

# Recent Executive Compensation Disclosure Developments: Has The Bar Been Raised?

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As is well known to all those who have grappled with the appropriate level of disclosure during this year's proxy season, the expectations of the Securities and Exchange Commission (the "SEC") and shareholders with respect to executive compensation disclosure have increased. In addition to the heightened focus by the SEC on the transparency and comprehensiveness of such disclosure as evidenced by recent SEC enforcement actions and public statements, institutional shareholders and shareholder advocacy groups have stressed the importance of improving communications with shareholders with respect to executive compensation arrangements by, among other things, enhancing disclosure in proxy statements and other SEC filings.

It is premature to predict whether these initiatives will ultimately result in additional SEC rulemaking in the executive compensation disclosure area.<sup>1</sup> However, we are currently observing in our practice and in the market that public companies are already reacting to the SEC's and shareholders' calls for enhanced and more transparent executive compensation disclosure.

This article provides an overview of the current regulatory framework for disclosure of executive compensation, including summaries of the relevant SEC rules, recent SEC enforcement actions in this area and recent public statements by the Chairman and Director of the Division of Corporation Finance of the SEC. We also include some examples of companies that have enhanced their executive compensation disclosure in proxy statements filed during the 2005 proxy season (as compared to the disclosure they provided in their respective proxy statements filed during the 2004 proxy season).

## ***Current Regulatory Framework for Disclosure of Executive Compensation***

Item 402 – Executive Compensation. The SEC regulations governing disclosure of information about executive compensation are contained in Item 402 of Regulation S-K. Pursuant to Item 402, a public company must disclose to its shareholders information concerning compensation paid to its CEO and its four most highly-compensated executive officers (its "named executive officers") during the last fiscal year, as well as its directors, in certain registration statements, its annual proxy statement, and certain other filings under the Securities Exchange Act of 1934, as amended ("Exchange Act"). Each annual proxy statement must also include a report of the compensation committee of the company that discloses the criteria used by the committee in reaching compensation decisions and the degree of the relationship between the company's corporate performance and its executive compensation practices.

Item 402 requires "clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to" named executive officers and directors, whether it is paid currently or deferred.<sup>2</sup> Companies are required to provide detailed information with respect to annual compensation; long-term compensation; option grants, exercises and values; and pension plan remuneration paid to named executive officers. Companies are required to furnish a summary compensation table that reflects, among other items, the dollar amounts of salary and bonus paid to each of the named executive officers during the previous fiscal year, as well as the dollar value of "other annual compensation not properly categorized as salary or bonus," including "[p]erquisites and other personal benefits, securities or property," when the aggregate amount of such additional compensation exceeds the lesser of \$50,000 or 10% of the total amount of salary and bonus reported for such executive officer.<sup>3</sup> Each perquisite or other personal benefit exceeding 25% of the total perquisites and other personal benefits reported for a named executive officer must be identified by type and amount.<sup>4</sup> Perquisites and other personal benefits

are to be valued on the basis of the aggregate incremental cost to the company.<sup>5</sup> Definitions of the terms “perquisite” and “other personal benefits” are not provided in the regulations.

Companies are also required to describe the terms and conditions of employment contracts with named executive officers,<sup>6</sup> and to describe any compensatory arrangements that result or will result from the resignation, retirement or other termination of a named executive officer’s employment or from a change in control of the company or a change in any such executive officer’s responsibilities following a change in control, if the amount involved exceeds \$100,000.<sup>7</sup>

With regard to compensation of directors, companies are required to describe any arrangements pursuant to which any director was compensated during the previous fiscal year.<sup>8</sup>

The compensation committee report must disclose the committee’s compensation policies applicable to the company’s executive officers, including the specific relationship of corporate performance to executive compensation. The report must also discuss the committee’s bases for the CEO’s compensation reported for the previous fiscal year, including the factors and criteria upon which the CEO’s compensation was based, and a specific discussion of the relationship of the company’s performance to the CEO’s compensation, including a discussion of each measure of the company’s performance on which CEO compensation is based.<sup>9</sup> The SEC regulations state that “[b]oilerplate language should be avoided in describing factors and criteria underlying awards or payments” of executive compensation.<sup>10</sup>

Item 601(b)(10) – Exhibit Filings. Item 601(b)(10)(iii)(A) requires companies to file as exhibits to certain of their registration statements and periodic reports any management contracts or compensatory plans (or if not set forth in any formal document, a written description thereof) to which any directors or named executive officers participate, and any management contracts or compensatory plans in which any other executive officers participate, unless immaterial in amount or significance.

