

October 11, 2004

Update: SEC Actions Challenging the Adequacy of Disclosure of Executive Compensation

Recently, the SEC has begun taking a closer look at the adequacy of disclosure relating to executive compensation. This is highlighted by the recent enforcement actions by the SEC against Tyson Foods, Inc. and General Electric Company, which are discussed in more detail below. In addition, Alan L. Beller, director of the division of corporate finance at the SEC, is scheduled to give a speech at a conference later this month on what the agency expects in terms of compensation disclosure and actions it plans to take when it does not consider disclosure sufficient.

Tyson Foods, Inc. On August 16, 2004, Tyson Foods, Inc. announced it received notice the staff of the SEC intends to recommend a civil enforcement action against Tyson and is considering seeking a monetary penalty. The notice alleges that Tyson's proxy statements for 1997 through 2003 failed to comply with SEC regulations with respect to disclosure regarding perquisites provided to Don Tyson, former Senior Chairman of Tyson, totaling approximately \$1.7 million and that Tyson failed to maintain an adequate system of internal controls regarding the personal use of company assets and the disclosure of perquisites and personal benefits. Don Tyson has voluntarily repaid \$1.5 million to Tyson for certain items identified by independent members of the Board of Directors. The SEC is considering recommending bringing administrative cease-and-desist actions against Don Tyson, as well as two Tyson employees for allegedly causing these disclosure failures.

Tyson first announced that it was the subject of a formal non-public investigation by the SEC on March 29, 2004.

General Electric Company. On September 23, 2004, the SEC announced that it instituted and settled enforcement proceedings against General Electric Company. The SEC found that from 1997 to 2002 GE failed to fully and accurately describe in proxy statements and annual reports the retirement benefits John F. "Jack" Welch, Jr., former chairman and CEO, was entitled to receive from GE. The SEC concluded that GE's inadequate disclosure violated Sections 13(a) and 14(a) of the Securities Exchange Act of 1934 and Rules 13a-1, 14a-3 and 14a-9 of the Exchange Act. GE settled the proceedings by consenting to the entry of an order by the SEC that it cease and desist from violating the proxy solicitation and periodic reporting provisions of the federal securities laws.

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GE and Welch entered into an “employment and post-retirement consulting agreement” in 1996 which was filed as an exhibit to GE’s 1996 Form 10-K and incorporated by reference as an exhibit in each subsequent Form 10-K until Welch retired in 2000. The Welch agreement disclosed that Welch would receive access to company facilities and services comparable to those provided to him prior to his retirement, including access to company aircraft, cars, office, apartments and financial planning services. GE’s 1997 proxy statement referred to Welch’s entitlement to “. . . continued lifetime access to Company facilities and services comparable to those that are currently made available to him by the Company.” GE included this same disclosure in each of the subsequent five proxy statements it filed through 2002.

The SEC found that GE’s disclosure did not provide investors with details of many of the most significant “facilities and services” Welch had been provided prior to his retirement, including personal use of GE-owned aircraft, personal use of chauffeured limousines and home security systems. The year following Welch’s retirement, Welch received approximately \$2.5 million, previously estimated by GE to be \$1 million per year, in benefits under his retirement agreement, which included:

- access to GE aircraft for unlimited personal use and for business travel;
- exclusive use of a furnished New York City apartment that, according to GE, had a rental value of approximately \$50,000 per month and a resale value in excess of \$11 million;
- unrestricted access to a chauffeured limousine driven by professionals trained in security measures;
- a leased Mercedes Benz;
- office space in both New York City and Connecticut;
- the services of professional estate and tax advisors;
- the services of a personal assistant;
- communications systems and networks at Welch’s homes;
- bodyguard security for various speaking engagements; and
- installation of a security system in one of Welch’s homes and continued maintenance of security systems GE previously installed in three of Welch’s other homes.

The SEC found that GE had an obligation to fully describe Welch’s retirement benefits under Item 11 of Form 10-K and Item 8 of Schedule 14A, both of which require the

information required by Item 402 of Regulation S-K. The underlying purpose of Item 402 disclosures with respect to executive compensation is “to improve shareholders’ understanding of all forms of compensation paid to senior executives and directors,” and “enhance shareholders’ ability to assess how well directors are representing their interests.”

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The SEC’s recent challenges to disclosure of executive compensation, particularly with respect to perquisites, should serve as a reminder to companies as they prepare future proxy statements and annual reports. Companies should ensure that they have adequate disclosure controls and procedures to facilitate the inclusion of elements of compensation and benefits subject to disclosure in the company’s proxy statement and annual report and that both the Disclosure Committee and the Compensation Committee are aware of these disclosure requirements. The potential for other enforcement actions in respect of disclosure controls and procedures is underscored by the reference to Rule 13a-15 (which requires the maintenance of disclosure controls and procedures) in the second enforcement action against Siebel Systems for violations of Regulation FD.

Should you have any questions concerning disclosure relating to executive compensation, please do not hesitate to call any of the following members of the Paul, Weiss Securities Group. In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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