EXECUTIVE COMPENSATION: THE NEW EXECUTIVE COMPENSATION DISCLOSURE RULES DO NOT RESULT IN COMPLETE DISCLOSURE

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In 2006, the Securities and Exchange Commission adopted new rules governing the disclosure of executive compensation. This Article discusses four ways in which the rules do not result in complete disclosure. While the SEC should be commended for its efforts, the rules still leave investors uninformed about compensation consultants, performance targets, earnings on deferred compensation, and perquisites. To remedy these deficiencies, this Article suggests several amendments to Regulation S-K. It recommends that the Commission require disclosure of: all work performed by compensation consultants, all performance targets after the conclusion of the performance period, all earnings on deferred compensation, and all perquisites.

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* This Article reflects the views and considerations of the author and does not reflect the views of the Securities and Exchange Commission.

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I. INTRODUCTION

Can a compensation consultant provide objective advice to the board regarding executives’ pay packages when the same consultant provides other services to the company? Can investors understand how executives are compensated if companies do not disclose the level of performance that the company must achieve for executives to obtain certain amounts of compensation? Is the disclosure about executive compensation complete absent full information regarding earnings on deferred compensation and perquisites? The answer to these three questions is a resounding no. While the SEC promulgated new executive compensation disclosure rules that governed the 2007 proxy season, the new rules do not result in complete disclosure.

The first reason disclosure is incomplete is the lack of information regarding the conflicts of interest of compensation consultants. Where these consultants provide executive compensation advice to the board, and are retained by management for other services, the consultant’s impartiality can be affected. Take for instance the compensation advice given by Mercer Human Resources Consulting, to the board of North Fork Bancorporation. Mercer suggested a golden parachute that would pay...

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5 See infra Section V, pp 19-23.


7 See Reda, supra note 1, at 1-8.


10 JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS (7th ed. 2006). (“[A] golden parachute [is a] lucrative contract given to a top executive to provide lavish benefits in case the company is taken over by another firm, resulting in the loss of the job. A golden parachute might include generous severance pay, stock options, or a bonus.”).
the top three executives $288 million if the company underwent a change in control.\textsuperscript{11} This package included a tax gross-up\textsuperscript{12} on restricted stock\textsuperscript{13} to the chief executive officer ("CEO") of $44 million,\textsuperscript{14} and the total tax gross-ups could be worth up to $111 million.\textsuperscript{15} Essentially, the corporation is paying the taxes for a CEO who is walking away from the company with $185 million dollars.\textsuperscript{16} According to one pay expert, it is unusual for a company to pay the taxes on restricted stock upon a change in control.\textsuperscript{17} Thus, it is no surprise to learn that Mercer recommended this uncommon compensation package in a situation where it performed other services for the bank.\textsuperscript{18} In fact, Mercer earned nearly $1 million in 2002 and 2003 for its services as actuary to North Fork's cash-balance retirement plan.\textsuperscript{19} The compensation paid to Mercer by the management of the corporation for these services raises doubt as to whether Mercer provided objective advice to the board regarding management's compensation.\textsuperscript{20}

The second reason disclosure is incomplete is the lack of disclosure regarding performance target levels.\textsuperscript{21} A performance target level is a quantitative or qualitative performance-related factor considered by the compensation committee of the board of directors that an executive must meet to obtain a certain level of compensation.\textsuperscript{22} Without disclosure of target performance levels, investors cannot determine whether executives are being paid in accordance with the performance of the company.\textsuperscript{23}

The third reason disclosure is incomplete is that earnings on deferred compensation only have to be disclosed at above-market interest rates.\textsuperscript{24} The deferred compensation paid in 2006 to the CEO of Analog Devices, Inc. ("Analog")


\textsuperscript{13} Investopedia, Restricted Stock, http://www.investopedia.com/terms/r/restrictedstock.asp (last visited Sept. 9, 2007). ("Restricted stock [is] insider holdings that are under some other kind of sales restriction. Restricted stock must be traded in compliance with special SEC regulations. Insiders are given restricted stock after merger and acquisition activity.").

\textsuperscript{14} See Morgenson, supra note 9.

\textsuperscript{15} See Drucker & Bandler, supra note 11.

\textsuperscript{16} Id.

\textsuperscript{17} See Morgenson, supra note 9.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} See Trumka, supra note 2, at 2.

\textsuperscript{22} See Adopting Release, supra note 6, at 53166.

\textsuperscript{23} See Trumka, supra note 2, at 2.

\textsuperscript{24} See Adopting Release, supra note 6, at 53174.
exemplifies the problems with this exception.25 When Analog filed its 2006 proxy statement, investors were shocked to learn that the company’s CEO had withdrawn a previously undisclosed $144.7 million from his deferred compensation account.26 Under the rules in effect when the proxy statement was filed, Analog was not obligated to disclose this amount to investors.27 Under the new rules, companies must disclose the amount of deferred compensation, and this figure is used to calculate the total amount of compensation that is paid to executives.28 However, the rules only require disclosure of a portion of the interest earned on the executives’ deferred compensation account.29 Instead of exempting this interest, the SEC should have adopted the rules as proposed,30 because the lack of disclosure of earnings on deferred compensation at above-market interest rates causes the figure for total compensation to be understated. For example, in 2005 Analog’s CEO earned $8.7 million of interest on the money in his deferred compensation account.31 However, under the new SEC rules, the company would be required to disclose only $1.2

25 See Analog Devices, Inc., Definitive Proxy Statement (Form 14A), at 28 (February 8, 2006) [hereinafter Analog Proxy]; Gretchen Morgenson, A ‘Holy Cow’ Moment in Payland, N.Y TIMES, Feb. 19, 2006, at 3.1 (“[T]he owners of Analog Devices … saw in glorious black and white that Jerald G. Fishman, the chief executive, had backed up his truck to corporate headquarters late last year and loaded up the $144.7 million that he was owed in deferred compensation.”).

26 See Morgenson, supra note 25, at 3.1.

27 Id.

28 See Adopting Release, supra note 6, at 53170.

29 Id. at 53174.

30 Letter from Kurt Schacht, CFA, Managing Director, CFA Centre for Financial Market Integrity & James C. Allen, CFA, Senior Policy Analyst, CFA Centre for Financial Market Integrity, to Nancy M. Morris, Secretary, SEC 8 (Apr. 13, 2006), available at http://www.sec.gov/rules/proposed/s70306/jcallen041306.pdf. (“The Commission proposes to require disclosure of earnings on compensation deferred on a basis that it is not tax-qualified in the All Other Compensation Column. Currently, these earnings must be disclosed only to the extent of any portion that is above-market or preferential. The Centre strongly supports this proposal.”).

