September 6, 2005
Via Fax (203) 849-9714
Mr. Robert H. Herz
Chairman, Financial Accounting Standards Board
401 Merritt 7, P.O. Box 5116
Norwalk, Connecticut 06856-5116

Dear Mr. Herz:

The Society of Corporate Secretaries & Governance Professionals wishes to offer comments on the FASB staff’s recent advice to one or more of the “big four” accounting firms that the grant date for financial measurement purposes under FAS 123(R) does not occur until the terms of the grant have been communicated to the employee. This advice is inconsistent with current practice followed by most companies and is a topic of great concern to our members. We believe there are other means to achieve the goals of accurate financial reporting and transparency, without the difficulties and expense that this advice will cause for corporations, as explained in detail below.

The Society of Corporate Secretaries & Governance Professionals (formerly The American Society of Corporate Secretaries) is a professional association, founded in 1946, with over 4,000 members who serve more than 3,000 issuers. Responsibilities of our members include supporting the work of corporate boards of directors, their committees and executive management regarding corporate governance and disclosure. Our members assure issuer compliance with the securities laws and regulations, corporate law, stock exchange listing requirements and the accounting rules, and have been on the front-line in implementing the structural changes necessitated by the Sarbanes-Oxley Act of 2002 and the resulting rules of the Securities and Exchange Commission, the Public Company Accounting Oversight Board and the exchanges. The majority of Society members are attorneys.

This comment letter is based on the experience of the members of The Society, who are managing corporate governance and counseling boards of directors and corporate executives at public companies, small and large, on a daily basis. The Society, after considering the impacts of the FASB staff’s recent advice, offers the comments set forth below. We note that this matter is complicated by the fact that the impact of the staff’s advice, and the relevant issues, may differ depending on whether a company uses stock options, restricted stock grants or performance-based phantom stock awards (which we refer to in this letter collectively as “equity grants”).
A. A Mutual Understanding Does Not Affect the Terms of the Grant

FAS 123 (R) states that the grant date for an equity grant does not occur until the employer and employee have reached a mutual understanding of the key terms of the award. However, employees do not negotiate the terms of equity grants and the employer and employee thus do not need to reach an understanding over the key terms of the grant. Rather, the grant is effective and the key terms are set when the board or committee approves the grant. As far as the employer and employee are concerned, equity grants are made on a "take it or leave it" basis. Therefore, notification to the employee represents communication only, and not the final step in a bargaining process.

Because the employee communication has no impact on the key terms of the equity grant, and the employee's rights to the equity grant commence at the time of the corporate action approving the grant, it is not appropriate to delay the effective date of the grant until after that communication has occurred. To our knowledge, many companies do not require any action on the part of an employee for an equity grant to become effective – the employee need not acknowledge receipt of the grant or agree to any action or inaction. We would be happy to survey our members and provide you the relevant data if you believe it would be helpful.

For these reasons, the accepted practice has been that the grant date for accounting and other purposes is the date of a board or committee's approval of the terms of the equity grant, or such later date as is specified in such approval. The grant date is important because (1) for stock option grants, this is the date on which the exercise price is set, (2) for all equity grants, this is the date as of which the grants are valued for accounting purposes and (3) the vesting schedule and termination date, if applicable, will be tied to that date.

Communication of the key terms to the grantees following the board or committee approval does not have any impact on whether the grant has or has not occurred. Therefore, companies should be permitted to continue the practice of considering the grant date for accounting and other purposes to be the date of a board or committee's approval of the terms of the equity grant, or such later date as is specified in such approval, so long as the key terms are communicated to the grantee within a reasonable period of time. If FASB has any concerns that companies may not be communicating the key terms of equity grants to their employees within a reasonable period of time, then we propose that FASB clarify that "reasonable time" following approval means that such communication must occur within one month of the board or committee’s approval.
B. Implementation of the New Advice Would Require Companies to Adhere to Poor Governance and Employee Relations Practices

It has been customary for companies to communicate the key terms of equity grants to their employees through a face-to-face meeting between an employee and his or her supervisor at which compensation is discussed in the context of an employee's overall performance review. It would be impractical for companies to track, for accounting purposes, the exact date on which each of these performance review meetings occurs. Further, these performance review meetings typically occur on different days, depending on the availability of an employee and his or her supervisor. Applying the staff's advice to this best practices approach would result in different grant dates for different employees. For companies that tie the stock option exercise price to the grant date, this would result in different stock option exercise prices for stock options granted to different employees. Employees would not react favorably to a system in which the stock option exercise price for their individual stock options is dependent on the date of their one-on-one meeting with their supervisor, or to different employees having different exercise prices for an otherwise identical stock option grant. Employing a system in which the grant dates for accounting purposes vary for a single board-approved grant would also result in different valuations of restricted stock awards, and would cause accounting for equity grants to become extremely complicated.

