

PART **One**

The Modern
Compensation Committee

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The Compensation Committee

One of the most important determinants of a successful corporate strategy is the quality of the compensation committee. The committee is charged with designing and implementing a compensation system that effectively rewards key players and encourages direct participation in the achievement of the organization's core business objectives.

Outstanding, well-integrated compensation strategy does not just happen. Rather, it is the product of the hard work of independent, experienced compensation committee members. The most effective pay strategies are simple in design, straightforward in application, and easy to communicate to management and investors. The pay program for the chief executive officer (CEO) should be in line with pay programs for the company's other executives and with its broad-based incentive programs. In other words, there should be no conflict in the achievement of objectives, and the potential rewards should be as meaningful to all participants as to the CEO.

The United States is unique in its vast number of high-earning entrepreneurs, entertainers, athletes, lawyers, consultants, Wall Street traders, bankers, analysts, investment managers, and other professionals. Yet, it is the pay levels of corporate executives, in particular CEOs, that stir the most heated debate and controversy. It is estimated that the bull market of the 1990s created over 10 million new millionaires whose wealth was derived almost solely from stock options. During this period, many CEOs made hundreds of millions in option gains and other compensation—often making as much as 400 times the earnings of the average workers in their companies. Beginning in late 2001, the business world changed dramatically. Now, with the public's and investors' direct focus on corporate governance and compensation philosophy, and recent changes in accounting rules affecting equity-based compensation, CEOs and other executives should not expect to sustain historic rates of wealth accumulation, absent

substantial performance that is no longer linked solely to the price of the company's stock.

While the proxy statement compensation tables provide historical information and raw data about the company's compensation of its top executive officers, the new Compensation Discussion and Analysis (CD&A) provides a window into the company's compensation philosophy and a means for investors to assess whether and how closely pay is related to performance. A thoughtfully prepared CD&A is good evidence of a well-functioning compensation committee that takes its work seriously.

Among the topics covered in this chapter are:

- Board and board committee structure
- Independence measures
- Compensation committee size
- Compensation committee charter
- Role of the compensation committee and its chair
- Duties and responsibilities
- Precepts for responsible performance
- Compensation benchmarking
- The importance of meeting minutes

Board Structure: The Focus on Independence

Much of the recent public scrutiny of corporate governance issues has focused on structural issues as they relate to corporate boards—questions related to independence from management; separation of the chair and CEO positions; issues related to the composition and function of board committees; and renewed efforts to create a framework in which outside directors can obtain impartial advice and analysis, free of undue influence from corporate management.

While it has always been desirable to have a healthy complement of outside directors on the board, corporate governance rules adopted by the New York Stock Exchange (NYSE) and the NASDAQ Stock Market (NASDAQ) in 2003 require that a majority of a listed company's board consist of independent directors and, with limited exceptions, that such board appoint fully independent compensation, audit, and nominating/corporate governance committees. The NYSE and NASDAQ rules also prescribe standards for determining the independence of individual directors, which, when layered over the director independence standards under Section 162(m) of the Internal Revenue IRC (IRC) and Rule 16b-3 of the Securities Exchange Act of 1934 (Exchange Act), make the nomination and selection of compensation committee members a challenging exercise.

Compensation Committee Composition and Multiple Independence Requirements

When selecting directors to serve on the compensation committee of a public company, the nominating committee should choose only those persons who meet all the relevant independence requirements that will permit the committee to fulfill its intended function. For example, a compensation committee member must be an “independent director,” as defined under NYSE or NASDAQ rules, where applicable. In addition, a public company is well served to have a compensation committee consisting solely of two or more directors who meet (1) the definitional requirements of “outside director” under IRC Section 162(m), and (2) the definitional requirements of “non-employee director” under Rule 16b-3 of the Exchange Act. This often leads to a lowest-common-denominator approach of identifying director candidates who satisfy the requirements of all three definitions. Unfortunately, the three tests are not identical, and it is indeed possible to have a director who meets one or more independence tests but not another.

NYSE/NASDAQ Independence Tests

Under the 2003 NYSE listing rules, an *independent director* is defined as a director who has no material relationship with the company. NASDAQ defines independence as the absence of any relationship that would interfere with the exercise of independent judgment in carrying out the director’s responsibilities. In both cases, the board has a responsibility to make an affirmative determination that no such relationships exist. The rules list specific conditions or relationships that will render a director nonindependent. These are summarized in Exhibit 5.1 in Chapter 5.

As of January 2013, NYSE and NASDAQ listing standards require two new factors for determining eligibility to serve on the compensation committee. In addition to the rules summarized in Exhibit 5.1 in Chapter 5, boards of listed companies now also need to take into account two additional eligibility factors:

1. A prohibition against acceptance, directly or indirectly, by any compensation committee member of any consulting, advisory, or other compensatory fee from the listed company or any subsidiary of the listed company (referred to as the “Fees Factor”).
2. Whether the director is affiliated with the listed company, a subsidiary of the listed company, or an affiliate of a subsidiary of the listed company (referred to as the “Affiliation Factor”).

Rule 16b-3 Independence Test

Awards of stock options and other equity awards to directors and officers of a public company, generally referred to as “Section 16 insiders,” are exempt from the short-swing profit provisions of Section 16 of the Exchange Act if such awards are made by a compensation committee consisting solely of two or more “non-employee directors” (as defined in Rule 16b-3 under the Exchange Act). In addition to such compensation committee approval, there are three alternative exemptions under Rule 16b-3: (1) Such awards to Section 16 insiders can be preapproved by the full board of directors, (2) the awards can be made subject to a six-month holding period (measured from the date of grant), or (3) specific awards can be ratified by the shareholders (which alternative is, for obvious reasons, rarely taken).

Disadvantages of relying on full board approval for the Rule 16b-3 exemption are that (1) it is administratively awkward to single out awards to Section 16 insiders for special full board approval, and (2) if the full board takes on that role, the CD&A may need to address that anomaly. Therefore, prevalent practice is for the compensation committee to be staffed exclusively with directors who meet the Rule 16b-3 definition of “non-employee director,” and to have the compensation committee approve all equity awards to Section 16 insiders.

To qualify as a “non-employee director” under Rule 16b-3, a director cannot (1) be a current officer or employee of the company or a parent or subsidiary of the company; (2) receive more than \$120,000 in compensation, directly or indirectly, from the company or a parent or subsidiary of the company for services rendered as a consultant or in any capacity other than as a director; or (3) have a reportable transaction under Regulation S-K Item 404(a) of the Securities and Exchange Commission (SEC), as outlined in Exhibit 1.1.

