

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

**FORM 8-K**

**CURRENT REPORT**  
**Pursuant to Section 13 or 15(d) of the**  
**Securities Exchange Act of 1934**

Date of Report (Date of earliest event reported): December 19, 2008



**CHURCHILL DOWNS**  
INCORPORATED

(Exact name of registrant as specified in its charter)

Kentucky  
(State of Incorporation)

0-1469  
(Commission File Number)

61-0156015  
(IRS Employer Identification No.)

700 Central Avenue, Louisville, Kentucky 40208  
(Address of principal executive offices)  
(Zip Code)

(502) 636-4400  
(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
  - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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**Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

(e) Compensatory Arrangements of Certain Officers.

On December 19, 2008, Churchill Downs Incorporated (the “Company”) amended and restated its Terms and Conditions of Performance Share Awards (the “Company LTIP”) that were previously issued pursuant to the Company’s 2007 Omnibus Stock Incentive Plan to be exempt from or otherwise comply with Section 409A of the Internal Revenue Code of 1986, as amended (“Section 409A”). In addition to including technical changes for purposes of complying with Section 409A, the amended Company LTIP (i) clarifies the timing of payments under the Company LTIP, and (ii) adopts the definition of “good reason” used under Section 409A.

The foregoing summary of the amendments to the Company LTIP does not purport to be complete and is subject to, and qualified in its entirety by, the full text of the amended and restated Company LTIP attached hereto as Exhibit 10.1, which is incorporated herein by reference.

**Item 9.01. Financial Statements and Exhibits.**

(d) Exhibits.

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
Exhibit 10.1	Amended and Restated Terms and Conditions of Performance Share Awards Issued Pursuant to the Churchill Downs Incorporated 2007 Omnibus Stock Incentive Plan

**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**CHURCHILL DOWNS INCORPORATED**

December 19, 2008

/s/ Robert L. Evans  
Robert L. Evans  
President & Chief Executive Officer

## Exhibit Index

<u>Exhibit No.</u>	<u>Description</u>
Exhibit 10.1	Amended and Restated Terms and Conditions of Performance Share Awards Issued Pursuant to the Churchill Downs Incorporated 2007 Omnibus Stock Incentive Plan

**TERMS AND CONDITIONS OF  
PERFORMANCE SHARE AWARDS ISSUED PURSUANT TO  
THE CHURCHILL DOWNS INCORPORATED  
2007 OMNIBUS STOCK INCENTIVE PLAN**

**As Amended and Restated as of December 19, 2008**

**1. ESTABLISHMENT OF THE TERMS AND CONDITIONS OF PERFORMANCE SHARE AWARDS ISSUED PURSUANT TO THE CHURCHILL DOWNS INCORPORATED 2007 OMNIBUS STOCK INCENTIVE PLAN.**

(a) The Compensation Committee (the "Committee") of the Board of Directors (the "Board") of the Company (as defined below) hereby establishes the following Performance Share Awards Terms and Conditions, as may be amended from time to time (the "Performance Share Awards Terms and Conditions") applicable to Performance Share Awards granted pursuant to the Company's 2007 Omnibus Stock Incentive Plan, as may be amended from time to time (the "Plan"). Any capitalized terms not defined herein shall have the meaning set forth in the Plan. In the event of a conflict between the provisions of the Plan and the Performance Share Awards Terms and Conditions, the provisions of the Plan shall prevail.