New Form 8-K Requirements. On August 23, 2004, new SEC rules took effect which expanded the range of events that must be reported by companies on Form 8-K, and shortened the filing time period to four business days after a reportable event occurs. Events triggering the reporting requirement include the entry of a company into a compensation arrangement with a named executive officer or director, the entry into a material compensation arrangement with an executive officer who is not a “named executive officer,” the material amendment of any such agreements, and the termination of any such agreements.<sup>11</sup> In addition, companies must disclose when directors are elected, when a director retires, resigns or refuses to stand for re-election, and when a director has been removed for cause.<sup>12</sup> Companies must also disclose the appointment of any new principal officer, along with a brief description of the material terms of any employment agreement between the company and that officer, and the retirement, resignation, or termination of any principal officer.<sup>13</sup>

Rule 12b-20 – Material Omissions. Rule 12b-20 under the Exchange Act states that, in addition to the information expressly required to be included in a statement or report, companies must also include any additional material information as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

### ***Recent SEC Enforcement Actions***

In several recent, high profile actions, the SEC instituted and settled enforcement proceedings against companies for their inadequate or incomplete disclosure of executive compensation in their public company reports and filings.

### In the Matter of Tyson Foods, Inc. and Donald Tyson

On April 28, 2005, the SEC announced that it had settled enforcement proceedings against Tyson Foods, Inc. and its former senior chairman, Don Tyson, in an action relating to the disclosure in Tyson Foods' proxy statements of perquisites and other personal benefits received by Don Tyson and his family and friends.<sup>14</sup> The SEC charged that Tyson Foods' proxy statements filed with the SEC from 1997 to 2003 contained misleading disclosure of perquisites provided to Don Tyson both prior to and after his retirement. The SEC also charged the company with failing to maintain adequate internal controls regarding the personal use of company assets and the disclosure of perquisites, and charged Don Tyson with aiding and abetting the company's disclosure failures.

The SEC found that, while Don Tyson was employed as senior chairman of Tyson Foods from 1997 to 2001, the company provided approximately \$3 million of perquisites and personal benefits to him, his wife, his daughters and three of his friends.<sup>15</sup>

The SEC's order found that Tyson Foods' annual proxy statements mischaracterized a number of the perquisites that Don Tyson received. Certain of such perquisites (including tax gross-up payments for imputed income attributable to such perquisites) were described as "performance-based bonuses" instead of as perquisites, in order to preserve the company's tax deduction for Don Tyson's compensation. In addition, the company characterized certain perquisites as "travel and entertainment costs," an expression that the SEC characterized as "misleading" as such perquisites were personal expenses received by Don Tyson and his friends that could not be considered either "travel" or "entertainment." The company also failed to separately identify by type and amount perquisites that exceeded 25% of Don Tyson's total perquisites, as required by Item 402.

Further, the SEC's order found that more than \$1 million in perquisites were not disclosed at all in Tyson Foods' proxy statements for the years 1997 to 2003, due to internal control failures at the company. Until the SEC's investigation and a subsequent internal company review of perquisites, the company's board of directors and its compensation committee were unaware of the extent to which the company was paying for personal expenses incurred by Don Tyson, his family and friends. The SEC found that Don Tyson caused, aided and abetted the company's disclosure failures by failing to identify or quantify various perquisites in the director and officer questionnaires that he signed in the years 1997 to 2003 and that were used to prepare the relevant proxy statements.