EXHIBIT 1.1 Regulation S-K Item 404(a) Transactions with Related Persons

| | |
|--------------------|---|
| What | Any financial transaction, arrangement, or relationship, including indebtedness or guarantee of indebtedness |
| When | Occurred in the last fiscal year or is currently proposed |
| Between Whom | (1) The company or its subsidiaries, and (2) the director or nominee or his or her immediate family member |
| Threshold Amount | \$120,000 |
| Nature of Interest | Direct or indirect material interest in the transaction or other entity |
| Exceptions | Instructions provide guidance as to whether an indirect interest is material |

IRC Section 162(m) Independence Test

For any performance-based compensation granted to a public company's CEO, or its next three (or four) most highly compensated executive officers ("covered employees") to be excluded from the \$1 million deduction limit of IRC Section 162(m), such compensation must have been approved in advance by a compensation committee consisting solely of two or more "outside directors" (as defined under the IRC Section 162(m) regulations). (See Chapter 8 for detail about the evolving definition of *covered employee* under IRC Section 162(m).) Full board approval of such compensation will not suffice for this purpose, unless all directors who do not qualify as outside directors abstain from voting. Therefore, prevalent practice is for the compensation committee to be staffed exclusively with directors who meet the IRC Section 162(m) definition of *outside director*, and to have such compensation committee approve all performance-based awards to executive officers and others who might reasonably be expected to become *covered employees* during the life of the award.

To qualify as an outside director under IRC Section 162(m), a director (1) cannot be a current employee of the company, (2) cannot be a former employee of the company who receives compensation for services in the current fiscal year (other than tax-qualified retirement plan benefits), (3) cannot be a current or former officer of the company, and (4) cannot receive compensation from the company, directly or indirectly, in any capacity other than as a director. Exhibit 1.2 outlines the IRC Section 162(m) independence test, including a summary of what constitutes "indirect" compensation.

State Law Interested Director Test

To further complicate the analysis, the concept of independence is also applied in determining whether a director is "interested" in a particular transaction under consideration by the board or the committee. A director who meets all of the regulatory definitions of independence under the NYSE/NASDAQ rules, Rule 16b-3 and IRC Section 162(m), can still have a personal interest in a particular transaction that can interfere with his or her ability to render impartial judgment with respect to that transaction. This type of nonindependence will not render the director unsuitable to serve on the compensation committee, but he or she may need to be excused from voting on the particular matter. An example of this might be a situation in which the compensation committee is determining whether to hire a particular consulting firm to advise the committee with respect to a particular matter and one of the committee members has a relative at such consulting firm. This relationship would not necessarily bar the committee member from satisfying any of the regulatory definitions of

EXHIBIT 1.2 Outside Director Requirements under IRC §162(m) Regulations

| | |
|---|---|
| Current Employee | The director cannot be a current employee of the publicly held company. |
| Former Employee | The director cannot be a former employee of the publicly held company who receives compensation for services in the current fiscal year (other than tax-qualified retirement plan benefits). |
| Officer | The director cannot be a current or former officer of the publicly held company. |
| Remuneration | The director cannot receive remuneration from the company, directly or indirectly, in any capacity other than as a director. See categories 1–4 for what constitutes “indirect” remuneration. |
| Category 1 | If remuneration is paid directly to the director, he or she is disqualified. No <i>de minimis</i> exception. |
| Category 2 | If remuneration is paid to an entity of which the director is a 50% or greater beneficial owner, he or she is disqualified. No <i>de minimis</i> exception. |
| Category 3 | If remuneration (other than a <i>de minimis</i> amount) was paid in the last fiscal year to an entity in which the director beneficially owns between 5% and 50%, he or she is disqualified. See below for definition of a <i>de minimis</i> amount. |
| Category 4 | If remuneration (other than a <i>de minimis</i> amount) was paid in the last fiscal year to an entity by which the director is employed (or self-employed) other than as a director, he or she is disqualified. See below for definition of <i>de minimis</i> amount. |
| <i>De minimis</i> amount other than for personal services | Payments not for personal services are <i>de minimis</i> if they did not exceed 5% of the gross revenue of the other entity for its last fiscal year ending with or within the company’s last fiscal year. |
| <i>De minimis</i> amount for personal services | Payments for personal services are <i>de minimis</i> if they do not exceed \$60,000. |

independence (particularly if the amount of the consultant’s fee is less than \$120,000), but the director might have a personal interest in having the committee hire that consulting firm over another. In that case, the interested director should disclose the nature of his or her interest in the matter and abstain from voting on the hiring question. Once that consulting firm has been hired to represent the committee, the matter is over, and the originally interested director may resume active participation in the business of the committee.

Full Disclosure of Pertinent Information

The SEC's proxy rules require disclosure of relevant background information about each director that is intended to give shareholders an indication of the director's unique qualifications and any relationships or affiliations that might affect his or her judgment or independence. For example, disclosure is required regarding:

- All positions and offices the director holds with the company
- Any arrangement or understanding between the director and any other person pursuant to which he or she is to be selected as a director or nominee
- The nature of any family relationship (by blood, marriage, or adoption, not more remote than first cousin) between the director and any executive officer or other director
- The director's business experience during the past five years
- Any other public company directorships held by the director
- The director's involvement in certain legal proceedings
- The director's compensation from the company for the last completed fiscal year, in the form of a summary compensation table and related narrative disclosures, similar to the Summary Compensation Table for executive officers
- Any financial transaction, arrangement, or relationship, including indebtedness or guarantee of indebtedness, occurring in the last year or currently proposed, to which the company or any of its affiliates is party, in which the amount involved exceeds \$120,000 and in which the director has, or will have, a direct or indirect material interest
- Any failure by the director to make a timely filing of any Section 16 report during the last fiscal year
- Any director interlocking relationships

Director Interlocks

As a reflection of the insistence on unbiased, independent analysis in setting executive pay, there is a special sensitivity to so-called "director interlocks." A director interlock exists where there are any of the following relationships:

- An executive officer of the company serves as a member of the compensation committee of another entity, one of whose executive officers serves on the compensation committee of the company.
- An executive officer of the company serves as a director of another entity, one of whose executive officers serves on the compensation committee of the company.

- An executive officer of the company serves as a member of the compensation committee of another entity, one of whose executive officers serves as a director of the company.
- NYSE/NASDAQ description—A director of the listed company is, or has a family member who is, employed as an executive officer of another entity where at any time during the last three years any executive officers of the listed company served on the compensation committee of such other entity.

