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VENTURES AND INTELLECTUAL PROPERTY GROUP

LETTER

2006 1st Quarter

Soaring Energy Costs: Opportunities for Consumers and Entrepreneurs

Prices at the pumps continue to rise. The cost of fuel to heat our homes continues to escalate. Particularly in New England, we have an energy shortage that threatens darkness in highly populated areas. And according to the President, "America is addicted to oil." These factors have led to an "energy independence" movement to reduce our dependence on foreign oil and address an increasingly scarce supply of natural gas and other energy producing resources.

Historically, electricity generation has largely been something that has happened in large plants, often natural gas-fired or nuclear in the Northeast and coal in other parts of the country. The electricity produced is transmitted great distances (adding to its cost and losing some of its power along the way) across an integrated transmission grid to consumers. Each piece of the grid is dependent on the other, so that disruption at any one point threatens all power transmission, as evidenced by the August 2003 blackout. Continual growth in demand, combined with the inevitable closure (for reasons of age, economics, safety or public pressure) of existing generating plants, and the increasing cost of foreign oil and natural gas mean that society needs to take action and decide how to replace (and increase) capacity. Replacing capacity with distributed renewable resources, in addition to promoting energy independence, provides an added measure of grid security and protection against catastrophic grid attacks and failures.

Both the state and federal governments have enacted legislation to stimulate investment in renewable energy sources. Government is working towards meeting our growing energy demands while striving for and maintaining security, energy independence and environmental protection. Additionally, many industry participants are themselves turning towards cleaner sources of energy due to the many benefits renewable sources of energy provide. Renewable energy resources reduce financial risk to consumers. Many renewables, including wind and solar, have predictable cost-streams throughout their operating lives. Such technologies also do not suffer from seasonal changes in natural gas or other fuel prices. All renewables contribute to a diversified energy portfolio, increasing energy security, and minimize the risks associated with traditional power sources such as nuclear power.

Renewables can also respond rapidly to demand growth. Renewables such as solar and wind can be manufactured in small or large increments and deployed either a few at a time or many at a time. As additional capacity is needed, more turbines or panels can simply be added. Higher costs associated with environmental regulations are minimized by renewable technologies, as most renewables have low, or even zero, emissions. Thus, there is no threat of increased operating costs resulting from new regulations.

Fuel cells provide another technological alternative for electricity generation. They have applications in portable devices, motor vehicles, and both small scale and large scale stationary systems either as part of grid generation or on-site distributed generation. Connecticut has been at the forefront of developments in this area with companies such as UTC Power, Fuel Cell Energy and Proton Energy leading the charge with installations around the world.

Recognizing these benefits, government has enacted legislation in an attempt to spur investment in and use of alternative energy technology. The availability of grants, tax credits and low-cost financing make renewable technology attractive to many consumers. Technology grants are also available for nascent renewable technologies. The Connecticut Clean Energy Fund, which is funded by ratepayers through a surcharge on electric utility bills and administered by Connecticut Innovations, sponsors a number of financing programs, including an operational demonstration program that provides funding for early stage clean energy projects that "rely on the innovative use or application of renewable energy resources or technology." The ability of a project to secure a commercial trial is a valuable means of introducing new renewable energy products into the mainstream market and provides outside investors with assurances of a tested venture.

Consumers are actively pursuing alternative energy installations for more than just environmental benefits and reliable supply. On-site distributed generation provides price protection from skyrocketing energy prices and can even provide consumers with a revenue stream to offset required energy purchases. Connecticut is among the ever-growing list of states that have enacted renewable portfolio requirements. Portfolio requirements mandate electric suppliers to procure a certain percentage of their electric supply from renewable resources. Most portfolio requirements escalate annually. In Connecticut, 10% of all electricity supplied must be from renewable resources by 2010. Substantial penalties are assessed for failure to meet the renewable portfolio requirements. One way for suppliers to meet the portfolio requirements is through the purchase of renewable energy credits, or RECs. Currently, there are not enough renewable energy supplies or RECs to meet the needs of all electric suppliers. Thus, suppliers are forced to try and purchase RECs from other states and regions. Consumers installing renewable sources of energy earn RECs for the power generated by the customer-side resource. Those RECs can then be sold in the market to electric suppliers seeking to meet their portfolio requirements.

