exclusive discretion. Although the account agreements give the advisor complete discretionary authority to vote and sell securities held in the managed accounts, the account holders may revoke this authority within 60 days. Both the investment advisor and the individual account holders must be identified under Item 507 of Regulation S-K because both are viewed as security holders given their shared power to vote and sell the securities held in the managed accounts. [July 3, 2008]

240.04

[Withdrawn, July 26, 2016]

Section 241. Item 508 — Plan of Distribution

241.01 Stabilizing transactions begun on the day a registration statement became effective, but prior to the time of effectiveness (e.g., stabilizing began at 10:00 A.M. and the registration statement was declared effective at 2:00 P.M.), are not deemed to be "before the effective date of the registration statement" for purposes of Item 508(l)(2). Accordingly, the disclosure set forth in Item 508(l)(2) need not be made for such transactions. [July 3, 2008]

Section 242. Item 509 — Interests of Named Experts and Counsel

242.01 A legal fee incurred in the preparation of a registration statement, even if in excess of $50,000, is not the kind of "substantial interest" in the registrant requiring disclosure under Item 509. Such fees, of course, are normally disclosed in Part II of the registration statement. [July 3, 2008]

242.02 Where a registrant's attorney has a 10% limited partnership interest in a limited partnership in which the registrant has a 50% limited partnership interest, the registrant's relationship to the partnership is sufficiently analogous to a parent-subsidiary relationship to warrant furnishing the disclosure required by Item 509 of Regulation S-K. [July 3, 2008]

242.03 A law firm is charging a flat fee to a registrant for services performed in connection with preparation of the registrant's Securities Act registration statement. However, as the company will declare bankruptcy if the offering is unsuccessful, the law firm is not certain it will be paid unless the offering is successful. The Division staff has taken the position that this is not a form of "contingent interest" the disclosure of which was contemplated by Item 509. [July 3, 2008]

Section 243. Item 510 — Disclosure of Commission Position on Indemnification for Securities Act Liabilities

None

Section 244. Item 511 — Other Expenses of Issuance and Distribution

None

Section 245. Item 512 — Undertakings

245.01 A Rule 415 offering provides that purchasers within the first 60 days will receive a security with a higher yield than that to be received by subsequent purchasers. The registrant wished to extend the preferential purchase period for an additional 30 days. The Division staff has taken the position that such an extension is a material change in the plan of distribution, which according to the Item 512(a)(iii) undertaking would require a post-effective amendment (or, for registration statements on Form S-3 or F-3, compliance with one of the methods in Item 512(a)(1)(B)). [July 3, 2008]

245.02 In an offering of limited partnership interests registered under the Securities Act, the undertaking required by Item 512(f) that the issuer provide certificates to the underwriter need not be included in the registration statement where no certificates will be used. [July 3, 2008]

Section 246. Item 601 — Exhibits

246.01 Item 601(b)(3) requires that the entire amended text of the articles or by-laws be filed, along with the text of the new amendments. This could be accomplished by filing the entire amended text, redlined to show the new amendments. [July 3, 2008]

246.02 The exhibits to be filed with a Form 10-Q need only include instruments defining the rights of security holders with respect to long-term debt that was issued during the quarter covered by the form. Thus, documents defining the rights of commercial paper holders are not required to be filed as exhibits since commercial paper is not long-term indebtedness. [July 3, 2008]

246.03 Item 601 of Regulation S-K provides that a Form 10-Q must include, among other things, the exhibits required by Item 601(b)(4) (viz., instruments defining the rights of security holders, including indentures). However, an indenture need be filed with a Form 10-Q only in those situations where the Form 10-Q discloses a new debt issue in the quarter for which the report is filed. See Item 601(b)(4)(v). If the indenture has already been filed as part of a Securities Act registration statement, it can be incorporated by reference into the Form 10-Q pursuant to Exchange Act Rules 12b-23 and 12b-32. [July 3, 2008]