31 See Analog Proxy, supra note 25, at 19. (“The total amounts of interest credited to participants’ deferred compensation accounts in fiscal 2005 are as follows: Mr. Fishman: $8,743,912.”).
million of this interest\textsuperscript{32} and therefore the total compensation figure would be understated by $7.5 million.\textsuperscript{33}

The fourth reason disclosure is incomplete is that perquisites only have to be disclosed to the extent that they exceed $10,000.\textsuperscript{34} This lack of disclosure will result in an understated figure for total compensation.\textsuperscript{35} The other significance of this exemption is that inappropriate perquisites, even in small dollar amounts, may indicate larger problems with the executive compensation policy of the company.\textsuperscript{36} Moreover, shareholders have a right to determine whether or not perquisites are proper or are a waste of corporate assets.\textsuperscript{37}

North Fork Bancorporation and Analog Devices exemplify the reality of the new executive compensation disclosure rules. While the amendments are an improvement over the previous regime, the rules do not result in complete disclosure. Specifically, they fall short in four areas. These areas are a lack of information regarding compensation consultants,\textsuperscript{38} a lack of disclosure of target performance levels,\textsuperscript{39} a lack of disclosure of earnings on deferred compensation,\textsuperscript{40} and a lack of disclosure of perquisites.\textsuperscript{41} To remedy these problems, the Commission should require disclosure of: all work performed by compensation consultants,\textsuperscript{42} all target performance levels

\textsuperscript{32} Id. at 19 n.3. (“SEC regulations consider the “market rate” to be 120% of the applicable federal long-term rate, or AFR. Earnings credited to participants electing the fixed-rate investment option for fiscal year 2005 were calculated using an average interest rate of 6.48% and 120% of the average AFR was 5.57%.”). With earnings of $8,743,912 at 6.48% the deferred compensation balance used to calculate the earnings on deferred compensation can be determined. This calculation shows that the total deferred compensation balance used to calculate earnings on deferred compensation for Mr. Fishman was ($8,743,912/.0648) which equals $134,936,914. The earnings on this total at 5.57% is ($134,936,914*.0557) which equals $7,515,986. Because the company only has to disclose above-market earnings it is obligated to disclose ($8,743,912-$7,515,986) which equals $1,227,926.

\textsuperscript{33} See Adopting Release, supra note 6, at 53174 (explaining that the new rules only require disclosure of earnings on deferred compensation at above-market interest rates).

\textsuperscript{34} Id. at 53176.

\textsuperscript{35} Id.

\textsuperscript{36} See Carter, supra note 4, at 2-3.


\textsuperscript{38} See Reda, supra note 1, at 1-8.

\textsuperscript{39} See Trumka, supra note 2, at 2.

\textsuperscript{40} See Schacht & Allen, supra note 30 at 8.

\textsuperscript{41} See Carter, supra note 4, at 2-3.

\textsuperscript{42} See Reda, supra note 1, at 1-8.
after the conclusion of the performance period, all earnings on deferred compensation, and all perquisites.

Part II of this article describes the history of executive compensation and the disclosure of this compensation. Part III discusses problems with incomplete disclosure. Part IV discusses the amendments to the executive compensation disclosure rules. Part V discusses problems with the new rules. Part VI proposes solutions for more effective executive compensation disclosure. Part VII summarizes the article and advocates for the proposed solutions.

II. BACKGROUND

A. History of Executive Compensation

Executive compensation is a relatively new area of study. In fact, such compensation did not exist prior to the development of the modern corporation. This form of business organization started with New Jersey legislation in 1896, and by 1901 the first major corporation was organized. Early in the development of corporations, the companies were led by entrepreneurs such as Henry Ford. However, by the middle of the century a new class of people had formed to run corporate America. These people did not start the company, but rather made up an elite class of executives that held powerful positions in major corporations.

Even though a corporation must disclose the pay for its top five executives, the study of executive compensation typically focuses on the pay received by the CEO. The chief executive officer typically receives the highest pay of any person in the

44 See Schacht & Allen, supra note 30 at 8 (expressing strong support for disclosure of all earnings on deferred compensation).
47 Id.
49 Id. at 9.
50 Id. at 10.
51 Id.
corporation, and this amount of compensation has increased over time. By the 
1950’s, some CEO’s were making relatively large salaries, but many of them were not paid an exorbitant sum. As of 1960, the average CEOs at the largest 
corporations were earning $190 thousand which is equivalent to $1.3 million 
today. CEO pay rose quickly during the 1960s, but experienced less growth during the 1970s. Between 1980 and 1993, executive compensation increased 
dramatically. For example, during the 1980s CEO compensation rose by 212% in 
real terms.

From 1993 to 2000, the amount of executive compensation increased sharply. In 
large companies, such as those firms that represent the S&P 500, average CEO 
pay increased from $3.7 million in 1993 to $17.4 million in 2000. This jump in pay 
represents an increase of 327% in real terms. Similarly, during this time period, the aggregate pay of the top-five executives increased from $9.5 million to $36.6 
million. This jump in pay represents an increase of 285% in real terms. There 
were similar trends in both the mid-cap and small-cap firms for both CEO pay and

54 Id. at 1 (discussing the increase in CEO pay in the 1980s and 1990s).
55 See Bogus, supra note 48, at 10.
56 Id.
bin/cpicalc.pl. (last visited September 9, 2007). (“The CPI inflation calculator uses the average 
Consumer Price Index for a given calendar year. This data represents changes in prices of all 
goods and services purchased for consumption by urban households. This index value has 
been calculated every year since 1913. For the current year, the latest monthly index value is 
used.”) Id. (follow “about this calculator” hyperlink).
58 Id.
59 Id.
60 Id.
61 Lucian Bebchuk and Yaniv Grinstein, The Growth of Executive Pay 2-3 (The Harvard John 
62 Id. at 2. (“The dataset includes all the S&P 500, Mid-Cap 400 and Small-Cap 600 
companies. Together, these firms constitute more than 80% of the total market capitalization 
of U.S. public firms.”).
63 Id. at 2.
64 Id.
65 Id.
66 See DOWNES AND GOODMAN, supra note 10, at 421. (“Mid cap [is] stock with a middle-level 
capitalization (number of shares outstanding time the price of the shares). Mid Cap stocks 
typically have between $1 billion and $5 billion in outstanding market value.”).
67 Id. at 655. (“Small cap is shorthand for small capitalization stocks or mutual funds holding 
such stocks. Small cap stocks usually have a market capitalization (number of shares 
outstanding multiplied by the stock price) of $500 million or less.”).
the pay of the top five executives. Executive compensation peaked in 2000 and decreased during 2001 mainly due to the poor performance of the stock market. However, executive compensation levels have been on the rise since 2001. In fact, CEO pay increased by 6% in 2006.

