



# Securities Briefing Vol. 5, No. 1

July 1, 2006

## **TOPICS IN THIS SECURITIES BRIEFING:**

This Securities Briefing discusses:

- Preparation for SEC's new executive compensation and related disclosures; and
- NASDAQ's conversion to a national securities exchange.

This Securities Briefing is intended only as a summary of the SEC rules discussed and you are encouraged to review the full text of the rules.

## **PREPARATION FOR SEC'S NEW EXECUTIVE COMPENSATION AND RELATED DISCLOSURES OVERVIEW**

In January 2006, the SEC proposed extensive amendments to the executive compensation and related disclosures for proxy and information statements, periodic reports and registration statements. This is the first material change to these rules since 1992. The proposed rules are intended to:

- make proxy statements, reports and registration statements easier to understand;
- provide investors with more complete information on, and a better understanding of, all types of compensation earned by executive officers and directors; and
- provide investors with improved information about key financial relationships among a company, its executive officers, directors, significant shareholders, and their immediate families are the offering process.

The proposed rules organize executive compensation disclosures into three categories:

- historical compensation received for the last three years;
- holdings of equity-related interests that are related to compensation or are potential sources of future gains; and
- retirement and other post-employment benefits.

In addition, in June 2006, SEC Chairman Christopher Cox reportedly told members of the media that its executive compensation rules will contain some specific provisions dealing with option back-dating.



The SEC is expected to adopt final rules on these matters in its open meeting to be held on July 26, 2006 that are expected to apply to the 2007 proxy season. For these reasons, companies are urged to become familiar with the requirements of the expected new rules so that appropriate disclosure controls and procedures can be implemented on a timely basis to capture all of the information required by the new rules. Once the SEC's final rules have been adopted and studied, we plan to issue a Securities Briefing summarizing the new rules.

## **PROPOSED EXECUTIVE COMPENSATION DISCLOSURES**

The SEC's proposed rules encourage more complete information on executive compensation matters through, among other things, the use of broader-based tabular presentations and require narrative disclosure to supplement those tables. The proposed rules, among other things,:

- Add a compensation discussion and analysis section that provides an overview of compensation and explains the material elements of the company's compensation for its named executive officers. This section must describe the objectives and elements of the company's compensation program; explain what the compensation program is designed to reward and not reward; explain why the company chooses to pay each element; describe how the company determines the amount of each compensation element; and disclose how each compensation element fits within the company's stated compensation objectives. This section would replace the compensation committee report and the stock performance graph.
- Modify the definition of **named executive officers ("NEOs")** so that the principal executive officer and principal financial officer are always included in the group regardless of the amount of compensation paid to such individuals. In addition, NEOs will include the three (rather than four) most highly compensated executive officers with more than \$100,000 of total compensation (rather than salary and bonus) in the most recent fiscal year and up to two additional persons for whom disclosure would have been required but for the fact that they were no longer serving as executive officers at fiscal year-end.
- Modify the **summary compensation table** to show the NEOs' compensation for the last three fiscal years, whether or not such compensation was actually paid out; add a new total compensation column which is the sum of all of the other columns in the table; disclose the dollar value of stock-based awards as of the grant date while the value of non-equity incentive awards will only be disclosed when earned or paid; combine the existing "All Other Compensation" and "Other Annual Compensation" columns; and expand the disclosure of perks in the "All Other Compensation" column.
- Add a **grants of performance-based awards table** to disclose information on non-stock grants of incentive plan awards, stock-based incentive plan awards, and awards of options, restricted stock and similar instruments under plans that are performance-based.
- Add a **grants of all other equity awards table** to disclose information on equity-based compensation awards that are not performance-based, such as stock, options or similar instruments where the payout or future value is tied to the company's stock price and not to other performance criteria. This table and the Grants of Performance-Based Awards Table would replace the existing stock option grant and long-

term performance award tables.