With such a large pot of government money available for renewable technology installations and the monetary benefits available to consumers installing customer-side renewable distributed generation, consumers and developers are pursuing new, renewable energy technologies that best serve their energy needs. The market for renewables will only grow as demand increases and traditional sources of supply, such as natural gas and oil, become increasingly expensive and scarce. Some of the world's largest companies are already beginning to invest in renewable energy technologies, including Shell, General Electric, Siemens and United Technologies. While the public sector does play an important role in encouraging investments in renewable technologies, energy independence is not achievable without substantial investment and involvement by the private sector.

Shipman & Goodwin's Energy Practice Group combines the knowledge and experience of our energy lawyers with the talent and ability of our Ventures and Intellectual Property (VIP) Group to help clients take advantage of investment opportunities in the energy market.

Our Energy Practice Group routinely provides the following services:

- Reviewing current energy rate plans and usage at client facilities;
- Evaluating and recommending alternative energy sources;
- Evaluating and recommending various financing vehicles including state grants, low or no interest loans and rebates for energy efficiency installations;
- Preparing requests for proposals, if necessary, for energy facility installation contractors;
- Providing advice and counsel as to recently enacted energy legislation, including the Connecticut Energy Independence Act and the federal Energy Policy Act, and monitoring and updating clients as to new and emerging legislative and regulatory developments; and
- Negotiating contracts and agreements.

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Shipman & Goodwin's **Ventures and Intellectual Property (VIP) Group** has a long-standing practice of assisting high-technology and other emerging growth companies, as well as venture capital and other financing sources and financial intermediaries. We represent public and private companies in all stages of their development in various industries, including engineered materials, semiconductors, photonics, computer hardware and software, internet services, telecommunications, e-business and health care, in both domestic and international transactions. We regularly provide advice on venture capital finance and fund formation, securities offerings, equity compensation, intellectual property protection, technology development and commercialization, joint ventures and strategic relationships, and internet and e-business matters. VIP Group Co-Chairs: Donna Brooks and Thomas Flynn

Our energy lawyers have actively participated in energy industry restructuring in the Northeast. The push toward a competitive market for electric service has caused numerous legal challenges for industry participants and energy users alike. The Energy Practice Group combines its extensive regulatory experience with numerous other practice areas such as our VIP Group, tax, finance, environmental and land use law in order to provide a broad array of services meeting diverse client needs. Our energy attorneys are at the forefront of various industry and market-oriented organizations, providing up-to-date market information and insights.

The firm's energy attorneys routinely participate in regulatory proceedings on the state and federal level. Our attorneys provide advice regarding proposed legislation, energy options and contracts, generation facility siting matters, transfer of ownership, land use and environmental permitting for new and expanded facilities. Our attorneys have represented the regional independent system operator, the owner and operator of large fossil-fuel fired generating plants, merchant power plants, waste-to-energy facilities, cogeneration facilities, distributed generation facilities, natural gas companies, state agencies and quasi-public agencies.

We currently focus our energy practice on evaluating end-use commercial and industrial energy use and developing cost saving strategies through creative contracting or by assisting with the selection of engineered solutions. Our attorneys are well versed in renewable energy technology and portfolio standards and advise clients with respect to both grid and demand-side distributed generation. Finding unique solutions to common problems and assisting clients in managing energy options are a core part of our practice. As market changes force energy prices to record levels, our energy attorneys are able to focus clients' resources and implement strategies that are tailored to specific client needs.

Through our VIP Group, we are also experienced in representing entrepreneurial businesses and structuring venture capital and other financing arrangements.

- We have represented alternative energy producers in public and private securities offerings.
- We have represented businesses in project financing of co-generation plants.
- We have represented start-up ventures in many industries.
- We have represented financing sources in alternative energy investments, subsidies and grants.

As you can see, we offer "soup to nuts" advice from analyzing options, project planning and permitting, to financing new businesses, technologies and installations. Let our energy bring your energy to market. *For more information please contact Jennifer Janelle at (860) 251-5912 or jjanelle@goodwin.com or Donna Brooks at (860) 251-5917 or dbrooks@goodwin.com*.