While not prohibited as a legal matter, director interlocks are suspect due to the possibility that they could engender a “you scratch my back, I’ll scratch yours” influence or other *quid pro quo* situation affecting executive compensation decisions. For that reason, a director who has an interlock of the nature described under applicable NYSE or NASDAQ rules will not be deemed an independent director until three years after such interlocking employment relationship has terminated. During that time, he or she would not be eligible to serve on the compensation committee.

An interlocking relationship will be evident to the public. The SEC’s rules for public companies require disclosure in the proxy statement, under the specific caption “Compensation Committee Interlocks and Insider Participation,” of each person who served as a member of the compensation committee (or board committee performing equivalent functions) during the last fiscal year, indicating each committee member who is or was an employee or officer of the company, had a disclosable interest or transaction with the company, or had an interlocking relationship.

Compensation Committee Size

State law has little to say about the size of a board of directors, and even less about the size of its oversight committees such as the compensation committee. The Revised Model Business Corporation Act (Model Act), on which a majority of states base their corporation laws, provides that a board must consist of one or more individuals, with the number to be specified or fixed in accordance with the corporation’s charter or bylaws. Under the Model Act, a company’s charter or bylaws may fix a minimum and maximum number of directors and allow the actual number of directors within the range to be fixed or changed from time to time by the shareholders or the board. Delaware, which does not follow the Model Act but is the state of incorporation for many U.S. companies, has similar requirements for determining the size of the board.

Corporations should attempt to assemble a board that reflects a diversity of viewpoints and talents, but is not so large as to frustrate the

accomplishment of business at meetings. Smaller boards (those with 12 or fewer members) may allow more free interchange among directors who might otherwise be reticent to express their views in a larger group. However, when considering the appropriate size for a public company board, it is important to include a sufficient number of independent directors to staff the audit, compensation, and nominating/corporate governance committees, each of which is now required by applicable rules to consist solely of independent directors.

Given the interplay of three separate independence requirements for compensation committee members, as discussed previously, it is unusual for a public company's compensation committee to have more than five members. A compensation committee of three to five members should provide an adequate forum for a useful exchange of ideas and healthy debate.

Compensation Committee Charter

The compensation committee (whether it is called such or by some other name—e.g., the human resources committee) generally is established through a formal board resolution, in accordance with applicable state corporate law, the company's articles/certificate of incorporation, and/or the company's bylaws. In the past, some compensation committees had a written charter while others did not. Today, all compensation committees have a written charter, largely due to recent changes in stock exchange listing rules. As discussed in more detail later, rules at the NYSE and NASDAQ require that both the audit committee and the compensation committee have a written charter. Moreover, compensation committees at private and not-for-profit companies typically have a written charter since it is viewed as an element of good corporate governance and companies must disclose in their proxy statements whether or not they have a charter. In addition, there may be other federal or state statutory or regulatory requirements for such a charter with respect to specific regulated industries.

Some companies use a short-form charter (often less than a page) that grants the compensation committee authority in very broad strokes. Others adopt a long-form charter that spells out the duties and responsibilities of the committee, the procedures to be followed, and a variety of other specifications and requirements (such as number of members, number of scheduled meetings per year, and so forth).

While the long-form charter is often favored as providing an aura of good corporate governance practice, one drawback is that the details in the charter must in fact be followed. For example, if the charter provides that the committee shall meet at least once every quarter, then the committee must do so or be in violation. Another consequence of the long-form

charter is the need for more frequent review and adjustment. Any adjustments must follow an appropriate amendment procedure and will require subsequent disclosure.

See Appendix D for selected examples of compensation committee charters at NYSE and NASDAQ companies.

NYSE Compensation Committee Requirements

Under NYSE rules, the compensation committee must have a written charter that addresses the committee's purpose and responsibilities and requires an annual performance evaluation of the committee. The compensation committee of an NYSE listed company must, at a minimum, have direct responsibility to:

- Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or, if the board so directs, together with the other independent directors, determine and approve the CEO's compensation level based on that evaluation. The committee is free to discuss CEO compensation with the board generally, as long as the committee shoulders these absolute responsibilities.
- Make recommendations to the board with respect to (1) compensation of the company's executive officers other than the CEO, (2) incentive compensation plans, and (3) equity-based plans.
- Produce a compensation committee report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report on Form 10-K filed with the SEC. (This is now just a very short-form report under the SEC's 2007 disclosure rules, stating that the committee has reviewed and discussed with management the CD&A and recommends, or not, that it be included in the proxy statement and annual report. Therefore, the committee's review and discussion of the CD&A is now indirectly part of the NYSE requirement.)

The compensation committee charter should also address: (1) committee member qualifications, (2) committee member appointment and removal, (3) committee structure and operations (including authority to delegate to subcommittees), and (4) committee reporting to the board.

If a compensation consultant is to assist in the evaluation of director, CEO, or senior executive compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other engagement terms.

NASDAQ Compensation Committee Requirements

Under NASDAQ rules, compensation of the CEO and all other executive officers of the company must be determined, or recommended to the board for determination, by either a majority of the independent directors or a compensation committee comprised solely of independent directors. The CEO may not be present during voting or deliberations with respect to his or her own compensation.

NASDAQ rules were recently changed to require the compensation committee to have and publish a charter. The first model compensation committee charter appearing in Appendix D is annotated to conform to both the NYSE and NASDAQ rules as currently in effect.

Role of the Compensation Committee

Over time, the role of the compensation committee as a core oversight committee of the board has crystallized. As indicated previously, the NYSE and NASDAQ corporate governance rules require all listed companies to have a compensation committee (or a committee having that function, regardless of the name) composed entirely of independent directors.

The tenets of sound corporate governance embodied in the NYSE and NASDAQ rules should be heeded by any company, whether public or private. The NYSE and NASDAQ rules set out minimum standards governing the deliberative process of the compensation committee. A good committee will not stop there. As discussed more fully in Chapter 5, a host of influential business and investor groups have published their own concepts of best practices for the compensation committee. While none is binding or has the force of law, and while one might not agree with all the views in each report, these best practice guidelines are a “must read” for every compensation committee member who seriously undertakes to consider the proper role of the committee.

The basic role of the compensation committee is twofold. First is to be the “owner” of the company’s executive and director compensation philosophy and programs. Second is to provide the primary forum in which core compensation issues are fully and vigorously reviewed, analyzed, and acted upon (either by the committee itself or by way of recommendation to the full board or the independent directors as a group). The decisions and actions of the compensation committee may make the difference between mediocre and outstanding corporate performance.