- Add a requirement to provide a **narrative description** of any additional material factors necessary to an understanding of the information disclosed in the Summary Compensation Table, the Grants of Performance-Based Awards Table and the Grants of All Other Equity Awards Table.
- Add an **outstanding equity awards at fiscal year-end table** to show the market value at fiscal year-end of all previously awarded and outstanding equity awards (i.e., unvested or unexercised), including grants disclosed in the proposed Grants of Performance-Based Awards Table and Grants of All Other Equity Awards Table. Footnotes to the table must disclose the vesting and expiration dates of options and SARs and the vesting dates for other stock and incentive plan awards.
- Add an **option exercises and stock vested table** to show the amounts received upon exercise of options or similar instruments and the vesting of stock or similar instruments during the most recent fiscal year as compared to the grant date fair value previously reported in the Summary Compensation Table. This table and the Outstanding Equity Awards at Fiscal Year-End Table would replace the existing aggregated option exercises/fiscal year-end option value table.
- Add a **retirement plan potential annual payments and benefits table** to show an estimate of retirement benefits payable under defined benefit plans to NEOs at normal retirement age and, if available, early retirement followed by a narrative disclosure of the material factors necessary to an understanding of the information in the table. This table would replace the existing pension plan disclosures of the current rules.
- Add a **nonqualified defined contribution and other deferred compensation plans table** to show contributions, earnings and balances under nonqualified defined contribution and other deferred compensation plans for NEOs followed by a narrative disclosure of the material factors necessary to an understanding of the information in the table. To provide clarity and avoid double counting of deferred amounts, footnotes to the table must quantify the extent to which amounts in the contributions and earnings columns are reported as compensation in the Summary Compensation Table for prior years.

## **PROPOSED EXPANSION OF TERMINATION AND CHANGE-IN-CONTROL DISCLOSURES**

The proposed SEC rules require the disclosure of certain provisions of any written or unwritten arrangement that provides for payments at, following or in connection with a resignation, severance, retirement or other termination, including constructive termination of a NEO, a change in a NEO's responsibilities or a change-in-control of the company. The following information is required:

- the specific circumstances that trigger payment(s) under the termination or change-in-control arrangements or the provision of other benefits, including perks;
- the estimated payments and benefits that will be provided in each termination scenario, whether such payments would or could be paid on a lump-sum basis or other periodic basis, including the duration of the payments/benefits and by whom will be provided;
- the specific factors used to determine the appropriate payment and benefit levels under each termination scenario that trigger payments or benefits;
- the material conditions or obligations applicable to the receipt of payments or benefits, including non-compete, non-solicitation, non-disparagement or confidentiality covenants; and



- the material features necessary to an understanding of the provisions.

#### **PROPOSED EXPANSION OF DIRECTOR COMPENSATION DISCLOSURES**

The proposed SEC rules expand the disclosures for director compensation to more closely resemble disclosures required for executive compensation. The proposed rules include a director compensation table to disclose compensation earned or paid during the last fiscal year similar to that proposed for NEOs in the new Summary Compensation Table. Directors may be grouped in a single row if all elements and amounts of compensation are identical. The same information required by the Outstanding Equity Awards at Fiscal Year-End Table for NEOs must be disclosed in footnotes to the table. In addition, narrative disclosure of any material factors necessary to an understanding of the information in the table must follow the table.

#### **PROPOSED TREATMENT OF SMALL BUSINESS ISSUERS**

The proposed SEC rules provide that small business issuers would be required to provide, along with related narrative disclosure only the:

- Summary Compensation Table for the last two fiscal years;
- Outstanding Equity Awards at Fiscal Year-End Table; and
- the Director Compensation Table.

The proposed SEC rules narrows the definition of NEOs for small business issuers so that it only covers the principal executive officer and the two most highly compensated officers other than the principal executive officer. In addition, small business issuers would not be required to provide a compensation discussion and analysis.

#### **PROPOSED REVISIONS TO FORM 8-K**

The SEC commented that past disclosures under existing Item 1.01 (Entry into a Material Definitive Agreement) of Form 8-K have consisted of executive compensation disclosure on matters that do not appear always to be "unquestionably or presumptively material." As a result, the proposed SEC rules amend Item 1.01 of Form 8-K to eliminate disclosure of employment compensation arrangements and to require the discussion of such arrangements, with a broader disclosure requirement, under Item 5.02 (relating to changes in directors and executive officers). The proposed changes to Item 5.02 of Form 8-K capture all of the information required by existing Item 5.02 and also require additional information regarding material employment compensation arrangements involving NEOs such as requiring a brief description of not only employment agreements but any material plan, contract or arrangement to which a NEO or director is a party.