VENTURE BRIEFS

Liquidation Preference Applied to Merger Proceeds: In *Matthews v. Groove Networks, Inc.*, the Delaware Chancery Court granted defendants' motion for summary judgment finding that the certificate of incorporation ("COI") of Groove Networks, Inc. intended that merger proceeds be subject to the liquidation preference in favor of preferred stockholders. The parties disagreed about the meaning of "Distributable Assets" as used in the COI, when the company merged with Microsoft Corporation in March 2005. At the time of the merger, the company's capital structure consisted of one class of common stock (of which plaintiff was a member) and eight classes of preferred stock. Because the company applied the liquidation preference to the merger proceeds, the plaintiff received nothing from the merger and subsequently filed suit. The COI stated that, "in the event of a merger, the preferred shareholders are to be paid from the Company's 'Distributable Assets' which are defined as the Company's assets . . . from capital, surplus or earnings." The COI also included in the definition of Distributable Assets the proceeds from the sale of a majority of the company's assets. The plaintiff argued that because the definition of Distributable Assets did not expressly include proceeds from a *merger*, such proceeds were not subject to the liquidation preference. The court rejected this argument. First, the COI stated that one of the rights of the preferred stock is that "in the event of a merger of [the Company], the assets shall be distributed according to the Liquidation Preference." Second, the COI had only one preference scheme, and therefore, the liquidation preference must have applied to the merger proceeds. Third, the plaintiff's interpretation made "little sense" because the Company's assets of capital, surplus and earnings are transferred to the acquiring corporation in a merger and not to the shareholders. Therefore, the court stated that if it adopted plaintiff's interpretation, the liquidation preference would have applied in the case of a merger but would have no effect. Finally, the court observed that the COI provided that the liquidation preference could be paid in stock of an acquiring company in the event of a merger which means the COI must have intended that stock of an acquiring corporation be considered Distributable Assets. *Carol McVerry, (860) 251-5839 or cmcverry@goodwin.com*

VENTURE BRIEFS
continued

FASB Issues New Standards in Accounting for Certain Hybrid Financial Instruments. On February 16, 2006, the Financial Accounting Standards Board ("FASB") issued FASB Statement No. 155 (the "Statement"), which amends FASB Statement No. 133, Accounting for Derivative Instruments and Hedging Activities and FASB Statement No. 140, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities. The following is a summary of the Statement's amendments:

- Permits re-measurement (at fair value) of hybrid financial instruments that contain embedded derivatives that would otherwise require bifurcation.
- Clarifies that certain strips (principal-only and interest-only) are not subject to FASB Statement No. 133.
- Establishes a requirement to evaluate interests in securitized financial assets to identify interests in free-standing derivatives and certain hybrid financial instruments.
- Clarifies that concentrations of credit risk in the form of subordination are not embedded derivatives.
- Amends FASB Statement No. 140 to eliminate the prohibition on a qualifying special-purpose entity from holding certain derivative financial instruments.