The more defined role of the compensation committee varies from company to company, and is contingent on various factors such as ownership structure, concerns of shareholders (and perhaps stakeholders—as broadly

defined), director capabilities, board values, market dynamics, the company's maturity and financial condition, and other intrinsic and extrinsic factors. The compensation committee, more than any other oversight committee, is charged with the all-important task of balancing the interests of shareholders with those of management. The essential conflict between these two interests is generally not over pay levels, but rather the relationship of pay to performance. Shareholders favor a compensation plan strongly tied to corporate performance while managers could prefer a compensation plan with maximum security.

Exhibit 1.3 illustrates a typical division of responsibilities among the full board, the nominating committee, and the compensation committee relative to certain matters. Where the responsibilities overlap, it generally implies committee recommendation followed by board ratification.

Role of the Compensation Committee Chair

The chair's role is to lead the committee and initiate its agenda. The chair of the compensation committee may be selected by the members of the compensation committee, by the nominating committee, or as otherwise provided in the committee's charter. The responsibilities of the chair might appropriately include:

- Suggesting the calendar and overall outline of the annual agenda for the committee
- Convening and preparing the agenda for regular and special meetings
- Presiding over meetings of the committee and keeping the discussion orderly and focused while encouraging questions, debate, and input from all members on each topic under discussion
- Providing leadership in developing the committee's compensation philosophy and policy
- Counseling collectively and individually with members of the committee and the other independent directors
- Interviewing, retaining, and providing interface between the committee and outside experts, consultants, and advisors

Duties and Responsibilities of the Compensation Committee

The fundamental task of the compensation committee is to establish the compensation philosophy of the company. Having done so, it should design programs to advance that philosophy. In almost all cases, this will require the advice of outside experts, to assure that specific performance metrics and performance goals are established that promote desired performance and that pay is in line with such performance.

EXHIBIT 1.3 Board/Compensation Committee Responsibility Matrix

| | Approval/Review Required | |
|--|--------------------------|--------------|
| | Full Board | Committee |
| Corporate Organization | | |
| Certificate of Incorporation (adoption or amendment) | X | |
| Corporate bylaws (adoption or amendment) | X | |
| Stock: all authorization to issue or buy back shares | X | |
| Board Organization | | |
| Board membership qualification | | Nominating |
| Board committee memberships | | Nominating |
| New member selection | | Nominating |
| Compensation Matters: Base Salary | | |
| Salaries of CEO and executive officers | | Compensation |
| Officer Employment Agreements | | |
| Severance agreements | X | Compensation |
| Retention agreements | X | Compensation |
| Change-in-control agreements | X | Compensation |
| Fringe Benefits | | |
| Establishment of new plans or amendments to existing plans | X | Compensation |
| Incentive Compensation | | |
| All arrangements for corporate officers | | Compensation |
| Approval of specific financial targets | | Compensation |
| Determination of payouts | | Compensation |
| Long-Term (Cash) Incentive Plans | | |
| Establishment of performance targets | | Compensation |
| Award sizing compensation | | Compensation |
| Stock Plans | | |
| Establishment of, or amendment to, equity compensation plans | X | Compensation |
| Administration of stock plans | | Compensation |
| Grants under all stock plans | | Compensation |

The compensation committee should assume primary responsibility for the following general areas:

- Compensation philosophy and strategy
- Compensation of the CEO and other executive officers
- Compensation of nonexecutive officers (or the oversight of such compensation if delegated to others)
- Compensation of directors (this function is sometimes housed at the board level or with the governance committee)
- Management development and succession (this function is sometimes placed with the full board or the governance committee)
- Equity compensation plans
- Retirement plans, benefits, and perquisites (this function is sometimes shared with, or performed by, a separate benefits plan committee):
 - Qualified retirement plans, profit sharing, and savings plans
 - Nonqualified plans such as supplemental executive retirement plans (SERPs), nonqualified deferred compensation, and pension restoration plans
 - Welfare benefits, including medical, life insurance, accidental death, and disability insurance
 - Executive benefits such as supplemental medical coverage and supplemental life and/or disability insurance
 - Perquisites
- Contractual arrangements with management, including employment and severance agreements
- For public companies, preparation of the CD&A, or a least review and discussion of the CD&A with management, for inclusion in the company's proxy statement and annual report

The decision as to how far compensation committee oversight should be extended depends on various factors, including the corporate culture, strength of management, the size of the committee, the regulatory environment in which the company operates, and prior corporate performance in these areas.

To execute its duties responsibly, the compensation committee must be able to efficiently synthesize highly technical information and apply sound business judgment. As the field of executive compensation becomes increasingly complex and more in the focus of public attention, the committee's job grows more and more challenging. Adherence to the following six precepts will pave the way to optimal performance by the committee:

Six Precepts for Responsible Committee Performance

1. Get organized.
2. Get and stay informed.

EXHIBIT 1.4 Checklist for the Compensation Committee

- Ensure disinterest and independence from management.
 - Retain and maintain direct access to outside experts/consultants.
 - Establish and periodically review/update compensation philosophy.
 - Establish a compensation strategy (including pay plans) consistent with overall compensation philosophy and corporate objectives.
 - Ensure that shareholder and corporate economic values are prime drivers of the executive pay program.
 - Be sensitive to external pressures.
 - Be mindful of controversial pay practices.
 - Balance fixed versus variable rewards.
 - Define equity participation strategy.
 - Understand and coordinate all elements of executive pay.
 - Assess the real dollar value/cost of executives' total pay packages.
 - Carefully select recognized industry index and/or an appropriate peer group for the performance group.
 - Compare pay programs with relevant peer group.
 - Link payments with performance goals.
 - Set goals for CEO, evaluate performance against such goals, and set CEO pay levels.
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3. Keep an eye on the big picture.
4. Return to reason.
5. Consider the shareholders' perspective.
6. Communicate effectively.

Exhibit 1.4 contains a checklist covering typical duties of the compensation committee.

1. Getting Organized

Set the agenda. As noted previously, many topics generally fall within the purview of the compensation committee. To make sure that all are considered in a timely and effective manner, the compensation committee chair should at the beginning of the fiscal year prepare a schedule of meetings for the whole year, along with a tentative agenda for each meeting. To accommodate new topics arising over the ensuing months, a specific agenda should be prepared and circulated before each meeting. An example of such an annual schedule, along with possible recurring agenda items, is shown in Exhibit 1.5.