(b) For purposes of Performance Share Awards granted pursuant to the Plan, the terms listed below shall have the following meanings:

(1) **Award Value** shall mean the maximum dollar award value a Participant may earn for any Performance Period

(2) **Cause** shall have the meaning set forth in an employment agreement or other agreement, including, but not limited to a severance agreement, between Participant and the Company or a Subsidiary that contains a definition of "Cause." If no such agreement exists, "Cause" shall mean the occurrence of any one of the following acts by Participant:

(i) Participant shall have been convicted of, or shall have pleaded guilty or *nolo contendere* to, any felony or any crime involving dishonesty or moral turpitude;

(ii) Participant shall have breached his or her Performance Share Award Agreement or any employment, non-competition or non-solicitation covenant or agreement with the Company or a Subsidiary, whether in an employment agreement or otherwise;

(iii) Participant shall have failed (x) to substantially comply with the rules or policies of general application of the Company or a Subsidiary, or (y) to devote substantial time and energy to the business

and affairs of the Company or a Subsidiary (other than due to death or Disability);

(iv) Participant shall have engaged in any fraud, embezzlement, theft or other dishonesty against the Company or a Subsidiary;

(v) Participant's continued failure to substantially perform Participant's duties;

(vi) Participant's repeated acts of insubordination, or failure to execute Company or Subsidiary plans and/or strategies; or

(vii) Participant engages in any act that is intended or may reasonably be expected to harm the reputation, business, prospects or operations of the Company or a Subsidiary.

(3) **Change in Control** shall mean the first to occur of the following events:

(i) the acquisition, directly or indirectly, by any individual, entity or group (within the meaning of Section 13(d)(3) or 14(d)(2) of the Exchange Act) (a "Person") of beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act) of more than 50% of either the then-outstanding voting securities of the Company (the "Outstanding Company Common Stock") or the combined voting power of the then-outstanding voting securities of the Company entitled to vote generally in the election of directors (the "Outstanding Company Voting Securities"); provided, however that for purposes of this subsection (i), the following acquisitions shall not constitute a Change in Control: (w) any acquisition directly from the Company, (x) any acquisition by the Company or any of its Subsidiaries, (y) any acquisition by any employee benefit plan (or related trust) sponsored or maintained by the Company or any corporation controlled by the Company, or (z) any acquisition by any corporation pursuant to a transaction which complies with clauses (x), (y) and (z) of subsection (iii) of this definition;

(ii) individuals who, as of the Effective Date, constitute the Board of Directors of the Company (the "Incumbent Board") cease for any reason to constitute at least a majority of the Board; provided, however, that any individual becoming a director subsequent to the Effective Date whose election, or nomination for election by the Company's shareholders, was approved by a vote of at least a majority of the directors then comprising the Incumbent Board shall be considered as though such individual were a member of the Incumbent Board, but excluding, for this purpose, any such individual whose initial assumption of office occurs as a result of an actual or threatened election contest with respect to the

election or removal of directors or other actual or threatened solicitation of proxies or consents by or on behalf of a Person other than the Board;

(iii) consummation of a reorganization, merger or consolidation or sale or other disposition of all or substantially all of the assets of the Company or the acquisition of assets of another entity (a "Corporate Transaction"), in each case, unless, immediately following such Corporate Transaction, (x) all or substantially all of the individuals and entities who were the beneficial owners, respectively, of the Outstanding Company Common Stock and Outstanding Company Voting Securities immediately prior to such Corporate Transaction beneficially own, directly or indirectly, more than 50% of, respectively, the then-outstanding shares of Common Stock and the combined voting power of the then-outstanding voting securities entitled to vote generally in the election of directors, as the case may be, of the Company resulting from such Corporate Transaction (including, without limitation, an entity which as a result of such transaction owns the Company or all or substantially all of the Company's assets either directly or through one or more subsidiaries) in substantially the same proportions as their ownership, immediately prior to such Corporate Transaction, of the Outstanding Company Common Stock and Outstanding Company Voting Securities, as the case may be, (y) no Person (excluding any corporation resulting from such Corporate Transaction or any employee benefit plan (or related trust) of the Company or such corporation resulting from such Corporate Transaction) beneficially owns, directly or indirectly, 50% or more of, respectively, the then Outstanding Company Common Stock resulting from such Corporate Transaction or the Outstanding Company Voting Securities resulting from such Corporate Transaction, except to the extent that such ownership existed prior to the Corporate Transaction, and (z) at least a majority of the members of the Board resulting from the Corporate Transaction were members of the Incumbent Board at the time of the execution of the initial plan or action of the Board providing for such Corporate Transaction; or

(iv) approval by the shareholders of the Company of a complete liquidation or dissolution of the Company.