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VENTURE BRIEFS

First Litigation over Connecticut's "Business Combination" Law in a Connecticut Court: Connecticut has had a "business combination" (or "fair price") law on the books for more than twenty years, but it wasn't the subject of any lawsuits until late 2005. The state's "fair price" business combination act was adopted in 1984 to protect publicly-traded Connecticut corporations from a takeover technique that was common at the time. Raiders would acquire a controlling stake at one price and then attempt to coerce the remaining shareholders into selling to the raider at a lower price. The means by which the statute sought to prevent such tactics was to require a "supermajority" vote of two-thirds of the disinterested shares to approve any one of a long list of "business combinations" with any shareholder that held 10% or more of the company's voting stock. Ironically, it was a raider that invoked the law in 2005 in an attempt to block a Connecticut company, Kaman Corporation, from carrying out a recapitalization. Historically, Kaman had possessed two classes of common stock, one with voting rights that was held primarily by the founder's family, and the other with no voting rights that was publicly-traded. Although the founder's family held only a small percentage of the total number of shares, it held most of the voting shares and therefore controlled the company. In the proposed recapitalization, Kaman would combine the two classes of stock into a single publicly-traded class with full voting rights, and in the process terminate the founding family's control over the company. Mason Capital, a New York hedge fund whose stated goal was to block the recapitalization and acquire control over Kaman by purchasing the voting shares from the founder's family, acquired some of the voting stock and brought a lawsuit against Kaman in a Connecticut federal court. Mason claimed that the recapitalization would be a "business combination" between the corporation and a more than 10% shareholder (i.e., the founder's family), and consequently could not proceed unless approved by the holders of at least two-thirds of the voting shares, excluding the shares held by the founder's family. Noting that there were no judicial precedents to provide any guidance, and virtually no legislative history to the statute, the federal district court ruled against Mason's literal reading of two ambiguous clauses in the statute. Instead, the court highlighted the context in which the law was enacted (i.e., one in which states adopted such statutes to protect corporations against raiders), read the two ambiguous clauses as part of an integrated and consistent whole, and pointed out that Mason's reading would treat transactions that were functionally equivalent in an inconsistent manner. Shortly after the federal district court's ruling, Mason Capital dropped its lawsuit, and Kaman Corporation completed its recapitalization. *Marcus Wilkinson, (860) 251-5937 or mwilkinson@goodwin.com* *[Editor's note: Shipman & Goodwin LLP acted as Connecticut counsel to the Special Committee of the Board of Directors of Kaman Corporation in connection with the recapitalization and the Mason Capital lawsuit.]*

Financial Advisors Beware!: The U.S. District Court for the Northern District of Illinois recently denied defendant's motion for summary judgment in *Ha-Lo Industries, Inc. v. Credit Suisse First Boston, Corp.* allowing the plaintiff, a promotional products company, to pursue a claim of gross negligence, breach of contract and breach of fiduciary duty against the company's financial advisor in connection with advice given by the financial advisor on a merger between plaintiff and an internet start-up company. Plaintiff Ha-Lo Industries, Inc. sued its financial advisor, Credit Suisse First Boston, alleging, among other things, gross negligence in the performance of the contract between the parties - specifically in the valuation of the target company in connection with a fairness opinion. In denying the motion for summary judgment, the court applied New York law and stated that a cause of action existed under New York law as to plaintiff's claim that defendant negligently performed the contract between the parties and further specified that negligent performance of a contract may give rise to a claim sounding in tort as well as breach of contract. The court also stated that a duty of care is imposed by law when a person contracts by law to do certain work, and that in New York, a fiduciary duty may be created by the express provisions of a contract as well as by factors outside of the contract such as the relationship of the parties, their sharing of financial information, and their financial interdependence. The court denied the motion for summary judgment indicating that it could not weigh the evidence at the summary judgment phase because the determination as to what factors caused plaintiff's injury and whether a fiduciary duty arose out the relationship between the plaintiff and the defendant were decisions that it could not properly make at the summary judgment phase. *Lina McKinney, (860) 251-5660 or lmckinney@goodwin.com*

Will Thumb Typing Come to a Standstill?: In *NTP, Inc. v. Research in Motion, Ltd.*, the plaintiff, NTP, Inc., brought suit against Research in Motion, Ltd. ("RIM"), the manufacturer and seller of the popular BlackBerry system, which allows out-of-office users to send and receive electronic mail remotely with a small wireless device. NTP claimed that the BlackBerry system infringed sixteen system and method claims of its patents for an electronic mail system integrated with RF wireless communications networks. Between summary judgment and a jury trial, RIM was found to have infringed each of the sixteen claims. The district court entered judgment in favor of NTP, awarding it approximately $53.7 million in money damages and entering a permanent injunction against RIM, enjoining it from the further manufacture or sale of the BlackBerry system.

Not surprisingly, RIM appealed, claiming that the district court erroneously construed certain of the claim terms and that the district court erroneously failed to impose general restrictions on certain terms relating to asserted claims. As they say, "you win some;

you lose some." The United States Court of Appeals for the Federal Circuit made a number of rulings, some in favor of NTP and some in favor of RIM. The U.S. Supreme Court declined to hear the case, which was remanded to the United States District Court for the Eastern District of Virginia. As one of its rulings, the Appeals Court vacated the damage award and the injunction so that thumb typing for now can continue. As we go to press, the parties were continuing to wrangle at the trial court much to the judge's dismay but now have apparently reached a settlement of $612 million. While a sizable settlement, it is much lower than the $1 billion that some had estimated.