B. History of Executive Compensation Disclosure

Before there were specific disclosure rules for executive compensation, requirements for disclosure were in Schedule A to the Securities Act of 1933 (“Securities Act”) and Section 12(b) of the Securities Exchange Act of 1934 (“Exchange Act”). Both acts list the type of information that has to be disclosed in registration statements. In 1938, the SEC, after observing that executive compensation needed more specific attention, enacted its first executive compensation disclosure rules for proxy statements. Since 1938, the Commission’s rules have required companies to: provide a narrative explanation of the levels of compensation, provide these levels of compensation in tabular form, or provide both

68 See Bebchuk and Grinstein, supra note 61, at 3.


72 See Adopting Release, supra note 6, at 51359-60. (“Initially, disclosure requirements regarding executive and director compensation were set forth in Schedule A to the Securities Act and Section 12(b) of the Exchange Act, which list the type of information to be included in Securities Act and Exchange Act registration statements.”).

73 Id. at 51360.

Item 14 of Schedule A called for disclosure of the “remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year.” Section 12(b) of the Exchange Act as enacted required disclosure of “(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;” and “(E) remuneration to others than directors and officers exceeding $20,000 per annum.”

74 Id. (“In 1938, the Commission promulgated its first executive and director compensation disclosure rules for proxy statements.”).
types of disclosure. For example, in 1942 the Commission introduced the first tabular disclosure of executive compensation. Ten years later, it introduced a separate table for pensions and deferred compensation. In 1978, the SEC expanded tabular disclosure to cover all forms of executive pay. Then, in 1983, the SEC issued new rules because the 1978 rules were overly complex, too detailed, and resulted in too many interpretive issues. While the 1983 rules mandated some tabular disclosure, they primarily required narrative disclosure.

In 1992, after analyzing the effectiveness of limited tabular disclosure, the Commission adopted amendments to the executive compensation rules. These amendments abandoned the primarily narrative disclosure approach, replacing it with formatted tables that were designed to capture all forms of compensation. The main reason for this new approach was to allow for comparability of annual compensation between companies. However, because of the complex nature of the compensation programs, the Commission observed that the rigid nature of the 1992 rules did not result in complete disclosure.

After determining that the 1992 rules were ineffective in capturing all executive pay, the SEC, in August 2006, amended the executive compensation disclosure rules. The new rules build on the 1992 amendments by providing broader tabular disclosure while simultaneously improving narrative disclosure. Consequently, the amended rules are more complete than any of the previous regimes governing executive compensation. However, despite this improvement, the new rules do not result in complete disclosure.

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75 Id. (“At different times thereafter, the Commission has adopted rules mandating narrative, tabular, or combinations of narrative and tabular disclosure as the best method for presenting compensation disclosure in a manner that is clear and useful to investors.”).  
76 Id.  
77 Id.  
78 Id.  
80 See Adopting Release, supra note 6, at 53160.  
81 Id. at 53161.  
82 Id.  
83 Id.  
84 Id.  
85 Id. at 53160.  
86 Id. (“This approach will promote clarity and completeness of numerical information through an improved tabular presentation, continue to provide the ability to make comparisons using tables, and call for material qualitative information regarding the manner and context in which compensation is awarded and earned.”).  
87 Id.  
88 See infra Section V, pp 19-23.
III. PROBLEMS WITH INCOMPLETE DISCLOSURE

There are two main problems with incomplete disclosure of executive compensation. The first problem is that when both individual and institutional shareholders are unaware of the amounts paid to executives, these shareholders cannot adequately influence the board of directors’ decisions regarding executive pay.89 The second problem is that when shareholders, business media, social groups and professional groups do not know the entire amount of compensation paid to executives, there is no risk that executives and board members will be affected by “outrage costs.”90 Outrage costs refer to negative reactions by outsiders regarding high levels of executive compensation.91

A. Inability of Shareholders to Influence Board

Complete disclosure of the entire amount of executive compensation informs both institutional and private shareholders about the actual levels of executive pay.92 When this information is properly disseminated, shareholders can take two major actions to influence the amount of compensation paid to executives.93 One action that shareholders can take is to place proposals directly on proxy statements pursuant to rule 14a-8 of the Exchange Act.94 While these resolutions are precatory, meaning that they are not binding on the board even if they garner support from a majority of shareholders, such resolutions can still greatly influence board decision making.95 Two major shareholder proposals made during both 2006 and 2007 were resolutions seeking pay for performance and proposals seeking a “say on pay.”96 These “say on

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89 See BECHUK & FRIED, supra note 53, at 51-52 (explaining that shareholders’ resolutions can influence executive pay practices).
90 Id. at 64-66.
91 Id.
92 See Adopting Release, supra note 6, at 53158 (explaining that the new rules which require increased disclosure will provide investors with a more complete picture of the compensation earned by a company’s executives).
95 See BECHUK & FRIED, supra note 53, at 51-52. (“The resolutions are called “precatory” because they are not binding on the board even if they garner support from a majority of the voting shareholders.”). Id. at 51.
“Say on pay” proposals would give shareholders a non-binding advisory vote on the executives’ compensation packages.\textsuperscript{97} In addition to shareholder proposals, the other action that shareholders can take to influence executive compensation is to launch a “vote no” or “withhold the vote” campaign.\textsuperscript{98} They can do so by withholding their vote from one or more directors that is up for reelection.\textsuperscript{99} Although directors only need a plurality\textsuperscript{100} of votes to get elected, a substantial withholding of the vote from the members of the board’s compensation committee demonstrates shareholders’ disapproval of the executives’ compensation packages.\textsuperscript{101}

1. Shareholder Proposals

The type and form of shareholder proposals has changed over time.\textsuperscript{102} In recent years, the data from proxy resolutions shows that executive pay has become increasingly important to shareholders.\textsuperscript{103} In fact, an examination of the 2006 proxy season reveals that executive compensation was probably the most important issue for shareholders.\textsuperscript{104} Moreover, a preliminary review of the 2007 proxy season shows that this trend has continued.\textsuperscript{105} In 2004, there were 23 shareholder proposals regarding pay for performance and by 2007 there were over 60.\textsuperscript{106} The percentage of shareholders who voted for these proposals has increased from 19.2% to 35.1% during this time period.\textsuperscript{107} Regarding “say on pay” proposals, 2006 was the first year that they appeared on shareholders’ ballots and by 2007 there were more than 40 of such proposals.\textsuperscript{108}

\textsuperscript{97} Reuters, \textit{House Votes to Give Investors Say on Executive Pay}, N.Y. TIMES, Apr. 21, 2007, at C4. (‘[‘Say on pay’ proposals] give shareholders the right to cast nonbinding votes on the pay of top company executives.’).

\textsuperscript{98} Diane Del Guercio et al., \textit{Do Boards Pay Attention when Institutional Investors ‘Just Vote No’?: CEO and Director Turnover Associated with Shareholder Activism 1} (2006), http://www.fma.org/Chicago/Papers/voteno_fma.pdf#search=’withhold%20vote’.

\textsuperscript{99} Id. at 3.

\textsuperscript{100} BRYAN A. GARNER, \textit{BLACK’S LAW DICTIONARY} 534 (2d. Pocket Ed. 2001).

\textsuperscript{101} See Guercio et al, supra note 98, at 3.