- (4) **Company** shall mean Churchill Downs Incorporated or any successor or successors.
- (5) **Company Performance Goal** shall have the meaning set forth in Section 5(a).
- (6) **Disability** shall mean the inability of Participant to perform his normal duties as a result of any physical or mental injury or ailment for (i) any consecutive ninety (90)-day period, or (ii) any one hundred eighty (180) days (whether or not consecutive) during any three hundred sixty-five (365) calendar day period.

- (7) **EBITDA** shall mean the Company's net income from continuing operations plus interest expense plus taxes plus depreciation and amortization (after giving effect to accruals for the cost of the Performance Share Awards).
- (8) **Effective Date** shall mean the date the Committee approves the Performance Share Awards Terms and Conditions.
- (9) **Good Reason** shall mean the occurrence (without Participant's express consent) of any one of the following acts by the Company or a Subsidiary:
- (i) the assignment to Participant of any duties inconsistent in any material respect with the position of Participant as of the effective date of any Change in Control, or any other diminution in any material respect in such position, authority, duties or responsibilities unless agreed to by Participant;
  - (ii) a material change in the geographic location at which Participant must perform services for the Company, as required by the Company;
  - (iii) a material reduction in Participant's base salary unless other similarly situated employees are subject to a comparable reduction; or
  - (iv) a material breach of a material term of a written employment agreement by and between the Company or a Subsidiary and Participant.
- (10) **Open Performance Period** shall mean a Performance Period for which the Company Performance Goal has not been achieved.
- (11) **Participant** shall mean an eligible Employee that has been granted an Award Value pursuant to the Performance Share Awards Terms and Conditions.
- (12) **Performance Period** shall mean each of the 2008-2012 calendar years, inclusive.
- (13) **Performance Share** shall mean a bookkeeping entry that records the equivalent of one Share.
- (14) **Performance Share Award** shall mean a grant of Performance Shares following Committee certification of the Company's Performance



Goal and individual performance goals pursuant to the Performance Share Awards Terms and Conditions.

(15) **Performance Share Award Agreement** shall mean a written agreement between the Company and a Participant with respect to any earned Performance Shares.

(16) **Retirement** shall (i) have the meaning assigned to it in Company's tax qualified retirement plan, or (ii) mean the attainment of such other retirement age as the Committee may designate from time to time.

(17) **Section 162(m)** shall mean Section 162(m) of the Internal Revenue Code of 1986, as amended, and the guidance and regulations promulgated thereunder.

(18) **Section 409A** shall mean Section 409A of the Internal Revenue Code of 1986, as amended, and the guidance and regulations promulgated thereunder.

(19) **Share** shall mean one share of the Company's common stock, no par value, or any security into which a Share may be converted by reason of a merger, acquisition or any other transaction or event that affects the stock of the Company.

(20) **Termination Date** shall mean the date set forth in Section 12(a).

## **2. ADMINISTRATION OF THE PERFORMANCE SHARE AWARDS TERMS AND CONDITIONS.**

The Performance Share Awards Terms and Conditions shall be administered by the Committee. The Committee shall have the sole authority, in its absolute discretion, to adopt, amend and rescind any and all rules and regulations as, in its opinion, may be advisable in the administration, construction and interpretation of the Performance Share Awards Terms and Conditions, its rules and regulations, and the instruments evidencing awards granted under these terms and conditions, and to make all other determinations deemed necessary or advisable for the administration of these terms and conditions. All decisions, determinations and interpretations of the Committee shall be binding on all Participants.