### In the Matter of The Walt Disney Company

On December 20, 2004, the SEC entered a cease and desist order against The Walt Disney Company, charging it with neglecting to disclose certain related party transactions and relationships in its annual proxy statements, and failing to disclose certain benefits and services provided to its directors.<sup>16</sup>

The SEC found that, from 1991 to 2001, three adult children of Disney board members received annual compensation in excess of \$60,000 from Disney, the disclosure threshold amount under Item 404 of Regulation S-K. In addition, in 2000 and 2001, a company in which Disney owned a 50% interest employed the wife of a Disney director, paying her more than \$1 million annually. These matters were not disclosed until Disney filed its Form 10-K/A in August 2002, which, the SEC indicated, was not timely disclosure.

The SEC also found that, from 1984 through 2003, Disney made payments to a corporation that was owned by a director and officer of Disney and managed by another Disney director. Disney made payments to such entity for fixed hourly amounts plus expenses when one of the directors used planes owned by the corporation when traveling for Disney-related business purposes. As the payments that Disney made to this corporation exceeded 5% of the corporation's gross revenues, these payments were

required to be disclosed under Item 404. Disney failed to disclose the provision or value of these services until December 2002.

In addition, the SEC found that Disney provided secretarial services, a leased car and a driver to one of its directors, and that the provision and value of such services were not disclosed, as required under Item 402, in Disney's periodic filings or proxy statements until December 2002.

#### In the Matter of General Electric Company

On September 23, 2004, the SEC entered a cease and desist order against General Electric Company, charging GE with violating the proxy solicitation and periodic reporting requirements of the Exchange Act by failing to fully and accurately disclose retirement benefits entitled to be paid, and actually paid, to Jack Welch, its former Chairman and CEO.<sup>17</sup>

In 1996, GE and Welch entered into an "employment and post-retirement consulting agreement" that provided that, following his retirement, Welch would provide consulting services and advice to GE. In addition to a specified fee, the agreement provided that GE would provide Welch, "for the remainder of his life, continued access to [GE] facilities and services comparable to those provided to him prior to his retirement, including access to [GE] aircraft, cars, office, apartments, and financial planning services." Welch retired on September 30, 2001. In his first year of retirement, he received approximately \$2.5 million in benefits under his consulting agreement, which included access to GE aircraft for unlimited personal use and business travel; exclusive use of a furnished New York City apartment; unrestricted access to a chauffeured limousine; a leased Mercedes Benz; office space in New York City and Connecticut; the services of estate and tax advisors; the services of a personal assistant; communications and computer systems at his homes, with technical support; bodyguard security for various speaking engagements; and installation of a security system in one of his homes and the continued maintenance of security systems GE previously had installed in three of his other homes.

GE's proxy statements for the years 1997 through 2002 stated that GE would provide Welch with "continued lifetime access to [GE] facilities and services comparable to those which are currently made available to him by [GE]" following his retirement pursuant to his consulting agreement. The SEC found that GE failed to fully and accurately describe the "facilities and services" Welch would receive in retirement. According to the SEC, GE's shareholders could not learn from the company's previously filed proxy statements what many of the most significant "facilities and services" were that were provided to Welch prior to his retirement, including, for example, personal use of GE-owned aircraft, personal use of chauffeured limousines and home security systems. In its order, the SEC noted that Item 402 of Regulation S-K requires companies to describe the terms and conditions of any compensatory plan or arrangement that results from an executive officer's retirement if the amount involved is in excess of \$100,000. The SEC also noted that annual reports are required to be "complete and accurate in all material respects," and that proxy statement rules prohibit "the use of proxy statements which omit to state any material fact necessary in order to make the statements therein not false or misleading."

#### ***Recent Remarks by the Chairman and Staff of the SEC***

In each of the actions described above, the SEC found that companies had failed to comply with the existing rules governing disclosure of executive compensation. In recent speeches and public remarks, SEC staff members have expressed the view that the disclosure that companies are currently providing to their shareholders regarding executive compensation is unclear and unhelpful, and that companies are not fully complying with the existing rules. In addition, they have indicated that the SEC is in the process of reviewing the existing rules to determine whether additional rulemaking in this area is necessary.