\textsuperscript{102} See BECHUK AND FRIED, supra note 53, at 52. (“In recent years . . . an increasing number of precatory resolutions have called for changes that institutional investors favor, such as expensing stock options, and these proposals have received significant support.”).

\textsuperscript{103} Id.

\textsuperscript{104} See POSTSEASON REPORT, supra note 93, at 2. (“Executive pay, which has long been a concern for U.S. shareholders, was arguably the single most important issue this proxy season.”).

\textsuperscript{105} See Institutional Shareholder Services, supra note 96.

\textsuperscript{106} See POSTSEASON REPORT, supra note 93, at 3; Institutional Shareholder Services, supra note 96.

\textsuperscript{107} See POSTSEASON REPORT, supra note 93, at 4; Institutional Shareholder Services, supra note 96.

\textsuperscript{108} See Institutional Shareholder Services, supra note 96.
percentage of shareholders who voted for these proposals increased from 40% to 42.4% during this time period.\textsuperscript{109} In addition to this increase in shareholder voting, the United States House of Representatives acted on this issue in April 2007 by passing a bill mandating that shareholders have a “say on pay.”\textsuperscript{110} This legislation would give shareholders the right to vote on executives’ pay packages without having to use shareholder proposals.\textsuperscript{111} While the vote would still be non-binding, the United States system of corporate governance would be following the lead of Australia and the United Kingdom where these votes are already mandatory.\textsuperscript{112}

2. “Vote No” Campaigns

Another way for shareholders to show their disapproval of executive compensation packages is by engaging in “vote no” or “withhold the vote” campaigns where they withhold support from a member of the board of directors who is on the compensation committee.\textsuperscript{113} While shareholders cannot vote against a director who is running unopposed, they do have the ability to withhold their vote from the director.\textsuperscript{114} In 2006, investors withheld support for compensation committee members at many large companies, including Pfizer and Exxon Mobil.\textsuperscript{115} For example, with the help of the AFL-CIO and the Connecticut Retirement Plans and Trust Funds, an investor group with a stake in Pfizer organized a “vote no” campaign for two Pfizer compensation committee board members.\textsuperscript{116} The result of this campaign was that these two members received a 21% withhold vote.\textsuperscript{117} In addition, Home Depot investors were enraged that the company’s CEO had earned $200 million in compensation between 2001 and 2005 while the company’s stock price dropped 13%.\textsuperscript{118} As a result, in 2006 ten of eleven directors received withhold votes

\textsuperscript{109} Id.

\textsuperscript{110} Id. (“By a 269-to-134 vote, the House passed the "say on pay" bill drafted by Representative Barney Frank, a Democrat from Massachusetts and the chairman of the Financial Services Committee, amid soaring pay for chief executives and rising concerns over income inequality.”).

\textsuperscript{111} Id. (“The measure would require corporations to hold the symbolic shareholder votes on pay each year, but they could ignore the outcomes. The measure is meant to make boards think twice before giving huge pay packages to managers.”).

\textsuperscript{112} Gretchen Morgenson, Roadblocks To Greater Say on Pay, N.Y. TIMES, Jan. 21 2007, at 3.1. (“[T]hese proposals seek something that regulators already require of public companies in Britain and Australia. Since 2001, for example, shareholders in British companies have been voting on compensation practices; in Australia, holders have been doing so since 2005.”).

\textsuperscript{113} See Guercio et. al, supra note 97, at 3.

\textsuperscript{114} Id. at 2.

\textsuperscript{115} See POSTSEASON REPORT, supra note 92, at 2.

\textsuperscript{116} Id. at 5.

\textsuperscript{117} Id.

\textsuperscript{118} Id. at 6.
ranging from 30% to 36%. These withhold votes, such as the ones at Pfizer and Home Depot, may cause boards to reevaluate the amount of compensation paid to executives. \(^{119}\)

**B. Lack of Social Accountability**

When shareholders, business media, social groups and professional groups know the amount compensation paid to executives, the disapproval by these groups may result in “outrage costs.” \(^{121}\) This public outcry can influence both the levels of executive compensation and the procedures by which such compensation is awarded. \(^{122}\) There are three main ways in which “outrage” can influence the levels of executive compensation and the policies by which it is determined. \(^{123}\) These three ways are through the market for corporate control, the labor market, and the social network. \(^{124}\)

With respect to the market for corporate control, investors may view excessive compensation as a sign that directors and managers are indifferent to shareholders’ interests. \(^{125}\) As a result, if a potential proxy fight or hostile takeover occurs, these investors are less likely to support the incumbents. \(^{126}\) Regarding the reputation of directors and managers in the labor market, a negative reputation caused by excessive compensation may affect the directors’ and managers’ future career prospects. \(^{127}\) Lastly, with respect to the negative consequences in the social network, the disapproval by social and professional groups can have harmful repercussions. \(^{128}\) Even if there is no monetary loss, embarrassment and criticism created by public exposure of excessive compensation may affect the levels of executive pay, and the means by which it is awarded. \(^{129}\) While “outrage costs” are a powerful constraint on executive pay, they have little influence on the levels of compensation unless all the groups of observers know the amounts of compensation and the way in which it is awarded. \(^{130}\) Much of this information will come as a result of the new executive compensation disclosure rules.

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119 Id.
120 See Guercio, supra note 98, at 2.
121 See BECHUK & FRIED, supra note 53, at 64-66.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
IV. OVERVIEW OF THE NEW EXECUTIVE COMPENSATION DISCLOSURE RULES

After proposing amendments to the executive compensation disclosure rules and receiving over 20,000 comments, the SEC adopted amendments to the disclosure requirements for executive compensation and other corporate governance matters. The goal of these amendments is to provide investors with a clearer and more complete picture of executive compensation. One major change in corporate governance disclosure is that the SEC is now requiring increased discussion of a company’s use of compensation consultants. In addition to this disclosure, the compensation committee of the board of directors must furnish a report stating that it reviewed and discussed with management the Compensation Discussion and Analysis section (CD&A). The CD&A is a narrative description of the company’s compensation policies and procedures. Following this narrative disclosure is tabular disclosure including a Summary Compensation Table that serves as the principal disclosure vehicle regarding executive compensation. This table shows compensation with respect to the last three fiscal years and discloses a single figure for total compensation.

A. Corporate Governance Disclosures

The SEC is now requiring increased disclosure regarding compensation consultants. This information is not required in the CD&A, but instead it must be disclosed in the corporate governance section, because it focuses on the resources utilized by the compensation committee in setting the amount of executive compensation. Companies must state any role of compensation consultants in determining the amount of compensation. Each company is also required to

132 See Adopting Release, supra note 6, at 53158.
133 Id. In addition to amending the rules for executive compensation and certain corporate governance matters, the SEC also amended the requirements for disclosure of related party transactions and board compensation. Id. This article is solely focused on the amendments to the executive compensation rules and certain corporate governance matters.
134 Id.
135 Id. at 53205.
136 Id. at 53168.
137 Id. at 53160.
138 Id. at 53169.
139 Id.
140 Id. at 53205.
141 Id.
identify such consultants; state whether such consultants are engaged directly by the compensation committee; describe the nature and scope of their assignment; and list the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement. However, what is lacking in this disclosure is that the company is not required to disclose whether the compensation consultant performs other consulting services for management.