## **3. ELIGIBILITY.**

The Committee shall determine the Employees that will be eligible for grant of Performance Share Awards under the Performance Share Awards Terms and Conditions, as well as his or her Award Value for each of the Performance Periods.

## **4. AVAILABILITY OF PERFORMANCE SHARE AWARDS.**

Pursuant to the terms of the Plan, up to 300,000 Performance Share Awards may be granted under the Performance Share Awards Terms and Conditions to any Participant in any calendar year. Performance Shares that are forfeited shall again be available for grant under the Plan and the Performance Share Awards Terms and Conditions.

## **5. PERFORMANCE MEASURES.**

(a) Thirty percent (30%) of each Performance Share Award shall be based upon the Company's achievement of minimum EBITDA performance goal for a particular Performance Period. The minimum EBITDA goal for each Performance Period is as follows (each, a "Company Performance Goal"):

- 2008 - \$70 million,
- 2009 - \$85 million,
- 2010 - \$100 million,
- 2011 - \$115 million,
- 2012 - \$130 million.

The determination of whether such Company Performance Goal has been achieved shall be made by the Company's outside auditors and certified by the Committee, as described below.

(b) Seventy percent (70%) of each Performance Share Award shall be based upon the Participant's achievement of his or her individual performance objectives, which shall be recommended each year by the Company's CEO and approved by the Committee. The determination of whether such individual performance goals have been achieved shall be made by the Committee upon advice of the Company's CEO.

(c) To the extent necessary to avoid the limitation under Section 162(m) with respect to the deductibility of the payment of any Performance Share Award payable to a "covered employee" (as defined under Section 162(m)), the Performance Share Award shall be treated as two separate grants, the terms of which are respectively set forth in Sections 5(a) and 5(b). The grant set forth in Section 5(a) is intended to satisfy the "qualified performance-based compensation" exception under Treasury Regulation Section 1.162-27, as may be amended or replaced. Consistent with that intent, with respect to any "covered employee," the Performance Share Awards Terms and Conditions and applicable Performance Share Award Agreements shall be interpreted in a manner consistent with this exception, and in the event that any provision that is necessary for the Performance Share Award payable to such "covered employee" to comply with such exception is determined by the Committee, in its sole discretion, to have been omitted, such omitted provision shall be deemed included herein and is hereby incorporated as part of such terms and conditions.

## **6. GRANT OF PERFORMANCE SHARE AWARDS.**

(a) The Committee shall certify the Company's EBITDA results and the results of each Participant's individual performance goals in the first quarter of each calendar year for the years 2009 through 2013, inclusive, following the Company's completion of its year end financial reports, as audited. Except as otherwise provided in the Performance Share Awards Terms and Conditions, following such certification, each Participant shall be granted a Performance Share Award in respect of applicable Performance Periods; provided that no Performance Share Award for a particular Performance Period shall be granted unless and until the Company's Performance Goal for such Performance Period has been achieved; and provided further, that no Performance Share Award may be granted in respect of a future Performance Period.

(b) The value of the Performance Share Award shall be based upon Participant's applicable Award Value and the Committee's certification of the Company's Performance Goal and Participant's individual performance objectives. Except as otherwise provided, if the Performance Share Award is settled in Shares, the number of Shares subject to such Award shall be determined by dividing the dollar value of the Performance Share Award for the particular Performance Period by the closing price of a Share on the last business day of the calendar year immediately preceding the date of grant. Except as otherwise set forth herein, the Performance Share Award shall vest and be payable in accordance with Section 7 below.

(c) In the event the Company does not achieve its Company Performance Goal in the scheduled year, the Participant's Award Value attributable to such Company Performance Goal may be achieved in a future year, in which case, the Performance Share Award shall be granted in the first quarter following the year such Company Performance Goal is achieved.

(i) The individual performance portion of Participant's Performance Share Award for the scheduled year shall be based on the Company's CEO recommendation and Committee's assessment of the Participant's attainment of performance objectives for the year in which the Company Performance Goal is met (and not attainment of individual performance objectives for the originally scheduled year).