The Appeals Court also addressed a number of other issues, several stemming from the fact that the BlackBerry Relay – that portion of the BlackBerry System where email messages are sent from a user's computer and then routed to the user's handheld device – is located in Canada. 35 U.S.C. §271(a) states, in relevant part, that "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." This section has no extraterritorial application, applying only to patent infringement that takes place in the United States. The court concluded that "infringement under section 271(a) is not necessarily precluded even though a component of a patented system is located outside of the United States. However, . . . the effect of the extraterritorial component may be different for different infringing acts." Since RIM's customers in the United States controlled the transmission of the originating information and benefited from its use, the court concluded, the location of the relay in Canada did not preclude infringement of the system claims and that the jury properly found that "use of NTP's asserted system claims occurred within the United States. With respect to method or process claims, however, the court noted that "a process is nothing more than the sequence of actions of which it is comprised, the use of a process necessarily involves doing or performing each of the steps recited." Thus, the court concluded that "a process cannot be used 'within' the United States as required by section 271(a) unless each of the steps is performed within this country." Each of the asserted method claims recited a step that required use of the relay in Canada so the court concluded as a matter of law that NTP's claimed methods could not be infringed by RIM's use of the BlackBerry System.

NTP's method claims did not fair any better under the "offers to sell or sells" or the "imports into the United States" provisions of section 271(a). The court concluded that "RIM's performance of at least some of the recited steps of the asserted method claims as a service for its customers cannot be considered to be selling or offering to sell the invention covered by the asserted methods claim" and the sale of the wireless handheld component of the BlackBerry System was not "enough." Accordingly, the court concluded that RIM "did not sell or offer to sell the invention covered by NTP's method claims within the United States." Relying on the same reasoning, the court further concluded that the jury could not have found infringement by importation.

With the threat that BlackBerry devices would go dark, another player in the wireless market, Visto, filed a patent infringement lawsuit against Good Technology, saying its products, including its push e-mail services GoodLink, infringe Visto patents. This suit puts at risk several mobile devices including Palm's Treo, Hewlett-Packard's iPAQ hw6500 and Motorola's MPx220. Given the proliferation of these wireless devices and their ubiquity as a business tool and not just a fun-to-have personal device, these are high stakes matters. *Sue Murphy, (860) 251-5707 or smurphy2@goodwin.com*

Restrictive Covenant Upheld In Context of Sale of Local Business: In a recent Connecticut Superior Court decision, the court enforced a non-competition agreement concerning a local business that had a ten-mile geographic restriction and a one-year term. In *Kim's Hair Studio, LLC v. Rogers*, the plaintiff purchased a hair salon from the defendant, who continued to work in the salon after the sale. Along with the purchase and sale agreement, the parties entered into a non-compete agreement, whereby the defendant agreed not to compete with the plaintiff during her employment - and for a one-year period thereafter - within a ten-mile radius of the plaintiff's salon. The defendant further agreed not to divulge or use client lists or solicit clients of the salon during that period. Four months later, the defendant left the plaintiff's employ, taking with her a Rolodex containing client contacts, whom she began to solicit. Reiterating the well-established principles underlying analysis of non-compete agreements, the court deemed the restrictive covenant reasonable, and enjoined the defendant from violating the terms of the non-compete agreement between the parties for a period of one year from when the defendant left the salon. In so doing, the court also noted that courts find restrictive covenants given at the time of the sale of a business more readily enforceable than those given in the context of an employment relationship, in light of the greater freedom to contract that often arises in the context of a sale of business. *Karen Staib, (860) 251-5612 or kstaib@goodwin.com*

Fluffernutter® in a Sticky Dispute: Remember making your lunch sandwich in grade school with Marshmallow Fluff® and peanut butter and your Fluffernutter® being the envy of your friends? Well, there is now a controversy over that gooey delight. Durkee-Mower, Inc. is the manufacturer of Marshmallow Fluff® and the owner of the registered trademarks: Marshmallow Fluff® for "marshmallow cream" and Fluffernutter® for "printed recipes sold as a component of food packaging and cookbooks." Durkee-Mower claims to have been using the Fluffernutter® trademark since 1961. Williams Sonoma has been selling a chocolate-covered peanut butter and marshmallow candy called fluffernutter, available on its website and in catalogs. Durkee-Mower has sued Williams Sonoma for trademark infringement and seeks unspecified damages. We will have to stay tuned to this sticky situation. *Cathy Intravia, (860) 251-5805 or cintravia@goowin.com*

The SEC Keeps on Going and Going and Going

The SEC has been busy over the last several months with proposals and rulemaking that will once again change the reporting and compliance landscape for public companies.