B. Compensation Committee Report

Under the new rules, the company’s compensation committee is required to furnish a Compensation Committee Report. This report is similar to the audit committee report currently required in proxy statements. In this section, the compensation committee must state that it has discussed the CD&A with management. It must also state that based on this review and discussion, it has recommended to the board of directors that the CD&A be included in the proxy statement. Like the Audit Committee Report, the name of each member of the compensation committee must appear below the disclosure. However, unlike the Audit Committee Report, which has a separate section describing whether auditors are independent of management, the Compensation Committee report has no separate section requiring disclosure of whether compensation consultants are independent of management. Because compensation consultants may have conflicts of interest, the absence of such disclosure makes the new rules incomplete.

C. Compensation Discussion and Analysis

The CD&A is a narrative overview that provides information about the company’s compensation objectives, policies, procedures, and processes. This section is designed to put into context the disclosure provided elsewhere in the filing. The CD&A is soliciting material that must be filed with the Commission

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143 Id.

144 See Reda, supra note 1, at 1-8.

145 Id. at 53167-68.

146 Id. at 53168.

147 Id.

148 Id.

149 Id.


151 See Reda, supra note 1, at 1-8.

152 Id.

153 See Adopting Release, supra note 6, at 53164.

154 Id.
and therefore subjects officers to the liabilities of Section 18 of the Exchange Act.\textsuperscript{155} The CD&A must explain the following: the objectives of the compensation program; what the compensation program is designed to reward; each element of compensation; why the company chooses to pay each element; how the company determines the amount for each element; and how each element fits into the company’s overall compensation objectives.\textsuperscript{156} To offer guidance to companies, the SEC lists several examples of the topics that may need to be disclosed in this section.\textsuperscript{157} However, because the rule requires disclosure of all material information,

\textsuperscript{155} Id. at 53167.

\textsuperscript{156} Id. at 53164.

\textsuperscript{157} Id. at 53165.

[Example] of such information may include, in a given case, among other things, the following: (i) The policies for allocating between long-term and currently paid out compensation; (ii) The policies for allocating between cash and non-cash compensation, and among different forms of non-cash compensation; (iii) For long-term compensation, the basis for allocating compensation to each different form of award (such as relationship of the award to the achievement of the registrant's long-term goals, management's exposure to downside equity performance risk, correlation between cost to registrant and expected benefits to the registrant); (iv) How the determination is made as to when awards are granted, including awards of equity-based compensation such as options; (v) What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions; (vi) How specific forms of compensation are structured and implemented to reflect these items of the registrant's performance, including whether discretion can be or has been exercised (either to award compensation absent attainment of the relevant performance goal(s) or to reduce or increase the size of any award or payout), identifying any particular exercise of discretion, and stating whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goal(s); (vii) How specific forms of compensation are structured and implemented to reflect the named executive officer's individual performance and/or individual contribution to these items of the registrant's performance, describing the elements of individual performance and/or contribution that are taken into account; (viii) Registrant policies and decisions regarding the adjustment or recovery of awards or payments if the relevant registrant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment; (ix) The factors considered in decisions to increase or decrease compensation materially; (x) How compensation or amounts realizable from prior compensation are considered in setting other elements of compensation (e.g., how gains from prior option or stock awards are considered in setting retirement benefits); (xi) With respect to any contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) at, following, or in connection with any termination or change-in-control, the basis for selecting particular events as triggering payment (e.g., the rationale for providing a single trigger for payment in the event of a change-in-control); (xii) The impact of the accounting and tax treatments of the particular form of compensation; (xiii) The registrant's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership), and any registrant policies regarding hedging the economic risk of such ownership; (xiv) Whether the registrant engaged in any benchmarking of total compensation, or any material element of compensation, identifying the benchmark
a company can neither rely solely on disclosing information that relates to these examples nor use mere boilerplate disclosure. 158 A company must disclose all information that is material to its compensation objectives and policies, unless a specific exemption applies such as the exception for target performance levels. 159 This “safe harbor” 160 for performance targets makes the new disclosure rules incomplete. 161

D. Summary Compensation Table

The purpose of the Summary Compensation Table is to provide investors with a clearer and more logical picture of total compensation and the various elements that make up such compensation. 162 This table is the principle disclosure vehicle for executive pay, 163 and was designed to capture all forms of executive compensation. 164 The Summary Compensation Table requires that a company disclose all executive compensation with respect to the last three fiscal years. 165 The portion of the Summary Compensation Table requiring monetary disclosure is reproduced below (shading added): 166

<table>
<thead>
<tr>
<th>Salary (c)</th>
<th>Bonus (d)</th>
<th>Stock Awards (e)</th>
<th>Option Awards (f)</th>
<th>Non-equity Incentive Plan Compensation (g)</th>
<th>Change In Pension Value and Nonqualified Deferred Compensation Earnings</th>
<th>All Other Compensation (i)</th>
<th>Total Compensation (j)</th>
</tr>
</thead>
</table>

and, if applicable, its components (including component companies); and (xv) The role of executive officers in determining executive compensation.


158 See Adopting Release, supra note 6, at 53164.

159 Id. at 53166.

160 [C]ompanies are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the compensation committee or the board of directors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm to the company.

161 See Trumka, supra note 2, at 2.

162 See Adopting Release, supra note 6, at 53169-70

163 Id. at 53169.

164 Id. at 53170.

165 Id. at 53169.

166 Id. at 53170.
The total compensation column (column (j)) is an innovative and crucial part of the new rules. Prior to the amendments, securities analysts and investors were unable to determine an accurate figure for total compensation. Moreover, they were unable to determine an amount of total compensation that was comparable across years for the same company; or comparable for the same year across different companies. The new total compensation column tries to solve these problems by attempting to capture all of the compensation earned by executive officers. It does so by aggregating in column (j) the total dollar value that is disclosed in columns (c) through (i). However, because of the way in which nonqualified deferred compensation earnings column (h) and perquisites column (i) are disclosed, the total compensation column will be understated.

V. PROBLEMS WITH THE NEW EXECUTIVE COMPENSATION DISCLOSURE RULES

There are four reasons that the amended executive compensation disclosure rules do not result in complete disclosure. The first reason disclosure is incomplete is the lack of information regarding the conflicts of interest of compensation consultants. The second reason is the lack of disclosure regarding performance target levels. The third reason is that earnings on deferred compensation only have to be disclosed at above-market interest rates. The fourth reason is that perquisites only have to be disclosed to the extent that they exceed $10,000.