In a speech delivered in March 2005, William Donaldson, Chairman of the SEC, indicated that he believes that clearer and more fulsome disclosure of executive compensation by companies is needed.<sup>18</sup> He stated

that he would “like to see greater disclosure of pay packages — with not only the total amount of compensation provided, but for each element of this compensation to be clearly explained, including benefits that may not be easily assessed but which carry a clear value and which the CEO clearly cares about.”

Alan L. Beller, the Director of the SEC’s Division of Corporation Finance, gave a speech in October 2004 in which he expressed concern regarding the current level of compliance by companies with the existing disclosure rules.<sup>19</sup> Beller also indicated that rule changes were being contemplated by the SEC.

According to Beller, disclosure of executive compensation has become increasingly opaque and unhelpful: “Too much executive compensation disclosure has become an example of the kind of disclosure companies should disavow — disclosure that says as little as possible while seeking to avoid liability, rather than disclosure that seeks to inform.” He indicated that shareholders have become increasingly frustrated with their inability to determine whether their interests are aligned with those of executives, as companies do not provide enough clear information to permit shareholders to understand how much executives are paid and how such pay fits within the overall pay structure of the company.

Beller addressed the “misconception” of many companies that if they comply with the detailed requirements of the various tables delineated in the rules, they are then in “literal compliance,” and thus full compliance, with the disclosure rules. Beller quoted from Rule 402, which states that “*clear, concise and understandable* disclosure of *all* plan and non-plan compensation (emphasis added)” is required. Beller’s view is that the “basic requirement to disclose all compensation takes precedence over the detailed requirements of the various tables in which disclosure is to be presented under our rules. *All* compensation must be disclosed.” If a company believes that disclosure of a given payment is not required under the rules, Beller noted that such company should consider whether *not* disclosing the payment in question is a material omission that renders the information that the company has disclosed misleading. The rules, Beller notes, explicitly require disclosure in these circumstances.

Beller focused in his remarks on the reporting and valuation of perquisites. He indicated that there were specific items, such as personal use of company planes and similar perquisites, that he suspected companies were routinely omitting from their disclosure. He suggested that companies consider whether items that have previously been called “business expenses” are in reality perquisites that should be disclosed as such. He singled out housing, security systems and cars as examples. His view is that determining whether a particular benefit is a perquisite is not very difficult, and suggested that a relevant, but not dispositive, inquiry is whether a benefit is available to employees generally on a non-discretionary basis, such as reimbursement for a taxi ride to a meeting, or whether it is a benefit for which only a few are eligible or selected on a discretionary basis. Beller also indicated that companies need to examine their methodologies for valuing perquisites. He emphasized that the SEC’s position is that the appropriate measure of a perquisite’s value is the aggregate incremental cost to the company, not the tax value of the benefit. He also noted with concern the fact that the SEC has seen disclosures of large tax gross-ups for perquisites that are not themselves disclosed.

Beller also expressed dissatisfaction with the compensation committee reports that are included in annual proxy statements pursuant to Item 402. He indicated that too much of the disclosure is boilerplate and not very informative. He suggested that compensation committees take a fresh look at their reports, and give thought to what deliberations and evaluations they should be conducting in connection with the preparation of these reports.

Beller indicated that the rules “may need updating to address more effectively methods and approaches to compensating executives,” and noted that the SEC is currently looking at such issues as: the reporting and valuation of perquisites; companies’ disclosure of, and disclosure requirements related to, SERPs and non-qualified deferred compensation plans; retirement, severance and change-of-control arrangements; the adequacy of total compensation and director compensation disclosure; the criteria for determination

of "named executive officers"; compensation committee report disclosure requirements; and related party disclosure.

### ***Examples from the 2005 Proxy Season***

As a result of the recent SEC enforcement actions and comments by the Chairman and staff of the SEC, many companies enhanced their executive compensation disclosure in their proxy statements filed during the 2005 proxy season prior to any additional SEC rulemaking in this area. We conducted a brief survey of proxy statements comparing disclosure practices in 2004 to those in 2005. Set forth below are some of the most recent enhanced disclosures made in proxy statements filed during the 2005 proxy season.