(ii) If the Performance Share Award is settled in Shares, the number of Shares subject to such Performance Share Award shall be determined by dividing the dollar value of the Performance Share Award for the particular Performance Period by the closing price of a Share on the last business day of the calendar year immediately preceding the date of grant of the Performance Share Award. Such Performance Share Award shall vest and be payable in accordance with the vesting schedule attributable to the underlying Performance Period as set forth in Section 7 below.

(iii) Example:

(x) Facts: Participant was granted an Award Value of \$100,000 for 2008, \$125,000 for 2009 and \$150,000 for 2010. The Company did not achieve either of the 2008 or 2009 Company Performance Goal, but achieved the 2010

Company Performance Goal. For the 2010 Performance Period, the Committee determined that Participant met 50% of his individual performance objectives. The closing price of the Company's Common Stock on December 31, 2010 was \$100.00 per share.

- (y) Awards: In the first quarter of 2011, Participant would be granted three separate Performance Share Awards.
- The Performance Share Award in respect of the 2008 Performance Period would have a dollar value of \$65,000 ( $30\% \times \$100,000$ ) + ( $70\% \times \$100,000 \times 50\%$ ) and if settled in Shares, would cover 650 Shares ( $\$65,000 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of thirty-six months, beginning on March 31, 2011.
  - The Performance Share Award in respect of the 2009 Performance Period would have a dollar value of \$81,250 ( $30\% \times \$125,000$ ) + ( $70\% \times \$125,000 \times 50\%$ ) and if settled in Shares, would cover 812 Shares ( $\$81,250 \div 100.00$  per share), plus a cash payment in respect of the remaining half share. This Performance Share Award would vest in quarterly installments over a period of thirty-six months, beginning on March 31, 2011.
  - The Performance Share Award in respect of the 2010 Performance Period would have a dollar value of \$97,500 ( $30\% \times \$150,000$ ) + ( $70\% \times \$150,000 \times 50\%$ ) and if settled in Shares, would cover 975 Shares ( $\$97,500 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of twenty-four months, beginning on March 31, 2011.
- (d) Once a Performance Share Award has been granted for a particular Performance Period, such Performance Period shall be closed. Only one Performance Share Award grant may be awarded with respect to any single Performance Period.

## **7. VESTING AND PAYMENT OF PERFORMANCE SHARE AWARDS.**

- (a) Subject to Participant's continued employment with the Company or a Subsidiary on any applicable vesting date, Performance Share Awards granted in respect of the 2008 and 2009 Performance Periods shall vest over a period of thirty-six (36) months in equal quarterly installments on the last day of each quarter, at which time one-twelfth (1/12th) of the award shall be payable as soon as administratively practicable following each applicable vesting date, but in no event later than sixty (60) days following each applicable vesting date. The first vesting date shall begin on March 31 of the year of grant.
- (b) Subject to Participant's continued employment with the Company or a Subsidiary on any applicable vesting date, Performance Share Awards granted in respect of the 2010 and 2011 Performance Periods shall vest over a period of twenty-four (24)

months in equal quarterly installments on the last day of each quarter, at which time one-eighth (1/8th) of the award shall be payable as soon as administratively practicable following each applicable vesting date, but in no event later than sixty (60) days following each applicable vesting date. The first vesting date shall begin on March 31 of the year of grant.

(c) Subject to Participant's continued employment with the Company or a Subsidiary on any applicable vesting date, Performance Share Awards granted in respect of the 2012 Performance Period shall vest over a period of twelve (12) months in equal quarterly installments on the last day of each quarter, at which time one-fourth (1/4th) of the award shall be payable as soon as administratively practicable following each applicable vesting date, but in no event later than sixty (60) days following each applicable vesting date. The first vesting date shall begin on March 31 of the year of grant.

(d) At or before each vesting date, the Committee shall determine, in its sole discretion, whether the Performance Share Award shall be settled in cash, Shares or a combination of both.