A. Compensation Consultants’ Conflicts of Interest

The current relationship between compensation consultants and the compensation committee is similar to the relationship between auditors and the audit committee prior to the enactment of the Sarbanes-Oxley Act. Before Sarbanes-Oxley, the

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167 Id.
168 See DOWNES AND GOODMAN, supra note 10, at 622. (“[A] securities analyst [is a] individual, usually employed by a stock brokerage house, bank, or investment institution, who performs investment research and examines the financial condition of a company or group of companies in an industry and in the context of securities markets.”).
169 See Adopting Release, supra note 6, at 53170.
170 Id.
171 Id.
172 Id.
173 Id. at 53174.
174 See Reda, supra note 1, at 1-8.
175 See TRUMKA, supra note 2, at 2.
176 See Adopting Release, supra note 6, at 53174.
177 Id. at 53176.
178 See Reda, supra note 1, at 5.
auditing firms of the late 1990s generated large percentages of their revenue by providing non-audit consulting services to companies.\footnote{Id.} As a result, auditors had an incentive to approve misleading accounting figures so that they could preserve and obtain more lucrative non-audit consulting contracts from management.\footnote{Id.} To prevent this from occurring, the Sarbanes-Oxley Act put limits on the types of non-audit services that an accounting firm can provide to a company for which it performs an audit.\footnote{Id.} In fact, the Act eliminated the economic incentives for the auditors to conform to management’s personal objectives during the audit.\footnote{Id.} However, this economic incentive has not been eliminated for compensation consultants that perform services for both the compensation committee and management.\footnote{Id.}

Like the auditing firms of the late 1990s, compensation consultants stand to profit more from the work performed for management than the services provided to the compensation committee.\footnote{Id. at 1.} This incentive is present because most human resources consulting firms are diversified, which means that they provide many types of consulting services.\footnote{Id. at 5.} In fact, out of the largest consulting firms in the U.S., just one company provides only compensation consulting services.\footnote{Id. at 6.} Moreover, compensation consulting makes up a very small percentage of revenue for most diversified consulting firms.\footnote{Id. at 5.} For example, at a typical diversified consulting firm, compensation consulting revenue will be between .5% and 2% of total firm revenue.\footnote{Id. at 7.} Therefore, all other revenues come from consulting services for matters other than executive compensation.\footnote{Id.} As a result, the diversified consulting firm is less likely to be independent in their advice to the compensation committee because they are under pressure to produce compensation packages that satisfy management.\footnote{Id.} They must bend to management in order to preserve and obtain lucrative consulting contracts for matters other than executive compensation consulting.\footnote{Id.}

\textbf{B. Target Performance Levels}
Under the new rules, the SEC does not require companies to disclose performance target levels in the CD&A if such disclosure would result in competitive harm to the company. A performance target level is a quantitative or qualitative performance-related factor considered by the compensation committee of the board of directors that an executive must meet to obtain a certain level of compensation. Under the amendments, companies are exempt from disclosing performance targets involving confidential trade secrets or confidential commercial or financial information, if the disclosure would result in competitive harm. In order to satisfy this exemption, the company must demonstrate to the SEC that it has met the same standard for confidential treatment that is used when the Commission decides whether to grant a confidential treatment request. Basically, the rule maintains a "safe harbor" under which companies may exclude performance targets if the SEC finds that such disclosure would be competitively harmful to the company. However, exempting performance targets from the CD&A will impair the quality of information disclosed because it makes it difficult to assess the link between executive pay and company performance.

Pay for performance is probably the most important issue for shareholders regarding executive compensation. Yet, under the new rules, shareholders will not know the performance target levels that executives must meet to obtain a specified level of compensation. Consequently, they cannot accurately determine whether executives are being paid for meeting these targets. Because companies do not have to disclose the levels of compensation that are tied to the targets, nor disclose

192 See Adopting Release, supra note 6, at 53166.
193 Id.
194 Id.
195 Id. at 53167.
196 While the instruction . . . does not require a company to seek confidential treatment under the procedures in Securities Act Rule 406 and Exchange Act Rule 24b–2 with regard to the exclusion of the information from the disclosure provided in response to this item, the standards specified in Securities Act Rule 406, Exchange Act Rule 24b-2, Exemption 4 of the Freedom of Information Act and Rule 80(b)(4) promulgated under the Freedom of Information Act still apply and are subject to review and comment by the staff of the Commission.

198 See Trumka, supra note 2, at 2.
200 Id.
whether such targets were met, the owners of the firm will not be informed as to how and why executives are compensated. 201

Moreover, shareholders can best judge the effectiveness of their board if they have access to information about performance targets. 202 Therefore, disclosure would help make compensation committees more accountable should they decide to provide bonuses or incentive pay even when performance targets are not met. 203 The exemption of performance targets is also unwarranted because shareholders as the owners of the company are entitled to know the levels of performance that must be achieved to earn the performance awards. 204 By exempting companies from making this type of disclosure, the Commission allows shareholders to remain ignorant about significant portions of a firm’s compensation policies. 205 This exception undermines the purpose of the new rules because it leaves out a vital element of the company’s compensation philosophy. 206

C. Summary Compensation Table

Under the new rules, the figure for total compensation will be understated for two reasons. The first reason is that earnings on deferred compensation only have to be disclosed at above-market interest rates. 207 The other reason is that perquisites only have to be disclosed to the extent that they exceed $10,000. 208 Because both of these figures are part of the total compensation column, 209 the amount of total compensation will be understated. 210 In the Summary Compensation Table, nonqualified earnings on deferred compensation are disclosed in column (h), 211 perquisites in column (i), 212 and total compensation in column (j). 213 To highlight these portions of the Summary Compensation Table, the table is reproduced below (shading added): 214

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201 Id.
202 Id.
203 Id.
204 See Trumka, supra note 2, at 2.
205 See generally id.
206 See generally id.
207 See Adopting Release, supra note 6, at 53174.
208 Id. at 53176.
209 Id. at 53170.
210 Id. at 53176.
211 Id. at 53174.
212 Id. at 53176.
213 Id. at 53170.
214 Id. at 51370.
1. Nonqualified Deferred Compensation Earnings

Under the new rules, the disclosure of deferred compensation earnings is limited to the amount earned at above-market interest rates. The term “above-market interest” refers to interest earned in excess of 120% of the applicable federal long-term rate. As of September 2007, this above-market interest would include interest earned at a rate that exceeds 6.13%. This means that a company does not have to disclose earnings on deferred compensation that are earned at an interest rate below 6.13%. An analysis of the earnings on deferred compensation at Analog Devices provides an example of how disclosing earnings at above-market interest rates results in incomplete disclosure. In 2005, executives at Analog Devices earned a total of $10.2 million in interest on deferred compensation. However, under the new rules, the company is only obligated to disclose $1.4 million of these earnings.