To the extent that communication of the key terms of equity grants to executive officers (those who are required to file Form 4 with the Securities and Exchange Commission) occurs on different days, this would result in the Forms 4 for a company's officers being filed on different days and, for companies that tie the stock option exercise price to the grant date, the Forms 4 would reflect different stock option exercise prices. This is likely to cause confusion on the part of investors and others who review Form 4 filings and would also complicate the internal processes that companies use to file their Forms 4. The Securities and Exchange Commission has cautioned issuers to avoid the timing of option grants to "take advantage" of anticipated stock price moves due to news yet to be announced; one important control in the avoidance of such behavior is to be able to plan for and set a single date certain as the grant/pricing date for options for an entire population of recipients. The availability of this control will be lost if the FASB staff position controls.

Because companies are likely to find different exercise prices, different valuation dates, different vesting dates, and different Form 4 filing dates to be unacceptable, most companies would probably move to an e-mail or web-based communication of the key terms of equity grants. This means that companies would eliminate a positive face-to-face individualized employee communication in favor of an automated communication.

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1 Forms 4 are required to be filed with the SEC within two business days of the date of the equity grant.
2 In fact, the big four accounting firms and compensation consultants have been recommending various e-mail and web-based communications to their clients in light of the staff's advice. If a mutual understanding is indeed to be required, we question whether it is reached (a) when an e-mail is sent, (b) when an e-mail or web-based communication has been read, or (c) when the information has actually been understood by the employee. These questions highlight the implementation difficulties raised by the staff's advice.
In addition, the automated communication would cover key terms of equity grants, but would be unlikely to cover salary or bonus amounts and, therefore, an employee would learn the components of his or her total compensation piecemeal instead of as one comprehensive package. This represents a clear sacrifice of good employee relation practices.

In addition, you should be aware that many employee benefit plan documents define the grant date (for accounting and other purposes) as the date of the board or committee approval. Therefore, many companies would need to amend their plan documents and, for companies with securities listed on the New York Stock Exchange, this amendment may require shareholder approval. Obtaining shareholder approval is a costly process, and the benefit of doing so are questionable when the plan amendment confers no benefit to the corporation, the employees or the shareholders. Further, there can be no assurance that shareholders would vote in favor of such an amendment.

Therefore, the staff's advice would ultimately require companies to change their historical practice and, in some cases, solicit shareholder approval of a plan amendment for the sole purpose of meeting a formalistic accounting requirement without any economic or legal substance and with no apparent benefit.

C. The Alternative Approaches to Implementation of the Staff's Advice Are Unworkable

There are five primary communication approaches that the big four accounting firms and outside compensation consultants have suggested companies could implement in light of the staff's advice, all of which we believe present substantial problems as described below.

1. Approve and Communicate Key Terms on the Grant Date

Companies could communicate the key terms of equity grants to employees on the grant date following board or committee approval of the equity grants. However, many companies will need to wait until the close of the market on the grant date for the stock option exercise price and/or valuation of other equity grants to be established. As a result, communicating to large numbers of employees on the actual date of the grant is likely to be virtually impossible. In addition, companies with global employees may have logistical issues with communicating grants on the grant date. Further, to the extent that individualized e-mail or web-based communication systems are used, the exercise prices and/or valuation amounts first will need to be loaded into the software program and, in some cases, transmitted to an outside vendor. So, while this approach appears to address some of the concerns, it is likely to be impractical for many companies. If the staff's advice stands, then we request that FASB expressly

\[a\] Some companies approve a specified dollar value of restricted stock awards, and use the market price of the company's common stock to determine the number of shares of restricted stock to be granted to each grantee. Similarly, some companies base the exercise price of employee stock options on the average of the highest and lowest quoted selling prices on the grant date.

\[b\] Some of these issues are described in subsection (C)(4) below.
authorize companies to communicate the key terms to employees within three business days of the grant date to accommodate system and logistical issues.