## **8. DIVIDEND EQUIVALENTS.**

Participants shall be entitled to accrue dividend equivalents with respect to the Performance Shares that are subject to the unvested portion of any Performance Share Award, which dividend equivalents shall be payable as soon as administratively practicable, but in no event later than sixty (60) days, following the vesting of the Performance Share Award related to such dividend equivalent amounts, but in no event later than March 15<sup>th</sup> of the year following the year of vesting. Dividend equivalents will be recorded as a dollar value and shall not be credited with interest or accrue additional dividend equivalents, but, upon vesting of the Performance Share Award related to such dividend equivalent amounts, may be settled in cash, Shares or a combination of both, as determined by the Committee.

## **9. EXTRAORDINARY EVENTS.**

If the Committee determines that one or more extraordinary events has occurred during a Performance Period that alter the basis upon which the performance measures set forth in Section 5 are to be calculated, the Committee may adjust these performance measures as may be necessary to exclude the effect of these events. Events warranting such action may include, but are not limited to, major acquisitions or divestitures, significant changes in accounting practices, or a recapitalization of the Company. Notwithstanding the foregoing, the Committee shall not have the discretion to increase the Award Value payable that would otherwise be due upon certification of the Company's Performance Goal and individual performance goals.

## **10. TERMINATION OF EMPLOYMENT.**

(a) Except as set forth in Sections 10(b) and 11(a) below, termination of a Participant's employment with the Company or a Subsidiary prior to full vesting of the Performance Share Award for any reason (whether voluntary or involuntary) shall result in forfeiture (i) of any then unvested Performance Share Awards and any accrued but unpaid dividend equivalents thereon and (ii) of all opportunity to receive a Performance Share Award for any Open Performance Period.

(b) Termination of a Participant's employment with the Company by reason of Participant's death, Disability, or Retirement shall result in (i) full acceleration of vesting of any earned but unvested Performance Share Awards and accrued dividend equivalents thereon and payout as soon as administratively practicable, but in no event later than sixty (60) days, following such termination date, in a lump sum to the Participant (or the Participant's beneficiary or estate in the event of death) and (ii) forfeiture of all opportunity to receive a Performance Share Award for any Open Performance Period.

## **11. CHANGE IN CONTROL.**

(a) Termination of Participant's employment with the Company or a Subsidiary by the Company without Cause (but not by reason of Participant's death or Disability) or by Participant for Good Reason as set forth in Section 11(a)(4) below, each within 24 months following a Change in Control, shall result in the following:

(1) Full acceleration of vesting and payout of Participant's earned but unvested Performance Share Awards as soon as administratively practicable, but in no event later than sixty (60) days, following such termination date, in a lump sum of such accelerated Performance Share Awards and accrued dividend equivalents thereon to the Participant;

(2) Automatic grant of a Performance Share Award equal to fifty percent (50%) of any of Participant's unearned Award Values (without regard to the satisfaction of the Company Performance Goal or Participant's individual performance objectives) for any Open Performance Periods. Such Performance Share Award shall be fully vested and payable as soon as administratively practicable, but in no event later than sixty (60) days, following such termination date, in a lump sum. To the extent the Performance Share Award is settled in Shares, the number of Shares subject to such Award shall be determined by dividing fifty percent (50%) of any of Participant's unearned Award Values for any Open Performance Period by the closing price of a Share on the last business day immediately prior to Participant's termination of employment; and

(3) Immediate termination and forfeiture of the remaining (50%) of any of Participant's unearned Award Values for any Open Performance Period.

(4) Notwithstanding any provision to the contrary, a Participant's employment with the Company by Participant shall be for Good Reason only if Participant terminates employment with the Company or a Subsidiary within two years

following the initial existence of one or more Good Reason conditions and prior to such termination, Participant gives the Company written notice of the existence of Good Reason within sixty (60) days of the initial existence of Good Reason with a description of the conditions, events or actions constituting Good Reason and upon receipt of such notice by the Company, the Company shall have sixty (60) days following such receipt to cure and remedy the Good Reason condition. If the Company does cure and remedy such condition, there shall not be a termination by Participant for Good Reason.