Provide timely information. It is best to provide written materials to each committee member at least a week before each meeting so that he

or she will have ample opportunity to review them in advance and will be able to come to the meeting fully prepared to ask pertinent questions and move the discussion forward. Such materials should include minutes of the prior meeting, and materials and information pertinent to the agenda for the current meeting—such as copies of any plans or agreements to be considered by the committee, reports and analysis from

EXHIBIT 1.5 Illustrative Compensation Committee Agenda

| Event | Meeting Date | Recurring Agenda Items |
|---|---|---|
| End of calendar/ fiscal year in December | Late February | <p>Approve minutes of prior meeting.</p> <p>Review prior-year operating results presented as required by bonus plan criteria.</p> <p>Evaluate performance of CEO for prior year, and review and approve recommended bonus plan payments.</p> <p>Review and approve recommendations related to current-year participation in bonus plan.</p> <p>Review and approve current-year bonus plan targets for organization units and plan participants.</p> <p>Review and approve personal goals of CEO for current year.</p> <p>Review and discuss draft of CD&A for inclusion in proxy.</p> <p>Review executive compensation disclosures for inclusion in proxy.</p> <p>Review new plan proposals for inclusion in proxy.</p> |
| After annual shareholders' meeting and approval of stock-related plans | June/ July or September/ October | <p>Approve minutes of prior meeting.</p> <p>Review and approve recommendations for annual equity grants.</p> <p>Review and approve midyear promotions, new hires.</p> <p>Receive consultant's report on fringe benefits and benefit costs, competitive practices, and recommended changes and costs.</p> <p>Receive annual management development and succession planning overview from CEO.</p> <p>Engage outside studies for various matters.</p> <p>Review performance of outside advisors.</p> |

| Event | Meeting Date | Recurring Agenda Items |
|--------------|--------------------------------|--|
| Late in year | November/ early December | <p>Approve minutes of prior meeting.</p> <p>Review consultant's report on compensation levels and competitive pay practices.</p> <p>Review and approve recommended changes in salary structure and bonus plan provisions.</p> <p>Approve additions and removals from bonus plan participation.</p> <p>Review executive compensation budget, and approve annual salary increases for next year.</p> <p>New ideas session (planning session for new ideas, plans, and programs).</p> <p>Discuss incentive measures for upcoming year.</p> <p>Annual review of executive severance plans.</p> |

outside experts, internally prepared information relevant to the matter, and proposed resolutions.

Engage outside experts. Issues faced by compensation committees today involve sophisticated techniques and require a facile understanding of financial measures and tax and accounting applications. The “level playing field” that resulted from stock option expensing has increased the use of alternative types of equity compensation vehicles, many of which may be less familiar to compensation committee members. The array of choices alone can be bewildering. Moreover, the role of the committee itself is becoming imbued with an overlay of regulatory requirements and legal nuances, while trends in shareholder litigation underscore the importance of relying on the advice of outside experts. Delaware courts in the well-publicized *Disney* and *Cendant* cases focused on the alleged failure of those compensation committees to seek expert advice in advance of important compensation decisions.

For these and other reasons, it is all but essential that the compensation committee look to competent outside compensation consultants and legal advisors. While it may be appropriate for the committee to engage its own legal counsel for special assignments, the relationship with the compensation consultant should be of an ongoing nature. It is axiomatic and essential that it should be the committee, and not management, that interviews and hires outside experts. The allegiance of such experts should be to the committee, and ultimately to the company, rather than to management.

Establish a meaningful CEO evaluation program. The compensation committee should create and adhere to an effective CEO evaluation program. NYSE and NASDAQ corporate governance rules require the compensation committee to review the CEO's performance on an annual basis, but this should be done regardless of any regulatory requirement. Such an evaluation is essential for the proxy statement CD&A, and provides a basis for determining whether the company's executive incentive compensation programs are achieving intended results. Chapter 3 addresses the CEO evaluation process.

Establish annual compensation committee (and perhaps board) evaluation programs. NYSE corporate governance rules require an annual self-performance evaluation by the compensation committee. If board compensation is within the purview of the compensation committee rather than the nominating/governance committee, it may also make sense for the compensation committee to implement the board evaluation program. The program should include feedback solicited from other directors, the CEO, other senior executives, and other interested parties. See Exhibit 1.6 for a sample board evaluation form.

2. Getting and Staying Informed

Understand the context. The committee cannot make valid compensation decisions in a vacuum. Even where the committee does not have direct oversight or responsibility for all aspects of compensation and benefits, it is imperative that the committee have an understanding of how all the pieces of the puzzle fit together. The committee should have access to information necessary to calculate the value of an executive's total compensation arrangement at any given time. For example, if the committee is considering one element of pay for the CEO, such as a long-term equity award, it must be able to do so in the context of the CEO's total pay, including all forms of compensation and benefits (such as base salary, short-term incentive opportunity, qualified and nonqualified deferred compensation, SERPs, perquisites, severance arrangements, and other previously granted long-term incentives), to ensure that the total compensation is reasonable and not excessive.

Naturally, not all elements of pay will be considered at a single committee meeting, and not all information before the committee at a given time will be presented with equal detail or emphasis. However, as baseline contextual information, the committee should insist on regularly being provided with the senior executives' total compensation tallies—perhaps in the form of a simple spreadsheet showing each element of pay and benefits, a brief summary of how each pay program operates, and an estimate of current rates, benefit levels, or balances.

EXHIBIT 1.6 Sample Form for Board Evaluation

Rate the following statements in relation to our board of directors:

| Topic Description | Rating* |
|---|---------|
| 1. The board knows and understands the company's beliefs, values, philosophy, mission, strategic plan, and business plan, and reflects this understanding on key issues throughout the year. | |
| 2. The board has and follows procedures for effective meetings. | |
| 3. Board meetings are conducted in a manner that ensures open communication, meaningful participation, and timely resolution of issues. | |
| 4. Board members receive timely materials for consideration prior to meetings. | |
| 5. Board members receive accurate minutes. | |
| 6. The board reviews and adopts annual capital and operating budgets. | |
| 7. The board monitors cash flow, profitability, net revenue and expenses, productivity, and other financially driven indicators to ensure the company performs as expected. | |
| 8. The board monitors company performance with industry comparative data. | |
| 9. Board members stay abreast of issues and trends affecting the company, and use this information to assess and guide the company's performance not just year to year, but in the long term. | |
| 10. Board members comprehend and respect the difference between the board's policymaking role and the CEO's management role. | |
| 11. The board acts to help the CEO by setting clear policy. | |
| 12. Board goals, expectations, and concerns are honestly communicated with the CEO. | |

*Rating 1 to 3, with 1 for "meets expectations" to 3 for "exceeds expectations."

