

Panel IV: Inside the SEC

Presenters:

- **B. Shayne Kennedy, *Partner*, Latham & Watkins LLP**
- **James J. Moloney, *Partner*, Gibson, Dunn & Crutcher LLP**
- **Randall Wick, *Senior Vice President and General Counsel*, Emulex Corporation**

SEC Comment Letters

■ Executive Compensation (CD&A)

“We are continuing to apply significant resources to ensuring that investors obtain quality disclosure about executive compensation and, to this end, the comment letters we most recently issued covered many of the same themes and topics that were the subject of the October 2007 report.” John W. White, Director, Division of Corporate Finance

• 3 Areas of Focus

- Need for more analysis
- Disclosure of performance targets
- Disclosure relating to benchmarking

SEC Comment Letters

■ Need for More Analysis

“[M]any others have missed the opportunity to transform their presentation into the useful analytical discussion that should be the essence of the CD&A. Rather than moving forward toward better quality disclosure, they are merely treading water.”

● Areas of focus

- Material elements of compensation
- How the company arrived at the varying levels of compensation
- Why the company believes its practices fit within its overall objectives
- Extent to which compensation committee is reviewing each element of compensation that comprises the entire compensation package

Sample SEC Comment: We refer you to Section II.B.1 of the Securities Act Release No. 33-8732A (Aug. 26, 2006). The Compensation Discussion and Analysis should be sufficiently precise to identify material differences in compensation policies with respect to individual executive officers. In future filings, please explain the reasons for the differences in the amounts of compensation awarded to named executive officers.

SEC Comment Letters

■ Disclosure of Performance Targets

- When is disclosure of performance targets required?
 - If required, when can performance targets be omitted?
 - What additional disclosure is required when performance targets are disclosed?
 - What additional disclosure is required when performance targets are omitted.
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- **Areas of focus**
 - Complete picture of range of targets and how achievement resulted in payouts.
 - Impact of discretion with respect to performance based payouts
 - Identifying specific contributions where individual performance is a significant factor
 - Description of how one element of compensation impacts compensation from other elements

Sample SEC Comment: In future filings, please disclose each performance target and threshold level that must be reached for payment to each officer under the annual incentive plan. Disclose the extent to which the performance targets were achieved. To the extent the targets are not stated in quantitative terms, explain how the compensation committee determined the officer's achievement levels for that performance measure. If you believe that disclosure of performance goals is not required because it would result in competitive harm such that you may omit this information under Instruction 4 to Item 402(b) of Regulation S-K, please provide in your response letter a detailed explanation of such conclusion. If you believe you have sufficient basis to keep the information confidential, disclose in future filings how difficult it would be for the executive or how likely it would be for you or a business unit to achieve the undisclosed performance goal.

SEC Comment Letters

■ Disclosure Relating to Benchmarking

- What is benchmarking?
- When must benchmarking be disclosed?
- **Areas of focus**
 - Identify the companies that comprise the peer group
 - Provide meaningful disclosure into the basis for selecting the group and the relationship between actual compensation and benchmark data
 - Describe extent to which compensation levels are established to remain competitive with peer group

Sample SEC Comment: In future filings, please identify the companies that you have relied upon for benchmarking purposes, if applicable. If you have benchmarked different elements of your compensation against different benchmarking groups, please identify the companies that comprise each group. Refer to Item 402(b)(2)(xiv) of Regulation S-K. In addition, please disclose the actual percentiles for total compensation, and each benchmarked element of compensation, in the most recently-ended fiscal year, including a discussion of where you target each element of compensation against the peer companies and where actual payments fall within targeted parameters. To the extent actual compensation was outside a targeted percentile range, please explain why.

SEC Comment Letters

■ Tips for Practical Application

- Use charts, tables and summaries to facilitate investor understanding
- Avoid boilerplate disclosure
- Focus on the “how and why,” not a description of philosophies
- Compensation committee should be focusing on individual elements of compensation, as well as collective package
- Perform a competitive harm analysis with respect to performance targets while preparing disclosure (not when the SEC asks)
- If performance targets are omitted, provided detailed disclosure on ability of officer to achieve the undisclosed targets
- If benchmarking, identify the companies in the benchmark group. Provide criteria upon which selection of group was based
- Recently proposed rules may require compensation committee to analyze the impact of compensation on employees’ risk taking activities

New Rules / Proposed Rulemaking

- **Shareholder Access**
 - Rule 14a-11 approach
 - Rule 14a-8 approach

New Rules / Proposed Rulemaking

- **Amendments to the Proxy Solicitation and Disclosure Rules**
 - Changes to Rule 14a-2(b) exempt solicitations
 - MONY Group, Inc. v. Highfields Capital Mgmt. L.P. (2nd Cir. May 13, 2004)
 - Changes to Rule 14a-4(d) short slates
 - Allow mix and match of nominees
 - Codify existing no-action letter(s) to Carl Icahn and others Enhanced Director and Nominee Disclosure
 - New Disclosure re Company Leadership Structure
 - Board's Role in Risk Management Process
 - Compensation Consultants
 - Reporting Results of Meetings on 8-K (four business days)

The SEC on Gatekeepers, Clawbacks and Control Persons: Personal Liability Without Personal Misconduct

- **SEC Clawback – Sarbanes Oxley Act Section 304**
 - *SEC v. Maynard L. Jenkins*, District of Arizona (complaint filed July 22, 2009)
- **SEC Control Person Liability – Foreign Corrupt Practices Act**
 - *SEC v. Nature’s Sunshine Products, Inc., Douglas Faggioli, and Craig D. Huff*, District of Utah (complaint filed July 31, 2009)