

SECURITIES ALERT

REPORTING CHANGES AFFECTING DIRECTORS AND OFFICERS UNDER THE NEW FORM 8-K RULES



The Securities and Exchange Commission's Division of Corporate Finance on November 23, 2004, issued answers to a list of Frequently Asked Questions (FAQ) addressing, among other things, certain officer and director arrival and departure scenarios and compensation matters that may require current reporting under Items 1.01, 1.02 and 5.02 of Form 8-K. This Alert is designed to address some of the most common questions companies may ask regarding what changes affecting directors and officers need to be reported on a current basis as a result of the new Form 8-K rules that became effective August 23, 2004, and the FAQ. The topics addressed include:

DIRECTOR AND OFFICER ELECTION, APPOINTMENT AND DEPARTURE

- Director Election or Appointment
- Director Resignation or Refusal to Stand for Re-Election as a Result of a Disagreement or Removal for Cause
- Director Retirement, Resignation or Declining to Stand for Re-Election Where No Disagreement Exists or Removal Other Than for Cause
- Company Decision Not to Nominate a Director for Re-Election
- Board Committee Appointment, Resignation or Removal
- Officer Appointment
- Officer Retirement, Resignation or Termination

DIRECTOR AND OFFICER COMPENSATION MATTERS

- Compensation Subject to Item 1.01 of Form 8-K
- Oral Compensation Arrangements
- Employment Agreements

- Equity Incentive Plans and Other Formal Compensation Plans
- Director Compensation
- Bonus Plans and Other Cash Payments.

References in this Alert to “Item” numbers refer to Form 8-K Items unless otherwise noted.

DIRECTOR AND OFFICER ELECTION, APPOINTMENT AND DEPARTURE

DIRECTOR ELECTION OR APPOINTMENT

1. Do we need to disclose when one or more directors are elected at an annual or special shareholders’ meeting?

No. Changes in a company’s board resulting from the vote of shareholders at an annual or special shareholders’ meeting held for the purpose of electing new directors do not need to be disclosed on a Form 8-K. (Item 5.02(d).)

2. Do we need to disclose the appointment of a new director by our board of directors?

Yes. The election or appointment of a new director (except in the case of elections at shareholders’ meetings described in Question 1) must be disclosed on a Form 8-K. The Form 8-K must disclose the name of the director, the date of election, any arrangement or understanding between the director and any other person(s) (who must be named) pursuant to which the director was elected, the board committees to which the director has been or is expected to be named, and information regarding certain related transactions between the new director and the company.¹ (Item 5.02(d)). If the board committees to which the director has been or is expected to be named or the information regarding certain related transactions between the new director and the company is not determined or is unavailable at the time of the required filing, the company must include a statement to this effect and must file an amendment to the Form 8-K containing this information within four business days after the information is determined or becomes available. (Instruction 2 to Item 5.02.)

DIRECTOR RESIGNATION OR REFUSAL TO STAND FOR RE-ELECTION AS A RESULT OF A DISAGREEMENT OR REMOVAL FOR CAUSE

3. What do we need to disclose when a director resigns or refuses to stand for re-election due to a disagreement with the company or is removed for cause?

If a director resigns or refuses to stand for re-election because of a disagreement with the company on any matter related to the company’s operations, policies or practices, and an “executive officer”² of the company knows that the disagreement was the reason for the resignation or refusal to stand for re-election, or if the director is removed for cause, the resignation, refusal to stand for re-election or removal must be dis-

¹ The company must provide the information required by Item 404(a) of Regulation S-K or Item 404(a) of Regulation S-B.

² Rule 3b-7 of the Securities Exchange Act of 1934, as amended (Exchange Act) defines the term “executive officer” as a company’s president; any vice president in charge of a principal business unit, division or function; any other officer who performs a policy-making function; or any other person who performs similar policy-making functions for the company. Executive officers of subsidiaries may be deemed executive officers of the company if they perform such policy-making functions for the company.

closed on a Form 8-K. The Form 8-K must disclose the effective date of the resignation, refusal to stand for re-election or removal; any committee positions of the director at the time of the resignation, refusal to stand for re-election or removal; and a description of the circumstances representing the disagreement that the company believes caused the resignation, refusal to stand for re-election or removal. (Item 5.02(a)(1).)

4. Do we need to include correspondence from the director related to the resignation or refusal to stand for re-election due to a disagreement with the company or removal for cause?

If the director has furnished the company with any written correspondence concerning the circumstances surrounding the resignation or refusal to stand for re-election due to a disagreement with the company or removal for cause, the company must file the correspondence as an exhibit to the Form 8-K announcing the resignation, refusal to stand for re-election or removal. (Item 5.02(a)(2).)

5. Do we need to allow the director an opportunity to respond to our Form 8-K disclosure regarding the circumstances surrounding the resignation or refusal to stand for re-election due to a disagreement with the company or removal for cause?

The company must provide the director with a copy of the disclosures it made or intends to make on the Form 8-K related to the resignation or refusal to stand for re-election as a result of a disagreement with the company or removal for cause no later than the date the Form 8-K is filed. The director has the opportunity to respond by letter as promptly as possible to the company's disclosure indicating whether he or she agrees with the disclosure. If the director provides such a letter, the company must file the letter as an exhibit by amendment to the previously filed Form 8-K within two business days after receipt of the letter by the company. (Item 5.02(a)(3).)