#### **PROPOSED REVISIONS TO CERTAIN RELATIONSHIPS AND RELATED TRANSACTION DISCLOSURES**



The proposed SEC rules revise Item 404 to make information on related party transactions clearer and easier to follow. The changes include, among others,:

- requiring disclosure of the policies and procedures established by the company and its board of directors for the review, approval or ratification of related party transactions;
- reducing the use of bright-line tests for materiality in favor of a "more appropriate" principles-based materiality analysis which determines the materiality of a transaction "on the basis of significance of the information to investors in light of all the circumstances and the significance of the interest to the person having the interest;"
- requiring disclosure of any transaction since the beginning of the company's last fiscal year where (i) the company was or is to be a participant, (ii) the amount exceeds \$120,000 (rather than the \$60,000) and (iii) the related party had, or will have, a direct or indirect material interest; and
- expanding the definition of "related party" to include the company's executive officers, directors, director nominee and any of their immediate family members, including any stepchildren, stepparents and any person (other than a tenant or employee) sharing the household of a related person.

Small business issuers will not have to disclose its policies and procedures for reviewing related party transactions and the disclosure threshold for related party transactions will be the lesser of \$120,000 or 1% of the average of the company's total assets for the last three fiscal years.

#### **PROPOSED EXPANDED AND CONSOLIDATED CORPORATE GOVERNANCE DISCLOSURES**

The proposed SEC rules contain a new Item 407 of Regulation S-K that consolidates existing disclosure requirements on director independence and corporate governance. New Item 407 requires, among other things, disclosure of:

- the identification of each independent director under applicable listing standards;
- the identification of each member of the compensation, nomination and audit committees who is not independent under the applicable independence standard;
- any transactions, relationships or arrangements not otherwise disclosed by the company that were considered by the board in determining that a director was independent;
- on either the company's website or in an appendix to the proxy statement (once every three years), the company's standards for director independence that are in addition to the applicable listing standards, if any;
- the processes and procedures for the consideration and determination of executive and director compensation, including the scope and authority of the compensation committee, the role of executive officers in determining or recommending the amount or form of executive and director compensation, and any role, and the identify, of compensation consultants in determining or recommending the amount or form of executive and director compensation.

#### **COPY OF PROPOSED SEC RULES REGARDING EXECUTIVE COMPENSATION AND RELATED DISCLOSURES**



A copy of the proposed SEC rules regarding executive compensation and related disclosures is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Proposed Rule: Executive Compensation and Related Party Disclosure.

## **NASDAQ'S CONVERSION TO A NATIONAL SECURITIES EXCHANGE OVERVIEW**

Effective July 1, 2006, NASDAQ converted from an interdealer quotation system to a national securities exchange. As a result of the change, the NASDAQ announced that the current NASDAQ Stock Market, Inc. would become a holding company for a newly formed subsidiary, The NASDAQ Stock Market, LLC, which will operate as the exchange.

### **THREE NASDAQ TIERS**

As a result of the conversion, the NASDAQ National Market has been renamed The NASDAQ Global Market and the NASDAQ SmallCap Market has been renamed The NASDAQ Capital Market. In addition, NASDAQ has introduced a new tier called The NASDAQ Global Select Market. NASDAQ unilaterally transferred any company whose securities meets the initial listing standards for the new market to The NASDAQ Global Select Market. Visit [www.nasdaq.com](http://www.nasdaq.com) to find a list of companies in each tier.

Beginning in October 2007, NASDAQ will review annually the qualifications of all companies listed on The NASDAQ Global Market and automatically transfer any company that then satisfies initial and continued listing standards for The NASDAQ Global Select Market to that market. Apart from this annual review process, a company may, at any time, transfer within The NASDAQ Global Market to The NASDAQ Global Select Market if it satisfies the initial listing standards and pays the applicable entry fees.

### **REGISTRATION OF SECURITIES UNDER SECTION 12(B) FOR NASDAQ LISTED COMPANIES**

Prior to NASDAQ's conversion to a national securities exchange, securities of most companies quoted on NASDAQ were registered under Section 12(g) of the Securities Exchange Act of 1934 or exempt from registration. As part of the conversion process, NASDAQ filed an application, on behalf of all companies with securities quoted on NASDAQ, to register such securities under Section 12(b) without the need for further action by the companies. Companies that did not wish to switch to registration under Section 12(b) had to opt-out of the process on or before May 30, 2006.

Each company that had its securities registration automatically switched to Section 12(b) must remember to indicate in its future reports filed with the SEC that its NASDAQ-listed securities are registered under Section 12(b) rather than Section 12(g). Despite the change in registration, the SEC has advised NASDAQ that companies should continue to file their reports under the Securities Exchange Act of 1934 using the same SEC file number that they previously received from the SEC. In addition, there will be no change in



CIK number.

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