Extension of 404 Compliance Deadline. The costs of compliance with the Sarbanes-Oxley Act of 2002 ("SOX") have been quite high for many public companies and may pose rather insurmountable challenges for smaller public companies. In recognition of those challenges, the SEC established the SEC Advisory Committee on Smaller Public Companies to assess the current regulatory system for smaller companies. The Advisory Committee has been charged with making recommendations for changes in the system by April 2006. On one front, on September 21, 2005, the SEC voted to extend for one additional year the date by which non-accelerated filers (companies with a public float of less than $75 million) are required to include in their annual reports a management assessment report on the effectiveness of the company's internal control over financial reporting and an accompanying auditor's report pursuant to Section 404 of SOX. Compliance is now required for those reports filed in connection with fiscal years ending after July 15, 2007. The measure was adopted to ease the reporting burdens on small companies pending further evaluation by the SEC. These small companies are hopeful that the SEC will ultimately dispense with, or at least substantially reduce, the Section 404 requirement for them.

Change to Accelerated Filers and Filing Deadlines. On December 14, 2005, the SEC voted to adopt rules concerning acceleration of filing deadlines for periodic reports and amendments to the definition of an "accelerated filer" under the Securities Exchange Act of 1934 (the "1934 Act"). These rules, previously proposed in September 2005, create a new category of companies known as "large accelerated filers" that include companies with a public float of $700 million or more, and redefine "accelerated filers" as companies with a public float of at least $75 million, but less than $700 million. The rules also provide that, beginning with fiscal years ending on or after December 15, 2006, only large accelerated filers will be subject to a 60-day Form 10-K annual filing deadline (75-day deadline until then), that accelerated filers will remain subject to the current 75-day deadline, and that both large accelerated filers and accelerated filers will be subject to the current 40-day Form 10-Q quarterly report filing deadline. Non-accelerated filers continue to be subject to 90-day and 45-day filing deadlines for Form 10-K annual reports and Form 10-Q quarterly reports, respectively. A filer may exit out of large accelerated filer status or accelerated filer status by filing on a non-accelerated basis when its public float drops below $500 million or $50 million, respectively.

Proposed Rules Regarding Electronic Transmission of Proxy Materials. On the proposed rule front, in November 2005, the SEC proposed new rules that would allow companies and other soliciting persons to use a "notice and access" electronic delivery option through the internet as an alternative means by which to satisfy proxy solicitation delivery requirements. This method would not be available in business combination transactions. The company would post its proxy materials (proxy statement, annual report, proxy card, etc.) on a website (other than EDGAR) and send shareholders a "Notice of Internet Availability of Proxy Materials" at least 30 days before the meeting date. The Notice must contain certain prescribed information about the meeting (time, date, location, electronic availability of proxy materials and a toll free number and email address to use to request copies of the materials, which must be provided within two business days of request), an impartial description of the matters to be voted on at the meeting and the company's recommendations regarding those matters. No information other than the prescribed information may be included, and plain English is required. Other soliciting persons will be able to utilize the same mechanism, except they will have a 10 day, as opposed to 30 day, notice period. A company would have the option of transmitting some proxy materials, such as an annual report, through conventional means, but the proxy card must accompany, and be transmitted by the same medium as, the Notice or the proxy statement. The proposed rules are intended to take advantage of technological developments in electronic communications to decrease proxy soliciting expenses and to provide other soliciting persons with a less expensive means by which to solicit proxies and engage in proxy contests. The comment period for these proposed rules expired on February 13, 2006, and we await SEC action on them.