(b) In the event the Performance Share Awards Terms and Conditions are terminated following a Change in Control but prior to the Termination Date, the following shall apply:

(1) Subject to Sections 10(b) and 11(a)(1), any earned but unvested Performance Share Awards and accrued dividend equivalents thereon shall continue to vest in accordance with its existing vesting schedule;

(2) Participant shall be automatically granted a Performance Share Award, effective immediately prior to the termination of the Performance Share Awards Terms and Conditions, equal to fifty percent (50%) of any of Participant's unearned Award Values (without regard to the Company Performance Goal or Participant's individual performance objectives) for any Open Performance Period. To the extent the Performance Share Award is settled in Shares, the number of Shares subject to such Award shall be determined by dividing fifty percent (50%) of any of Participant's unearned Award Values for any Open Performance Period by the closing price of a Share on the last business day immediately prior to the termination of the Performance Share Awards Terms and Conditions. Subject to Sections 10(b) and 11(a)(1), such Performance Share Award shall vest in accordance with the vesting schedule attributable to the underlying Open Performance Period of each such Performance Share Award, with the first vesting date beginning on the last day of the calendar quarter in which such Performance Share Award was granted.

(3) The remaining (50%) of any of Participant's unearned Award Values for any Open Performance Period shall terminate in full and Participant shall not be entitled to any Performance Share Award in respect of such Award Values.

(4) Example:

(i) Facts: Participant was granted an Award Value of \$100,000 for 2008, \$125,000 for 2009, \$150,000 for 2010, \$200,000 for 2011 and \$250,000 for 2012. The Company achieved the 2008 Company Performance Goal, but did not achieve the 2009 Company Performance Goal. In 2010, the Company was acquired in a transaction that constituted a Change in Control and on June 15, 2010, the successor corporation terminated the Performance Share Awards Terms and Conditions. The closing price of the Company's Common Stock on the business day prior to the termination of the Performance Share Awards Terms and Conditions was \$100.00 per share.

(ii) Awards: The Performance Share Award granted in respect of the 2008 Performance Period would continue to vest according to its existing schedule. As a result of the termination of the Performance Share Awards Terms and

Conditions, each Participant would be granted four separate Performance Share Awards.

- The Performance Share Award in respect of the 2009 Performance Period would have a dollar value of \$62,500 (50% x \$125,000) and if settled in Shares, would cover 625 Shares ( $\$62,500 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of thirty-six months, beginning on June 30, 2010.
- The Performance Share Award in respect of the 2010 Performance Period would have a dollar value of \$75,000 (50% x \$150,000) and if settled in Shares, would cover 750 Shares ( $\$75,000 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of twenty-four months, beginning on June 30, 2010.
- The Performance Share Award in respect of the 2011 Performance Period would have a dollar value of \$100,000 (50% x \$200,000) and if settled in Shares, would cover 1,000 Shares ( $\$100,000 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of twenty-four months, beginning on June 30, 2010.
- The Performance Share Award in respect of the 2012 Performance Period would have a dollar value of \$125,000 (50% x \$250,000) and if settled in Shares, would cover 1,250 Shares ( $\$125,000 \div 100.00$  per share). This Performance Share Award would vest in quarterly installments over a period of twelve months, beginning on June 30, 2010.

**12. EXPIRATION OF THE PERFORMANCE SHARE AWARDS TERMS AND CONDITIONS; TERMINATION OF THE PERFORMANCE SHARE AWARDS TERMS AND CONDITIONS.**

(a) The Performance Share Awards Terms and Conditions shall automatically terminate on the date the Committee determines the grants of Performance Share Awards, if any, in respect of 2012 Performance Period (the "Termination Date"), which date shall not be later than March 31, 2013. Any Open Performance Periods as of such date shall be immediately terminated and Participant shall not be entitled to any Performance Share Award for any remaining Open Performance Period.