246.04 A registrant adopts a resolution providing confidential proxy voting rights for shareholders and asks whether the resolution should be filed as an "instrument defining the rights of security holders" pursuant to Regulation S-K Item 601(b)(4). The Division staff has advised that it should be so filed. [July 3, 2008]

246.05 Subparagraph (ii) of Item 601(b)(4) requires filing as an exhibit instruments defining the rights of holders of long-term debt. Subparagraph (iii)(A) excludes from this requirement such instruments where the amount of indebtedness authorized thereunder does not exceed 10% of the total assets of the company and there is filed an agreement to furnish a copy of the instrument to the Commission upon request. The confidential treatment procedures set forth in Rule 83(c) would apply to such documents furnished upon request. [July 3, 2008]

246.06 A company issues a series of notes, amounting to 5% of its total assets, in a private placement and pursuant to an indenture. Since the amount involved is less than 10 percent of its total assets, the indenture is not required to be filed pursuant to Item 601(b)(4) as an exhibit to the Form 10-K and, although not made in the ordinary course of business, the indenture would not be required to be filed as a material contract pursuant to Item 601(b)(10). [July 3, 2008]

246.07 In connection with a rights offering, a foreign company registering: (1) warrants evidencing the rights to purchase American depositary shares representing ordinary shares; (2) provisional allotment letters ("PALs") evidencing rights to purchase ordinary shares; and (3) ordinary shares underlying the warrants and PALs, must provide an opinion of counsel as to the legal issuance of the warrants and PALs and the fact that they are valid and binding obligations of the company, in addition to the opinion regarding the valid issuance and fully-paid and non-assessable nature of the ordinary shares. [July 3, 2008]

246.08 Two companies propose a joint Form S-4 registration statement for a stock-for-assets acquisition. Although the company to be acquired is not the registrant, it should file as exhibits any contracts or other documents that would be material to the new entity. [July 3, 2008]

246.09 Item 601(b)(10) requires the filing of material contracts. Pursuant to Item 601(b)(10)(ii)(C), a contract for the acquisition of real estate must be filed if consideration in excess of 15% of the fixed assets of the company is paid for the real estate. When computing the consideration paid for the real estate, an issuer should include the cash purchase price plus the amount of any indebtedness assumed as a result of the purchase. [July 3, 2008]

246.10 For purposes of Form 10-K, Item 601(b)(10)(iii) of Regulation S-K requiring disclosure of remunerative contracts would apply to a deferred compensation plan entered into during the fiscal year, even though the officer/director retired during that fiscal year and no longer was an officer/director. [July 3, 2008]

246.11 Instruction 1 to Item 201(d) provides that no disclosure is required with respect to any employee benefit plan that is intended to meet the qualification requirements of Internal Revenue Code Section 401(a). The same treatment would apply to a foreign employee benefit plan that is similar in substance to a Section 401(a) qualified plan in terms of being broad-based, compensatory and non-discriminatory. The same analysis applies for purposes of determining whether a plan must be filed as an exhibit pursuant to Item 601(b)(10)(iii)(B) of Regulation S-K, based on the exclusion provided by Item 601(b)(10)(iii)(C)(4) of Regulation S-K. [Mar. 13, 2007] *[same as C&DI 206.03]*

246.12 A remuneration plan applicable to 300 key executives in a company with 18,000 employees would not be considered a plan available to employees generally. Therefore, it would not fall within the exemption provided by Item 601(b)(10)(iii)(C)(4) and would have to be filed as an exhibit. In this regard, if a compensatory plan, contract or arrangement is available generally to all officers and directors but is not available to all employees of the company, the plan, contract or arrangement does not fall within this exemption. [July 3, 2008]