These amounts reflect only the interest earned in excess of the interest that would have been earned at a rate equal to 120% of the applicable federal long-term rate, under the fixed-rate investment option on deferred compensation balances. SEC regulations consider the “market rate” to be 120% of the applicable federal long-term rate, or AFR. Earnings credited to participants electing the fixed-rate investment option for fiscal year 2005 were calculated using an average interest rate of 6.48% and 120% of the average AFR was 5.57%. The total amounts of interest credited to participants’ deferred compensation accounts in fiscal 2005 are as follows: Mr. Fishman: $8,743,912; Mr. McAloon: $283,118; Mr. Fuller: $429,360; and Mr. McDonough: $761,276.

These amounts reflect only the interest earned in excess of the interest that would have been earned at a rate equal to 120% of the applicable federal long-term rate, under the fixed-rate investment option on deferred compensation balances. SEC regulations consider the “market rate” to be 120% of the applicable federal long-term rate, or AFR. Earnings credited to participants electing the fixed-rate investment option for fiscal year 2005 were calculated using an average interest rate of 6.48% and 120% of the average AFR was 5.57%. The total amounts of interest credited to participants’ deferred compensation accounts in fiscal 2005 are as follows: Mr. Fishman: $8,743,912; Mr. McAloon: $283,118; Mr. Fuller: $429,360; and Mr. McDonough: $761,276.

With earnings of $10,217,736 at 6.48% the total deferred compensation balance used to calculate the earnings on deferred compensation can be determined. This calculation shows that the total deferred compensation balance used for calculating the earnings on deferred compensation was ($10,217,736/.0648) which equals $157,681,111. The earnings on this total at 5.57% is ($157,681,111*.0557) which equals $8,782,838. Because the company only has to disclose above-market earnings it is obligated to disclose ($10,217,736-$878,782,838) which equals $1,434,898.
of disclosure of earnings on deferred compensation at above-market interest rates would cause the total compensation column to be understated by nearly $9 million. 222

2. Perquisites

Perquisites given to executives are disclosed in the All Other Compensation Column of the Summary Compensation Table (column (i)); 223 and the dollar figure disclosed for these earnings is used to calculate the total amount of compensation. 224 Companies must disclose perks unless the amount of such compensation is less than $10,000. 225 Although the amendments to the rules for disclosing perquisites are an improvement over the old regime, 226 the exemption causes the total compensation figure to be understated. 227

There are two reasons why all perquisites should be disclosed. 228 The first reason is that any substantial threshold, especially one as large as $10,000, provides a loophole to companies. 229 Firms can simply disaggregate perquisite compensation to qualify for the exemption by breaking the perks down into increments that are less than $10,000. 230 For example, a firm could allocate $9,000 for football tickets, $9,000 for theatre tickets, and $9,000 for basketball tickets, and disclose none of this information in the Summary Compensation Table. 231 Another example of how this abuse could occur is that a company instead of disclosing a car allowance could break it down into a car leasing allowance, a gas allowance, a car insurance allowance, and a travel allowance. 232 It is easy to imagine that under the new rules a company could have $1,000,000 of perquisites broken down into 110 separate items each worth roughly nine thousand dollars. 233 As a result, hundreds of thousands of dollars worth of perks can remain undisclosed. 234

222 Id. The total compensation figure will be understated by ($10,217,736-$1,434,898) which equals $8,783,838.
223 See Adopting Release, supra note 6, at 53176.
224 Id.
225 Id.
226 Id. at 53176. (“Prior to today’s amendments, the rule permitted omission of perquisites and other personal benefits if the aggregate amount of such compensation was the lesser of either $50,000 or 10%.”).
227 Id.
228 See Jones, supra note 37, at 4.
229 Id.
230 See Schacht & Allen, supra note 30 at 8.
231 See Hodgson, supra note 45, at 8.
232 Id. at 2.
233 Id. A company could have 110 separate perquisites that amount to $1,000,000 if each perk was worth ($1,000,000/110) which equals $9,091 without having to disclose any perks.
234 Id.
The second reason that all perquisites should be disclosed is that certain perks may be a waste of corporate assets even if they do not have a major impact on the total compensation column.\textsuperscript{235} For example, a company may provide lavish office extras such as daily flowers and gilded umbrella stands.\textsuperscript{236} While these perquisites may or may not have a significant impact on the total compensation column, perks such as these may signal that there are other problems with the company’s executive compensation policies.\textsuperscript{237}

VI. PROPOSED SOLUTIONS TO THE PROBLEMS WITH THE NEW DISCLOSURE RULES

The proposed solutions to the problems with the amended executive compensation disclosure rules are specifically designed to address the four problems with the rules.\textsuperscript{238} First, the Commission should require disclosure of all work performed by compensation consultants by requiring companies to disclose all fees received by these consultants.\textsuperscript{239} Second, the SEC should require disclosure of target performance levels after the conclusion of the performance period.\textsuperscript{240} Third, the Commission should require disclosure of all earnings on deferred compensation\textsuperscript{241} and require disclosure of all perquisites.\textsuperscript{242}

A. Disclosure of All Work Performed By Compensation Consultants

The Commission should require companies to disclose all of the work performed by compensation consultants, list the fees received for the work that is done, and state the nature of the work that is performed.\textsuperscript{243} To accomplish this goal, the SEC should require tabular disclosure of these fees by amending section 407(e) of Regulation S-K.\textsuperscript{244} Such a table should include the type of work performed by the compensation consultant and the fees received by the consultant for this work.\textsuperscript{245}

\begin{thebibliography}{99}
\bibitem{235} See Jones, \textit{supra} note 37, at 4.
\bibitem{236} \textit{Id}.
\bibitem{237} See Carter, \textit{supra} note 4, at 3.
\bibitem{238} See \textit{supra} Section V.
\bibitem{239} See Reda, \textit{supra} note 1, at 1-8.
\bibitem{240} See Yerger, \textit{supra} note 43, at 2-3.
\bibitem{241} See Schacht & Allen, \textit{supra} note 30 at 8 (expressing strong support for disclosure of all earnings on deferred compensation).
\bibitem{242} See Hodgson, \textit{supra} note 45, at 1-2.
\bibitem{244} See Reda, \textit{supra} note 1, at 7 (suggesting similar disclosure but suggesting that such disclosure should be included in the CD&A rather than as an amendment to section 407(e)).
\bibitem{245} \textit{Id}.
\end{thebibliography}
SEC should also require narrative disclosure in the footnotes to this table that describe the specific nature of the work performed.246

This disclosure is appropriate because of the similarity between the current relationship of compensation consultants, management, and the compensation committee; and the relationship of auditors, management, and the audit committee prior to Sarbanes-Oxley.247 In fact, this recommended disclosure is similar to the disclosure required in the Audit Committee Report.248 Such disclosure has been crucial in assuring that auditors are truly independent of management.249 Thus, by requiring a table for compensation consultants similar to the one included in the Audit Committee Report for auditors, investors will be better able to see whether compensation consultants are independent of management.250 Such disclosure would also force the compensation committee to make sure that compensation consulting advice is truly independent.251