Understand each element of the compensation program. The compensation committee, not management or the human resources department, is the "owner" of the company's executive compensation and employment plans, programs, and arrangements. As such, it is the compensation committee's duty to thoroughly understand all compensation programs, both simple and complex.

There is no one correct way to conduct this review, as long as it results in a full and thorough examination of each program. Generally, this

review will involve management (including the human resources department), the company's auditors, and the committee's independent advisors. Only when the committee has its arms around all aspects of each program can it make informed and appropriate decisions in implementing (and perhaps restructuring) the overall compensation strategy. *Regularly review and quantify the impact of termination and change-in-control provisions in all compensation plans and programs.* Change-in-control (CIC) arrangements have become quite commonplace for senior executives at many public companies. At some companies, CIC agreements or policies extend protections deeper into employee ranks, and in some cases, cover all employees. The committee must keep sight of the estimated aggregate cost of all such CIC protections, including tax gross-ups and lost deductions, under various circumstances. Because circumstances change and compensation programs can dramatically affect the cost of CIC arrangements in not-so-obvious ways, this exercise should be undertaken on a regular basis to guard against surprises if and when an actual CIC situation arises. In assessing the potential cost, the committee should consider that aggregate CIC payments of 1 to 3 percent of the transaction amount are generally within standard practice, at least with respect to large public companies.

The SEC's new executive compensation disclosure rules require a public company to quantify in the proxy statement the amount that each named executive officer would receive from the company if he or she had terminated employment on the last day of the prior fiscal year, assuming termination under a variety of circumstances, including termination in connection with a change in control. This new specific disclosure requirement will necessitate a disciplined and detailed analysis of all compensation plans and arrangements at least annually.

3. Keeping an Eye on the Big Picture

Compensation plans and programs should be consistent with the achievement of corporate strategy. This is especially true with incentive-based compensation. It makes little sense for the compensation programs to be motivating executives to achieve goals that do not help to achieve the company's business objectives.

The committee must take an active hand in the process. For example, with the aid of management and outside advisors, each member of the committee should learn and understand the financial measures that are most relevant to the company's success and design incentive programs on the basis of those measures. The committee should understand how any year-end financial reporting adjustments (or other events) might affect such measures and thereby affect compensation based on those measures. Where feasible, performance compensation programs should be designed

to minimize the possibility of manipulation to achieve certain results—not on the assumption that management would do so, but more as evidence of a sound and reliable program.

The compensation committee should be prepared to explain to investors in the CD&A how the short-term and long-term incentive programs for executive officers relate specifically to and complement the company's overall strategy. Moreover, the committee should be thoughtful in setting and explaining goals for incentive compensation. For example, setting “stretch” or very demanding goals and being prepared to pay commensurate with achieving this level of performance can be an effective driver of performance.

4. Returning to Reason

There is no denying that executive compensation in the 1990s soared to unsustainable levels. Fueled by the seemingly endless bull market, the investing public's “irrational exuberance” (as dubbed by Alan Greenspan as early as 1996), and perhaps even unintentionally by the then-prevailing benchmarking practices of compensation consultants in which all executives were slated for above-average pay levels, executive compensation simply got out of hand. In the sobering post-scandal environment of the mid-2000s, boards and management alike recognized that something dramatic must be done to restore investor confidence and return compensation to sensible, sustainable levels. If the private sector cannot be disciplined and effective in achieving this, it is all but certain that Congress will intervene.

We are already seeing this in the form of sweeping legislation passed on July 21, 2010, when President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. Still, only two provisions related to executive compensation have been implemented (Say on Pay and Say When on Pay). However, with the installation of a new SEC Chairman, Mary Jo White, there have been signs and messages that the backlog of new SEC guidelines, particularly those related to Dodd-Frank, will soon be released. These new rules are in addition to the SEC rules relating to disclosure of performance measures and target levels, and the impact of risk on executive compensation plans and programs that became requirements in the previous few years.

Steering the correction course requires the attention, support, and serious direction of the compensation committee. Consultants and advisors should be given free reign and encouragement to give an honest review and assessment of the company's pay practices and to speak up when changes are in order. The compensation committee must then be prepared to make hard decisions or negotiate with management if cutbacks on existing compensation are recommended in one area or another. Evidence of

real negotiations with management can be of evidentiary importance in future shareholder litigation.

All this is not to say that executive pay is evil or unnecessary. It is, of course, still true that competitive compensation is needed to attract and retain the best executive talent. The compensation committee will continue to need to understand the “market” for executive compensation, in both form and levels of pay. Independent compensation specialists are best equipped to provide this information. However, the common practice of setting pay based on benchmarking for comparable positions gleaned from survey data is one of the main culprits for runaway compensation in the 1990s. This is because so many companies targeted executive pay at the 75th percentile of the selected peer group. It is easy to see, in hindsight, that this annual ratcheting effect—where this year’s 75th percentile becomes the next year’s 50th percentile—led to unrealistically high competitive data. Moreover, there is considerable room for manipulation of such studies, by cherry-picking the peer companies, for example, to include those that recently experienced aberrationally strong performance, those that emphasize one element of pay over others, or those that are not appropriate peers of the company based on revenue, market cap, or other factors. While the committee need not turn away from considering objective outside data as a legitimate measure of competitive practice, it can safeguard the process by making sure its consultants understand the committee’s expectation of candor and objectivity, and by asking the right questions about how and why the data were selected. The mechanical process of compensation benchmarking is discussed later in this chapter.

5. Considering the Shareholders’ Perspective

The compensation committee must consistently ask the question, “Is this in the shareholders’ best interests, and how will shareholders view it?” In today’s business environment, shareholders are taking a greater interest than ever before in matters of executive compensation. While this does not change the duty or allegiance of the committee, it does provide a useful focus to its deliberations.

Shareholder value is paramount. In general, executive compensation should be accretive to shareholder value. Existing and new programs should be considered by the compensation committee in this context. The committee should analyze each compensation program with a view to its potential effects on financial results and shareholder dilution, and whether such effects can be managed or mitigated. For example, in the case of an equity-based compensation plan, the source of shares to pay participants (i.e., newly issued shares or repurchases in the market) can affect the dilution analysis.