246.13 A company files its first Form 10-K containing management's report on internal control over financial reporting. The company inadvertently omits the internal control over financial reporting language from the introductory portion of paragraph 4 of the Section 302 certification, as well as paragraph 4(b). Because companies were permitted to omit these portions of the certification during the transition period to Section 404(a) compliance, if this error occurs in the company's first Form 10-K containing management's report, the staff will permit the company to file a Form 10-K/A that contains only the cover page, explanatory note, signature page and paragraphs 1, 2, 4 and 5 of the Section 302 certification. However, if the same company were to make this mistake in the following year, it would be required to file a Form 10-K/A containing full Item 9A disclosure as well as the company's financial statements. [July 3, 2008]

246.14 The following errors in a certification required by Item 601(b)(31) are examples of errors that will require the company to file a corrected certification that is accompanied by the entire periodic report: (1) the company identifies the wrong periodic report in paragraph 1 of the certification; (2) the certification omits a conformed signature above the signature line at the end of the certification; (3) the certification fails to include a date; and (4)

the individuals who sign the certification are neither the company's principal executive officer nor the principal financial officer, or persons performing equivalent functions. [July 3, 2008]

246.15 Consistent with the requirements of Item 601(b)(10)(iii), a company files its nonqualified deferred compensation plan as an exhibit. The company subsequently establishes a rabbi trust under the nonqualified deferred compensation plan. Establishment of the rabbi trust would trigger filing under Item 601(b)(10)(iii) only if it materially modifies participants' rights under the previously filed nonqualified deferred compensation plan. [May 29, 2009]

Section 247. Item 701 — Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

247.01 If the only warrants in an offering were issued to underwriters as compensation, and if the proceeds from the exercise of the warrants will be de minimis with respect to the overall proceeds, the Division staff may deem the obligation to report use of proceeds from an initial offering to be completed. Ordinarily, however, when purchase warrants remain outstanding, an offering is ongoing for purposes of reporting use of proceeds. [July 3, 2008]

247.02 Use of proceeds disclosure is required in the issuer's first periodic report filed following the effective date of its first registration statement filed under the Securities Act, even if the registration statement covered a best-efforts offering that has not closed on the due date of that periodic report. [July 3, 2008]

247.03 If a registrant's first filing under the Securities Act is a secondary offering, no disclosure need be provided in response to Item 701(f) since there is no use of proceeds. However, such a secondary offering would not constitute "the first registration statement filed under the Act by an issuer" for purposes of Rule 463. Accordingly, the first primary Securities Act offering by that registrant would necessitate disclosure under Item 701(f). [July 3, 2008]

247.04 On the same registration statement, in its initial public offering, a company registered X shares for sale to the public and Y shares for issuance pursuant to employee benefit plans. The Division staff agreed with the company's analysis that it need report the use of proceeds as required by Rule 463 and Item 701(f) of Regulation S-K only for the shares sold to the public, and could omit the information relating to the employee benefit plan shares in reliance on Rule 463(d)(3). The Division staff's response is premised on the representation that the employee benefit plan shares were originally registered for that purpose; had it been a matter of converting shares originally registered for sale to the public that remained unsold to the employee benefit purpose, this position would not apply. [July 3, 2008]

Section 248. Item 702 — Indemnification of Directors and Officers

None

Section 249. Item 703 — Purchases of Equity Securities by the Issuer and Affiliated Purchasers

249.01 If a company receives its shares back from a vendor in settlement of litigation, these shares must be disclosed under Item 703 of Regulation S-K. [July 3, 2008]

249.02 An investor purchased stock from an issuer in a private placement. The investor paid the consideration with a promissory note, which was secured by the stock. When it became apparent that the investor could not repay the note, the parties agreed that the investor would forfeit the stock in exchange for cancellation of the note. The forfeiture of the pledged stock to the issuer is an issuer repurchase that requires Item 703 of Regulation S-K disclosure. [July 3, 2008]

Section 250. Items 801 and 802 — Industry Guides

None

Section 251. Items 901 through 915 — Roll-up Transactions

None

Modified: Nov. 7, 2018