To assure independence, the tabular disclosure required by the suggested amendments to section 407(e) of Regulation S-K should result in the following table:252

<table>
<thead>
<tr>
<th>Executive Compensation Consulting Fees and All Other Fees</th>
<th>2007</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Compensation Consulting Fees (a)</td>
<td>$XXX</td>
<td>$XXX</td>
</tr>
<tr>
<td>All Other Fees (b)</td>
<td>$XXX</td>
<td>$XXX</td>
</tr>
<tr>
<td>Total Fees (c)</td>
<td>$XXX</td>
<td>$XXX</td>
</tr>
</tbody>
</table>

In this table, companies should be required to disclose the following information. Under the caption Executive Compensation Consulting Fees, the aggregate fees billed for each of the last two fiscal years for executive compensation consulting services rendered by the principal compensation consultant (row (a)). For fees disclosed under this category, the company would have to describe the nature of the services comprising the fees. Under the caption All Other Fees, the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal compensation consultant, other than the services reported in (row (a)). For fees disclosed under this category, the company would have to describe the nature of the services comprising the fees. Lastly, under the caption total fees, the sum of the amounts reported in rows (a) and (b).

B. Disclosure of Target Performance Levels After the Conclusion of the Performance Period

246 Id. at 3.
247 Id. at 5.
248 Id. at 7.
249 Id. at 5.
250 Id. at 7.
251 Id. at 7-8.
252 Id. This table is similar but not identical to the table provided in Reda’s comment letter.
The SEC should require companies to disclose target performance levels after the conclusion of the performance period. To accomplish this goal, the Commission should amend Instruction 4 to Item 402(b) of Regulation S-K to require disclosure after the performance related to the award is measured. This increased disclosure would result in investors being better able to assess the link between executive pay and company performance.

While the disclosure of performance targets can result in competitive harm, the potential for this harm is mitigated if disclosure is required after the performance related to the award is measured. Because competitors would also be required to publish information about performance targets, the competitive costs to the companies should equalize once all the information is disclosed. This disclosure will not result in competitive harm, because companies and compensation consultants already have access to this information. Moreover, because performance benchmarks are generally based on public information such as the company stock price or disclosed financial statements, requiring disclosure of performance targets will not place an undue burden on companies. Thus, the Commission should require companies to disclose this information to give investors a better understanding of a company’s compensation policies, philosophies, and procedures. Requiring disclosure after the conclusion of the performance period is appropriate because it addresses companies’ competitive concerns while providing shareholders with important information about executive compensation practices.

To strike the appropriate balance between the competitive concerns of companies and shareholders’ access to information, the SEC should require companies to disclose: the performance measure, the performance target, the actual performance, whether or not the target was achieved, and the amount earned from the performance. The table should appear as follows:

<table>
<thead>
<tr>
<th>Performance Measure</th>
<th>Performance Target</th>
<th>Actual Performance</th>
<th>Achievement</th>
<th>Amount Earned</th>
</tr>
</thead>
</table>

The SEC should require this disclosure in the Compensation Discussion and Analysis section by amending Instruction 4 to Item 402(b). This approach balances investors’ need for information and companies’ competitive concerns while

254 Id.
255 See Frank, supra note 199, at 2.
256 See Adopting Release, supra note 6, at 53166.
257 See Frank, supra note 199, at 2.
258 Id.
259 See Trumka, supra note 2, at 2.
261 See Frank, supra note 199, at 2.
simultaneously ensuring that the compensation committee knows that they have to reveal these targets to the public.262

C. Disclosure of All Earnings On Deferred Compensation and All Perquisites

In its proposing release, the Commission recommended disclosure of all earnings on deferred compensation.263 The SEC should have implemented the rules as proposed.264 It should remedy this decision by amending Item 402(c)(2)(vii)(B) to require disclosure of all earnings on deferred compensation. In addition, this Item should also require separate footnote identification if such earnings exceed $10,000.265 The Commission should also adopt Proposed Instruction 5 to Item 402(c)(2)(ix) under which a company would be permitted to identify by footnote the portion of any earnings that it considered to be paid at an above-market interest rate.266 The current rule, by permitting companies to skirt disclosure of all earnings on deferred compensation, allows firms to avoid disclosure of substantial executive pay.267 This exemption also causes the total compensation figure to be understated. Consequently, the Commission should adopt the recommended amendment because it strikes the appropriate balance between disclosing earnings that a company believes to be above-market, and capturing all of the compensation that is paid to executives.

In addition to requiring disclosure of all earnings on deferred compensation, the SEC should require disclosure of all perquisites.268 To accomplish this goal, the Commission should amend Item 402(c)(2)(ix)(A) to eliminate the $10,000 threshold for the disclosure of perks. The SEC acknowledges that the exclusion of perquisites results in an understated figure for total compensation.269 It justifies the $10,000 threshold because of the potential burden on companies to track every benefit no matter how small.270 However, companies accounting departments already track this

262 Id. at A-3.

263 See Proposing Release, supra note 131, at 6552.

264 Id. at 6552. (“Each compensation item that is not properly reportable in columns (d)–(h) must be reported in this column. . . Such compensation must include, but is not limited to . . . all earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on non-qualified defined contribution plans.”). Id. at 6612.

265 Id. at 6552. (“Each compensation item that is not properly reportable in columns (d)–(h) must be reported in this column and must be identified and quantified in a footnote if the amount of the item exceeds $10,000.”). Id. at 6612.

266 Id. at 6552. (“Footnote disclosure may be provided disclosing the portion of any earnings that the registrant considers to be paid at an above-market rate, provided that the footnote explains the registrant’s criteria for determining the portion considered to be above market.”). Id. at 6612.


268 See Hodgson, supra note 45, at 1-2.

269 See Adopting Release, supra note 6, at 53176.

270 Id.
expense and therefore most firms have this information readily available.\footnote{271 See Hodgson, supra note 45, at 2.} Moreover, shareholders are entitled to know both the amount and types of perquisites to assess whether the board is wasting corporate assets.\footnote{272 See Jones, supra note 37, at 4.} Consequently, the SEC should adopt the recommended amendment because it provides necessary information to shareholders and results in a more accurate figure for total compensation.

VI. CONCLUSION

Although the amendments to the executive compensation disclosure rules are an improvement over the previous regime, the new rules do not result in complete disclosure. Therefore, the Commission should require disclosure of: all work performed by compensation consultants,\footnote{273 See Reda, supra note 1, at 1-8.} all performance targets after the conclusion of the performance period,\footnote{274 See Yerger, supra note 43, at 2-3.} all earnings on deferred compensation,\footnote{275 See Schacht & Allen, supra note 30 at 8.} and all perquisites.\footnote{276 See Hodgson, supra note 45, at 1-2.} While the SEC should be commended for the new rules, an exhaustive review of the 2007 proxy season is likely to reveal some of the rules’ deficiencies. This article addressed some of these shortcomings, but further inquiry into the sufficiency of the new rules is warranted.