#### Merck & Co. Inc.

In its proxy statement filed on March 10, 2005, Merck disclosed that, in addition to the items described in the Summary Compensation Table, it provided its named executive officers with the following perquisites:

- "Reimbursement for financial counseling and tax preparation;
  - ◆ Value is taxable to executives;
- Limited use of the company plane, helicopter and limousine services for personal use;
  - ◆ Personal use of Company aircraft requires approval by the Chief Executive Officer;
  - ◆ Value of limousine services for commutation is taxable to executive (other than the CEO);
- Reimbursement for security alarm monitoring systems.
- Physical examinations by the company's medical staff."

Merck provided these disclosures even though it noted such disclosure is not required by the SEC as the aggregate value of the perquisites did not exceed the \$50,000 perquisite disclosure threshold for any of the named executive officers.

The foregoing was not included in Merck's proxy statement filed during the 2004 proxy season.

#### Pfizer Inc.

In its proxy statement filed on March 9, 2005, Pfizer made the following disclosures that were not reflected in its proxy statement from the prior year:

- Pfizer significantly increased its disclosure regarding use of the company aircraft such that its proxy statement for the 2005 season individually lists the situations in which the company aircraft was used by its executive officers. In addition, in its most recent proxy statement, the company details its policy regarding use of automobiles. In contrast, Pfizer's proxy for the prior year merely stated, "our executive officers may occasionally use the Company's aircraft or Company leased cars for personal travel."

- Pfizer's most recent proxy statement disclosed that in 2004, for compensation disclosure purposes, the company valued the CEO's personal use of the company aircraft at two times the Standard Industry Fare Level ("SIFL") as published by the Internal Revenue Service. In 2005, however, the company plans to value aircraft use incrementally.
- The company noted that it does not reimburse for country club memberships for any officers but does maintain a limited number of memberships for business purposes. Home security systems were available to members of the Pfizer leadership team.

#### Time Warner Companies Inc.

In its proxy statement filed on April 4, 2005, Time Warner included the following disclosures that were not reflected in its proxy statement from the prior year:

- A new chart, supplementing the Summary Compensation Table, presenting the total value of the compensation provided to its executive officers in 2004; and
- A new section in the Compensation Committee Report entitled "Elements of Executive Officer Compensation," which indicates that certain executive officers are provided with a car and driver and required for security reasons to use the company aircraft for business and personal use.

#### Intel Corp.

In its proxy statement filed on March 29, 2005, Intel expanded its traditional egalitarian disclosure by supplementing the list of perquisites that it does *not* provide to its officers with the following:

"Intel's office-building layouts are cubicle-based for all employees, including officers. Company-provided air travel for Intel's officers is for business purposes only: Intel's company-owned aircraft each hold approximately 40 passengers and are used in regularly scheduled shuttle routes between Intel's major U.S. facility locations, and Intel's use of non-commercial aircraft on a time-share or rental basis is limited to appropriate business-only travel."

Other executive compensation disclosure enhancements in Intel's proxy statement include:

- The company's compensation committee report stated that the committee compared the compensation components of each executive separately and in the aggregate to compensation of companies that Intel uses as its peer group of companies. Intel's peer group consists of a cross-industry subset of Fortune 50 companies as well as a technology industry subset of companies generally considered to be comparable to Intel.
- The compensation committee report also indicated that the committee reviews Intel's executive officers' cash compensation levels for internal consistency relative to Intel's 100 most highly paid employees. The committee monitors compensation levels to ensure that executive officer compensation is not increasing at rates significantly beyond that of Intel's other highly valued employees.