2. Communicate Some Terms on the Grant Date, and Some Terms After the Grant Date

On the grant date, companies could send to equity grantees a generic e-mail or web-based communication that contains the grant date and vesting schedule of the equity grants, but omits the exercise price and number of stock options or shares granted to each grantee. This information would be communicated within a reasonable period of time after the grant date, giving the company time to (a) load individual information into a computer-based system, (b) determine valuation amounts and use them to determine the number of shares to be granted to each individual and/or (c) prepare individualized grant documents that contain all key terms. If the staff's advice stands, then we request that FASB expressly approve this approach.

3. Communicate Some Terms Prior to the Grant Date, and Some Terms on the Grant Date

Companies could communicate the anticipated number of equity grants and the vesting terms to each grantee in advance of the grant date. On, or as promptly as practicable after, the board of committee approves the grants, a general communication would go to all grantees that contains the exercise price for employee stock options. We are troubled by this approach because it requires communicating the number of equity grants to an individual before the board or committee has approved them, thus potentially interfering with the board's deliberations regarding such grants and certainly creating confusion and other employee relations issues if the board grants a different amount to an individual than the amount originally communicated. Note that companies that determine the number of restricted shares awarded to each grantee based on a valuation as of the grant date could not use this approach. If the staff's advice stands, then we request that FASB expressly approve this approach.

4. Prepare Grant Documents in Advance But Distribute Them On the Grant Date

Companies may choose to prepare the individual grant documentation in advance so that they are ready to distribute the materials on, or as promptly as practicable after, the grant date. However, as noted above, some companies cannot determine the exercise price of employee stock options or the number of restricted stock awards per individual until after the close of the market on the date of the board's decision. In addition, even for companies not in that situation, it would be extremely difficult, if not impossible, for companies with many grantees to set an exercise price and deliver the documents within that time frame. For example, Intel Corporation has historically made annual equity grants to over 75,000 employees, over 30,000 of whom are located outside of the United
States in over 40 different countries. Further, revisions to the documents would be required if the board or committee chose to make any changes to the proposed grants.

5. Approve Equity Grants as of a Future Date

A company's board or committee could approve the equity grants as of a future date with the exercise price of employee stock options determined as of that date. The communication of key terms to employees would occur during the interim period between the board or committee approval and the designated future grant date, but the employee communication would not include the exercise price of employee stock options. For this alternative to work, companies would need assurance that communication of the exercise price could occur within a few days after the grant date, as in (3) above. In addition, since the board would not know the stock option exercise price when approving the grant, we are concerned that the board might be unable to discharge its fiduciary duty in considering all material terms when making the grant. Further, a company might find this alternative unappealing, as it will incur additional expense if the exercise price of its employee stock options is below the fair market value of the company's common stock on the date of grant. Note that companies that determine the number of restricted shares awarded to each grantee based on a valuation as of the grant date could not use this approach.

D. Conclusion

For the reasons stated above, we believe that the staff's advice with respect to the grant date of equity-based compensation is unnecessary and contrary to good employee relations and corporate governance practices. Further, there are inherent complications present in each of the five alternatives presented above. We therefore strongly encourage FASB to consider reversing the staff's advice and expressly authorize companies to continue the practice of using the date of the board or committee action as the measurement date, provided that the key terms of the grant are communicated to the grantee within a reasonable period of time after the date of such action. If FASB is reluctant to do so, then we request that FASB implement its customary process for addressing significant interpretive questions. As part of this process, FASB should solicit and consider the views of corporate, compensation and accounting communities before committing to this advice, which will have a severe negative impact on many best practice approaches currently implemented by companies without a corresponding benefit.

1 The award of equity grants to employees located outside of the United States introduces significant logistical issues to e-mail and web-based communication systems as well. These issues include the application of different tax rates that may need to be tracked, the need to translate employee communications into the local language and the effect of time zone differences on the time of delivery/time of receipt.
We would be happy to discuss our comments with members of FASB at your convenience, and we appreciate the opportunity to submit our thoughts for your consideration.

Respectfully submitted,

The Society of Corporate Secretaries and Governance Professionals

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