Proposed Amendments to Executive Compensation Disclosure and Related Matters. A long-time hot button for the SEC and shareholder activists has been a concern that there has been insufficient disclosure about executive compensation. On January 17, 2006, the SEC approved proposed amendments to the executive compensation disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors. Contained in a 370 page release, these amendments affect disclosure in proxy statements, annual reports and registration statements. The required disclosure must be in plain English. Additionally, certain amendments were proposed to the 8-K reporting requirements dealing with executive compensation arrangements. The proposed amendments are intended to present investors with a clearer and more complete understanding of executive officer and director compensation.

A new narrative entitled “Compensation Discussion and Analysis” would require a discussion of the company’s compensation policies and decisions reflected in the tabular disclosure, as well as the implementation of these policies. Three broad areas of disclosure would follow the narrative. First, the Summary Compensation Table would be reorganized and two new supplemental tables would be added to back-up the Summary Compensation Table. Second, tabular disclosure of holdings of equity-related interests that relate to compensation or are potential sources of future gains would be required, and finally, tabular disclosure of certain retirement plan and post-employment benefits would be required. All tabular disclosure would be supplemented by narrative discussion of material information necessary to understand the tables. This narrative discussion would replace the Compensation Committee Report and Performance Graph.

Changes to the Summary Compensation Table include the addition of a new column reporting total compensation, disclosure of a dollar value for all stock-based awards, including stock and stock options calculated pursuant to FAS No. 123R, the reduction of the threshold for reporting perquisites to $10,000 and the inclusion in the “All Other Compensation” column of the annual accrued increase in actuarial value of pension plans and earnings on non-tax qualified deferred compensation.

Additionally, the proposed rules include a Director Compensation Table (similar to the Summary Compensation Table) and related narrative. For related party transactions, narrative disclosure would be required regarding the policies and procedures for approval of related party transactions, certain changes would be made to the categories of related persons and the threshold for disclosure of these types of transactions would be increased to $120,000 (from $60,000).

A new Item 407 to Regulation S-K (and S-B) would consolidate existing governance-related disclosure items and would include disclosure regarding independence of directors, board meetings and committees, specifically the audit, nominating and compensation committees, and the compensation committee’s procedures for determining executive and director compensation.

Disclosure regarding total compensation and job description, but not the name, of up to three employees whose compensation is higher than the named executive officers would also be required. The named executive officers would now include the principal financial officer, in addition to the principal executive officer, without regard to their level of compensation.

Finally, the Form 8-K reporting requirements would be amended to consolidate in one item all disclosure requirements relating to employment arrangements, and beneficial ownership disclosure would be amended to require disclosure of pledged shares.

The comment period on this executive compensation release ends April 10, 2006. *For more information regarding any of these proposals, please contact Clare Kretzman at (203) 324-8116 or ckretzman @goodwin.com.*

Tax Update

Section 409A Year One Review – Looking Back and Looking Forward. By now, all businesses and executives that are parties to deferred compensation arrangements should have reviewed these arrangements for compliance with §409A of the Internal Revenue Code. The December 2004 enactment of §409A certainly was a shock to practitioners and clients alike who were suddenly confronted with the potential that once-standard employment agreements and stock option plans could potentially be considered abusive compensation arrangements that trigger immediate income recognition and an automatic 20% excise tax. However, with the issuance of Notice 2005-1 and Proposed Treasury Regulations, the initial shock is over, and the Treasury Department has provided temporary guidance. Most recently, on January 25, 2006, the IRS held hearings regarding final Treasury Regulations under §409A, which are anticipated to clarify and expand guidance on §409A’s applicability to common compensation arrangements. Until such final guidance is issued, practitioners will continue to utilize Notice 2005-1 and its safe-harbors for deferred compensation and stock option arrangements.

Automatic Extensions for Partnerships. On February 16, 2006, the IRS issued Information Release IR-2006-29 to streamline the extension-filing process for partnerships and certain other non-corporate taxpayers. Taxpayers that in prior taxable years filed Forms 8800, 8736, 7004 and 2758 to request an extension only need to file Form 7004 for 2005. Further, the revised Form 7004 for 2005 will grant an automatic six-month extension, with no need to file intervening forms. *For more information, please contact Jim Carroll at (860) 251-5825 or jcarroll @goodwin.com.*