#### Waste Management, Inc.

In its proxy statement filed on April 6, 2005, Waste Management included the following disclosures that were not reflected in its proxy statement from the prior year:

- The named executive officers receive various perquisites provided by or paid for by the company pursuant to their employment agreements and the company's policies. These perquisites can include financial planning services, annual physicals, memberships in social and professional clubs, car allowances, life insurance, home security monitoring and power back-up systems, personal use of the company aircraft and gross up payments equal to the taxes payable on certain perquisites. Pursuant to the company's executive security program, the company requires its chief executive to use the company's aircraft for personal use as well as business travel.
- An additional table which provides a three-year summary detailing each perquisite included in "Other Annual Compensation" in the Summary Compensation Table.
- In a footnote to the new perquisite table, Waste Management discloses that it has switched the method of reporting personal use of company aircraft from using the SIFL tables published by the Internal Revenue Service to a revised methodology that calculates the incremental cost based on the cost of fuel, trip-related maintenance, crew travel expenses, on-board catering, landing fees, trip-related hangar/parking costs and smaller variable costs. Waste Management also recalculated the incremental cost of personal use of company-owned aircraft for all named executives in the previously reported years 2003 and 2002 using the new methodology.

#### Johnson & Johnson

In its proxy statement filed on March 15, 2005, Johnson & Johnson included the following disclosure enhancements in its proxy statement from the prior year:

- Amounts shown under "Other Annual Compensation" now also include: "amounts reimbursed for the payment of taxes; life insurance premiums; and, the incremental cost to the company of providing perquisites and other personal benefits." It also further disclosed that: "the aggregate value of perquisites made available to Mr. Weldon in 2004 was \$112,480; and the only component of this amount which exceeded 25% of the total was personal use of company aircraft, which was valued at \$90,005."
- Interestingly, Johnson & Johnson noted the following regarding certain peer companies: "[M]any other peer corporations require their chairman and certain other executive officers to use company aircraft for personal as well as business travel. As a result, at those corporations, personal use of company aircraft by the chairman and those other executive officers is not treated as a perquisite or personal benefit and the costs associated with such personal use of company aircraft are not reported in the proxy statement. Johnson & Johnson has not required the chairman and other executive officers to use corporate aircraft for personal travel. Mr. Weldon is taxed on the imputed income attributable to personal use of company aircraft and does not receive tax assistance from the company with respect to these amounts."
- A statement that any perquisites or other personal benefits received from the company by any of the named executive officers in 2002 and 2003 were less than the \$50,000 reporting thresholds established by the SEC, but have been included in the Summary Compensation Table.
- A new chart, supplementing the Summary Compensation Table, presenting the specific amounts included as "Other Annual Compensation" for 2004.

#### Sara Lee Corp.

In its proxy statement filed on September 22, 2004, Sara Lee made the following disclosures that were not reflected in its proxy statement from the prior year:

- The perquisites offered are typical of those provided to senior executives and include company-provided cars, financial counseling, club memberships, first class air travel, annual physical exams and use of the company's aircraft for business and personal usage. Beginning in fiscal year 2005, executives will be required to reimburse the company for any personal use of Sara Lee's corporate aircraft.
- One of the guiding principles underlying Sara Lee's executive compensation program is to provide a competitive compensation opportunity in comparison to Sara Lee's peer group of companies. The companies used by Sara Lee for compensation comparisons consist of a select group of the largest global consumer products companies. This peer group is used for comparisons of all elements of the compensation and benefits package.

### ***Conclusion***

It is clear, based upon its recent enforcement activity and verbal comments from its Chairman and staff, that the SEC is serious about public companies providing to their shareholders disclosure of executive compensation that is both comprehensive and transparent. What is interesting, however, is that the SEC has signaled that proper disclosure may extend beyond the rather detailed rules provided in Item 402 of Regulation S-K. This is not new territory for the SEC. Post Enron, when the SEC was disappointed with issuers' Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") disclosure and such disclosure was criticized by the accounting community and investor groups, it issued a Commission Statement about MD&A, the purpose of which was to remind public companies of their obligations under Item 303 of Regulation S-K without creating new legal requirements or modifying then-existing legal requirements<sup>20</sup> even though certain disclosure practices that were recommended by the SEC in that Commission Statement were not typical best practices at the time of its release. Further, the SEC has historically relied upon Rule 12b-20, among other regulations, to emphasize public companies' disclosure obligations that may go beyond Regulation S-K disclosure.