(b) Except as set forth in Section 11(b), in the event the Performance Share Awards Terms and Conditions are terminated prior to the Termination Date, the following shall apply:

(1) Subject to Section 10(b), any earned but unvested Performance Share Awards and accrued dividend equivalents thereon shall continue to vest in accordance with its existing vesting schedule; and

(2) Participant shall be automatically granted a Performance Share Award, effective immediately prior to the termination of the Performance Share Awards Terms and Conditions, equal to fifty percent (50%) of any of Participant's unearned



Award Values (without regard to the Company Performance Goal or Participant's individual performance objectives) for any Open Performance Period. To the extent the Performance Share Award is settled in Shares, the number of Shares subject to such Award shall be determined by dividing fifty percent (50%) of any of Participant's unearned Award Values for any Open Performance Period by the closing price of a Share on the last business day immediately prior to the termination of the Performance Share Awards Terms and Conditions. Subject to Section 10(b), such Performance Share Award shall vest in accordance with the vesting schedule attributable to the underlying Open Performance Period of each such Performance Share Award, with the first vesting date beginning on the last day of the calendar quarter in which such Performance Share Award was granted.

(3) The remaining (50%) of any of Participant's unearned Award Values shall terminate in full and Participant shall not be entitled to any Performance Share Award in respect of such unearned Award Values.

### **13. UNFUNDED STATUS OF THE PERFORMANCE SHARE AWARDS TERMS AND CONDITIONS.**

The Performance Share Awards Terms and Conditions are intended to constitute an "unfunded" plan for incentive compensation. With respect to any payments not yet made to a Participant by the Company, nothing contained herein shall give any such Participant any rights that are greater than those of a general creditor of the Company.

### **14. SECTION 409A OF THE CODE.**

The Performance Share Awards Terms and Conditions and applicable Performance Share Award Agreements are intended to comply with the requirements of Section 409A. Consistent with that intent, the Performance Share Awards Terms and Conditions and applicable Performance Share Award Agreements shall be interpreted in a manner consistent with Section 409A and in the event that any provision that is necessary for the Performance Share Awards Terms and Conditions to comply with Section 409A is determined by the Committee, in its sole discretion, to have been omitted, such omitted provision shall be deemed included herein and is hereby incorporated as part of such terms and conditions. Further, all payments hereunder shall be made in no event later than the last day of the "applicable 2 ½ month period", as such term is defined under Section 409A in order that such amounts be treated as a short-term deferral for purposes of Section 409A.

Notwithstanding any provision to the contrary, the provisions in this Section 14 shall apply to the extent required in order to avoid accelerated taxation and/or tax penalties under Section 409A. If Participant is a "specified employee" (as defined under Section 409A) as of the date of his or her "separation from service" (as defined under Section 409A) from the Company or Subsidiary, then any payment of the Performance Share Award (and related dividend equivalents) scheduled to be paid to such Participant during the first six (6) month period following such separation date shall not be paid until the earlier of (a) the expiration of the six (6) month period measured from the date of Participant's "separation from service" (b) the date of Participant's death. All payments

and benefits that are delayed pursuant to the immediately preceding sentence shall be paid to Participant in a lump sum as soon as practicable following the expiration of such period (or if earlier, upon Participant's death) but in no event later than thirty (30) days following such period. No Performance Share Award (and related dividend equivalents) that is payable upon a termination of Participant's employment or services from the Company shall be payable unless such termination also meets the requirements of a "separation from service" under Section 409A. For purposes of Section 409A of the Code, to the extent that any payment payable under the Performance Share Awards Terms and Conditions is to be paid in installments, each such payment shall be treated as a separate identified payment for purposes of Section 409A of the Code.