Understand and consider institutional investor concerns. Institutional investors have been making their voices heard loud and clear, aided by a number of factors, including the post-Enron NYSE and NASDAQ rules that require shareholder approval for all new or materially modified equity compensation plans, new rules that prohibit brokers from voting street-name shares on compensation plan proposals without the express direction of the beneficial owners, and the increasingly high approval rate of shareholder proposals in recent proxy seasons. Shareholder activism has matured considerably from its roots in the 1970s. Independent research firms such as IRRC (Institute for Corporate Responsibility) glean, organize, and make available information on corporate governance and social responsibility issues affecting investors. IRRC does not advocate on any side of the issues it covers. A host of institutional investor advisory groups, such as Institutional Shareholder Services; Glass, Lewis & Co.; and the Council of Institutional Investors, as well as large investor pension funds such as the Teachers Insurance and Annuity Association–College Retirement Equities Fund (TIAA-CREF); the California Public Employees’ Retirement System (CalPERS); the State of Wisconsin Investment Board (SWIB); and the New York City Employees’ Retirement System (NYCERS); and large mutual funds such as Fidelity Investments, take a more confrontational stance on issues. Most have formulated complex models for assessing the potential dilution and “value transfer” of proposed compensation plans. Together or individually, these groups make possible powerful voting and economic blocs that cannot be ignored.

The compensation committee should be proactive in anticipating institutional investor concerns. Corporate governance issues, such as the independence of directors, organization of the board, incentive plans and programs, CEO selection and succession, employment agreements, executive stock ownership, insider trading actions, compensation levels, and other related issues are fair game for shareholder comment. It is usually productive to seek the input of the company’s largest institutional investors on compensation proposals well in advance of putting them up for shareholder vote. Often, it is possible to adjust proposed plan provisions in a way that will make the difference in the plan being approved or voted down.

6. Communicating Effectively

Take control of the CD&A. The CD&A that appears in the annual proxy statement provides the best window into the work of the committee. The amount of candor, care, and detail that goes into that report speaks volumes about how seriously the committee takes its role and responsibility. The preparation of this report should not be relegated to management, the compensation consultant, or legal counsel. Rather, it should reflect the independent and thoughtful analysis of the committee, even if others participate

in the drafting. In a shift of focus from prior years, the CD&A is “company disclosure” rather than a report of the compensation committee, and it is deemed “filed” with the SEC rather than “furnished.” This means that the company has liability for the CD&A under applicable securities laws and the CD&A is covered by the CEO and CFO certifications required by the Sarbanes-Oxley Act of 2002. Because of these new, more stringent standards, it is expected and appropriate for the preparation of the CD&A to be a collaborative effort, involving management, finance, human resources, internal legal staff, and outside advisors. But the compensation committee, as the architect of the company’s compensation philosophy and programs, should be a primary and active participant in the process. A straightforward and thorough explanation of the committee’s actions and philosophy is critical to a meaningful report.

See Appendix E for sample CD&As taken from several recent proxy statements, the first year for such reports.

Compensation Benchmarking

Compensation committees are constantly examining whether the compensation levels of the top executives are reasonable, from both an external perspective and an internal perspective. This is done for two reasons. First is to ensure that the pay levels are competitive, because if they are not (otherwise referred to as “below market”), another company may try to raid the executive talent pool. Second is to ensure that the compensation levels are neither too high nor too disproportionate (i.e., there is reasonable balance between salary, annual bonus, long-term incentives, pension, and so on).

This examination generally entails two processes. First is to collect and review recent and reputable surveys (usually published by compensation consulting or accounting firms). These surveys must be carefully reviewed to determine the methodology used and the quality of the data. For example, a survey might say that the median salary of CEOs in the biotechnology industry is \$400,000; however, upon closer review, it may be discovered that only three companies were included, and that one of the companies has a founder CEO who receives a nominal salary. Accordingly, these surveys are helpful but cannot—in and of themselves—be used to set executive compensation levels.

The second process is to prepare a benchmarking or comparison study. This can be done in-house, but most companies prefer to use outside advisors. The most important aspect of these studies is to construct a peer group of companies that both the compensation committee and management agree represents “market.” In addition, there should be a minimum of 10 peer companies. Generally, 15 to 30 companies would be preferred to ensure that any anomaly (known as an “outlier” or a “red circle”) would

not significantly impair the overall results. With the development of sophisticated databases, it is not uncommon for some companies to have peer groups in excess of 50 companies.

Peer companies generally are selected based on similarities to the subject company in terms of revenues, market capitalization, and/or industry, often using Standard Industrial Classification (SIC) codes that are the same as or similar to the subject company. Sometimes, other aspects are considered, such as geography, company age, financial performance, and so forth. No matter what and how many characteristics are used to construct the peer group, the key is for all parties to agree that the peer group is representative of an appropriate “market.”

After the peer group is finalized, the next step is to collect and collate executive compensation data, either from private databases or culled from publicly filed documents, such as proxy statements and Form 10-Ks. Of course, each data point must be reviewed to ensure that it is correct. For example, some benchmarking studies will mingle different fiscal years. Other benchmarking studies may mechanically cull data from a proxy statement without any analysis, and thus could, for example, use an “annual salary” amount that actually is for a partial year. Other benchmarking studies may apply inconsistent valuation methodologies (such as valuation of stock options or other long-term incentive awards). In addition, more and more benchmarking studies are including performance analysis of each peer company. This is then used to determine whether the compensation level should be set at, below, or above the peer group’s median level. For example, if the subject company is performing below the median of the peer group, then arguably the compensation levels should also be below the median of the peer group.

Finally, after all the data are collected, reviewed, and otherwise “scrubbed,” they are placed into a model that typically shows quartiles and what percentile levels apply to the company’s existing executives or candidates. An example of such a model is shown in Exhibit 1.7.

These models also typically show ratios, such as between target annual bonus and salary, long-term incentives (LTIs) and salary, and LTIs and total compensation. In addition, some companies use ratios to set executive compensation levels below the CEO (e.g., the chief operating officer’s salary level is set at 75 percent of the CEO’s salary level).