New best practices are emerging with regard to the disclosure of executive compensation. In particular, the definition and disclosure of perquisites has been a hot topic among securities practitioners in this area. We have observed a marked increase in the scope and specificity of executive compensation arrangements during this past proxy season. Public companies should first review their internal control over financial reporting policies and disclosure controls and procedures to ensure that all personal benefits received by their executives get properly reported to their respective disclosure committees and then carefully review those benefits for disclosure purposes in light of these recent trends.

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<sup>1</sup> In recent speeches, SEC Chairman William H. Donaldson and the Director of the SEC's Division of Corporation Finance, Alan L. Beller, have indicated that new rules regarding disclosure of executive compensation are being considered. See *infra* notes 18-19 and accompanying text.

<sup>2</sup> Item 402(a)(2) of Regulation S-K.

<sup>3</sup> Item 402(b)(2)(iii)(C)(1) of Regulation S-K. We note that this disclosure threshold for perquisites and other personal benefits, securities and property is limited to named executive officers (and is not applicable to directors).

<sup>4</sup> Instructions to Item 402(b)(2)(iii)(C) of Regulation S-K.

<sup>5</sup> *Id.*

<sup>6</sup> Item 402(h)(1) of Regulation S-K.

<sup>7</sup> Item 402(h)(2) of Regulation S-K.

<sup>8</sup> Item 402(g) of Regulation S-K.

<sup>9</sup> Item 402(k) of Regulation S-K.

<sup>10</sup> Instructions to Item 402(k) of Regulation S-K.

<sup>11</sup> Items 1.01 and 1.02 of Form 8-K. See SEC Division of Corporation Finance, Current Report on Form 8-K, Frequently Asked Questions (November 23, 2004), available at <http://www.sec.gov/divisions/corpfin/form8kfaq.htm>, for guidance from the SEC regarding the applicability of Items 1.01 and 1.02 to agreements with executive officers and directors.

<sup>12</sup> Items 5.02(a) and (b) of Form 8-K.

<sup>13</sup> Item 5.02(c) and (b) of Form 8-K.

<sup>14</sup> SEC Exchange Act Release No. 34-51625 (April 28, 2005).

<sup>15</sup> According to the SEC's order, the \$3 million in perquisites included purchases of oriental rugs, antiques, a horse and other substantial purchases of clothing, jewelry, artwork, vacations and theater tickets, which were paid through cash advances to company accounts, directly billed to the company or charged to company credit cards that were issued to Don Tyson and two of his friends while he was Chairman; personal use by Don Tyson and his family and friends of company-owned homes in England and Mexico; personal use of company-owned aircraft by Don Tyson and his family and friends, including use by his family and friends without him on board; housekeeping and lawn maintenance services provided at five different homes where Don Tyson and his family and friends lived; maintenance of nine cars owned and used by Don Tyson and his family and friends; telephone services for Don Tyson and his friends; gift certificates provided to Don Tyson's family and friends; and more than \$1 million to cover Don Tyson's personal income tax liability associated with his receipt of the foregoing benefits.

<sup>16</sup> SEC Exchange Act Release No. 50882 (December 20, 2004). We note that, while Disney has recently been involved in a number of other well-publicized matters relating to its executive compensation, such as the severance package awarded to its former president, Michael Ovitz, those matters fall outside of the scope of this article.

<sup>17</sup> SEC Exchange Act Release No. 50426 (September 23, 2004).

<sup>18</sup> Chairman William H. Donaldson, Remarks Before the Directors Education Institute (March 16, 2005), available at <http://www.sec.gov/news/speech/spch031605whd.htm>.

<sup>19</sup> Alan L. Beller, Remarks Before Conference of the NASPP, The Corporate Counsel and the Corporate Executive (October 20, 2004), available at <http://www.sec.gov/news/speech/spch102004alb.htm>.

<sup>20</sup> Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Securities Act Release No. 33-8056 (January 22, 2002).