While many companies have used these benchmarking studies as a rigid guide to setting executive compensation, the better practice is to apply both an objective and subjective analysis of the data. In other words, the data are first quantitatively reviewed and then qualitatively reviewed. The reason for this is that each company has its own particular set of facts and circumstances, and square pegs should not be forced into round holes. For example, assume a company wants to pay its CEO at “market median,” that

EXHIBIT 1.7 CEO Benchmarking Study Template

| Company | CEO | Salary | Target Bonus | Total Actual Bonus | Total Cash Comp | Stock Awards | Stock Options | Other LTI | Total LTI | Other Comp | Total Comp |
|-----------------|-----|--------|--------------|--------------------|-----------------|--------------|---------------|-----------|-----------|------------|------------|
| 1 | | | | | | | | | | | |
| 2 | | | | | | | | | | | |
| 3 | | | | | | | | | | | |
| ... | | | | | | | | | | | |
| 20 | | | | | | | | | | | |
| Subject company | | | | | | | | | | | |
| Minimum | | | | | | | | | | | |
| 25th percentile | | | | | | | | | | | |
| 50th percentile | | | | | | | | | | | |
| 75th percentile | | | | | | | | | | | |
| Maximum | | | | | | | | | | | |
| Average | | | | | | | | | | | |

the median CEO salary of the peer group is determined to be \$500,000, and the salary of the subject company's CEO is \$650,000. The compensation committee, however, when it hired the CEO, agreed to the \$650,000 salary level because that was the CEO's salary level at the previous employer. Accordingly, the salary level will be in the upper quartile, and the compensation committee will most likely need to adjust other components of this CEO's compensation (but not the salary) to bring it within "market median."

The Importance of Compensation Committee Meeting Minutes

Today's heightened focus on corporate governance in general, and executive compensation in particular, justifies a close review of the processes of the compensation committee and its documentation of the same. It has always been customary corporate practice to keep minutes of committee meetings. However, it is important to recognize that minutes, which are easily attainable by shareholders, are as important in what they don't say as what they do say.

Historically, many companies have taken the view that perfunctory, barebones minutes were adequate and even preferred—a means of satisfying minimum corporate procedural requirements without airing dirty laundry in the form of dissenting opinions or serious debate that might suggest lack of unanimity or weakness of resolve. However, recent shareholder litigation and apparent trends in judicial review, as discussed more fully in Chapter 5, suggest that the better approach favors thoughtful minutes that reflect in detail the ultimate action taken, discussion of each topic, the time devoted to the discussion, the alternatives reviewed, the consideration of relevant materials and outside advice, and the rationale for each decision reached. Two well-publicized Delaware court cases illustrate how the quality of minutes can make a difference very early in the litigation process.

In 2003, the Delaware Chancery Court refused to dismiss a complaint by shareholders in *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del Ch. 2003), alleging that Disney's directors breached their fiduciary duties when they approved an employment agreement with its president, Michael Ovitz, which ultimately resulted in an award to him allegedly exceeding \$140 million after barely one year of employment. The court focused heavily on what was reflected in the minutes of the compensation committee, from which it appeared that:

- No draft employment agreement was presented to the compensation committee for review before the meeting.
- The committee received only a summary of the employment agreement, and no questions were asked about the agreement.

- No expert consultant was present to advise the compensation committee.
- The compensation committee met for less than an hour and spent most of its time on two other topics, including the compensation of one director for helping secure Ovitz's employment.
- No time was taken to review the documents for approval.
- The committee approved the hiring in principle but directed Michael Eisner, Disney's CEO and Ovitz's close friend, to carry out the negotiations with regard to certain still-unresolved and significant details.

Referring to the board meeting that followed the compensation committee meeting, the court further noted that less than 2 of 15 pages of minutes were devoted to discussions of hiring the new president and that, so far as such minutes reflected, no presentations were made to the board regarding the terms of the draft agreement, no questions were raised, and no expert consultant was present to give advice.

The *Disney* court concluded that the alleged facts, if true, could support a determination that the defendant directors' action went beyond a mere breach of the duty of care to amount to a lack of good faith, such that their action would not be protected by the business judgment rule or by the company's director exculpation provision in its charter. If so, the directors could be held personally liable and unindemnifiable. Ultimately, after a full trial on the merits, the Delaware court in *Disney* determined that the directors did not breach their duties of care or good faith, although the process they followed fell short of current best practices. The lesson from the early phase of the *Disney* case remains intact: that thoughtfully prepared minutes can make the difference as to whether a well-pled fiduciary duty claim survives a motion to dismiss.

Also to the point is the April 2004 settlement of shareholder litigation against Cendant Corporation. The complaint alleged the directors breached their fiduciary duties in approving an amendment to the CEO's employment agreement that would have provided, among other things, an uncapped annual bonus stated as a percentage of the company's pretax earnings, \$100 million of life insurance for the rest of his life, and severance benefits that could have exceeded \$140 million. According to the complaint, the minutes of the compensation committee reflected:

- No analysis of the potential cost to Cendant of the new agreement
- No discussion of the committee's deliberation on various aspects of the proposed changes to the agreement
- No advice from outside advisors, such as compensation experts or independent legal advisors
- No questions raised about the financial consequences to the company under various severance scenarios

- No involvement by any member of the compensation committee in the negotiation of the agreement

Even if the directors did in fact exercise more care and deliberation than alleged, the quick settlement of this lawsuit (the month after it was filed) might indicate the defendants' recognition of the damning potential impact of scant minutes on their ability to establish adequate proof to the contrary.

The lesson from these cases and others sure to come is this: Adherence to fiduciary duties is an absolute requirement, and keeping minutes that reflect the proper amount of attention, deliberation, and consideration of compensation decisions can be of pivotal evidentiary value in shielding directors from personal liability.

Accordingly, compensation committee meeting minutes should reflect:

- Each discussion topic and the approximate time that the matter was considered
- Whether outside advisors were present or consulted and the extent of their involvement
- The committee's consideration of any cost analyses for specific proposals, such as financial modeling of employment and severance contracts under various scenarios
- Whether questions were asked, about what in general, and by whom (but minutes need not, and should not, be at the level of a transcript of the meeting)
- Due consideration by the committee of the reasonableness of the particular element of pay being voted on, when viewed in context with the executive's overall compensation package

Call to Action

The work of the modern compensation committee is serious business. Much progress has been made over the course of the last five years since the monumental corporate failures that set in motion a deluge of corporate reform measures. Compensation committees, for the most part, have exhibited a sincere effort to restore the trust of corporate America, but it is not an overnight task. As difficult as it has been in the last three years to grapple with the sea-change in accounting rules and tax and securities legislation that affect all aspects of executive pay, the compensation committee cannot afford to take a breather. Until there is widespread perception that the excesses of prior years are under control, we can expect to see more pressure brought to bear from all quarters: Congress, shareholder advocates, and the mainstream media. The groundwork has been laid, the paving has begun, and the road stretches out before us.