DIRECTOR RETIREMENT, RESIGNATION OR DECLINING TO STAND FOR RE-ELECTION WHERE NO DISAGREEMENT EXISTS OR REMOVAL OTHER THAN FOR CAUSE

6. What do we need to disclose when a director retires, or resigns, or declines to stand for re-election where there is no disagreement with the company or the director is removed other than for cause?

If a director retires, resigns or declines to stand for re-election for a reason not involving a disagreement with the company or is removed other than for cause, the Form 8-K disclosure need only include the fact that the director has retired, resigned, declined to stand for re-election or was removed, and the effective date of the retirement, resignation, declining to stand for re-election or removal. (Item 5.02(b).) The reporting obligation is triggered by the director's "notice of a decision"³ to retire, resign or decline to stand for re-election, whether or not such notice is written. In the case of a director declining to stand for re-election, the company must disclose when the election in question will occur (e.g., next annual meeting). (FAQ Question 24.)

7. What do we need to disclose when we are not sure why a director has retired or resigned or refused to stand for re-election?

Unless an executive officer knows of a disagreement between the director and the company on any matter related to the company's operations, policies or practices, the company need only disclose the fact that the

³ "Discussions or consideration" of resignation, retirement or refusal to stand for re-election does not trigger a reporting obligation. The distinction between the "notice of a decision" and mere "discussions or consideration" is a facts and circumstances determination. (FAQ Question 24.)

director has retired or resigned or would not stand for re-election and the effective date of the event. (Item 5.02(b).)

8. What do we need to disclose when a director dies or is disqualified from serving as a director?

The Form 8-K rules do not expressly address disclosure obligations following a director's death or disqualification. Nor does the death or disqualification of a director seem to fit within any of the other categories of director departures (i.e. retirement, resignation, refusal to stand for re-election or removal) requiring disclosure on a Form 8-K absent additional facts that may support disclosure under one of those categories. However, given the spirit of the new Form 8-K rules and the FAQs addressing director departures, we believe it would be prudent to disclose a director's death or disqualification on a Form 8-K.

COMPANY DECISION NOT TO NOMINATE A DIRECTOR FOR RE-ELECTION

9. Do we have to file a Form 8-K if we simply decided not to nominate a director for re-election at our next annual meeting?

No. A company's decision not to nominate a director for re-election is not considered a "removal" of that director. However, if a director, after receiving notice from the company that it does not intend to nominate him or her for re-election, resigns his or her position as a director, then a Form 8-K would be required because the director has communicated a "refusal to stand for re-election." (FAQ Question 25.)

BOARD COMMITTEE APPOINTMENT, RESIGNATION OR REMOVAL

10. Do we need to disclose when a director is appointed, resigns or is removed from a board committee?

Committee appointments, resignations or removals need to be reported in connection with the election or appointment of a new director (except in the case of elections at shareholder meetings as described in Question 1) (Item 5.02(d)(3)) as described in Question 2 above and when a director resigns or refuses to stand for re-election as a result of a disagreement with the company or is removed for cause (Item 5.02(a)(1)(ii)) as described in Question 3 above. There is no separate explicit reporting requirement in the Form 8-K rules for other changes in the memberships of board committees. However, changes in committee memberships may create other Form 8-K filing obligations. For instance, the resignation of an audit, compensation or nominating committee member may result in a violation of the rules of the exchange or market on which a company's stock is listed, which then may need to be reported under Item 3.01 (*Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing*). Additionally, any change that is material to the company or that the company deems of importance to shareholders can be reported under Item 8.01 (*Other Events*).

OFFICER APPOINTMENT

11. Do we need to disclose the appointment of a new officer by our board of directors?

The appointment of a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or other officer performing similar functions must be disclosed on a Form 8-K.⁴ This disclosure is also required when an existing executive officer is promoted to

any of the foregoing positions. The Form 8-K must disclose the name and position of the newly appointed officer, the date of appointment, information regarding the background of the officer and certain related transactions with the company,⁵ and a description of the material terms of any employment agreement between the officer and the company. (Item 5.02(c).) If the terms of any employment agreement between the officer and the company are not determined or are unavailable at the time of the required filing, the company must include a statement to this effect and must file an amendment to the Form 8-K containing this information within four business days after the information is determined or becomes available. (Instruction 2 to Item 5.02.)

12. Do we have to file a Form 8-K within four business days of appointing a new officer if we plan to make a public announcement of the appointment other than by means of a report on Form 8-K?

No. The Form 8-K rules permit a company to delay filing a Form 8-K disclosing the appointment of a new officer until the day on which the company first makes a public announcement of the appointment if the company intends to make a public announcement of the appointment other than by means of a report on Form 8-K. (Instruction to paragraph (c) of Item 5.02.) In this circumstance, the company can likewise delay disclosure of the company's entry into an employment agreement with the officer under Item 1.01 as well as disclosure of the appointment of a new director under Item 5.02(d) if the officer will also serve on the company's board of directors. (FAQ Question 26.)

OFFICER RETIREMENT, RESIGNATION OR TERMINATION

13. What do we need to disclose when a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or other officer performing similar functions retires, resigns or is terminated from that position?

If a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or other officer performing similar functions retires, resigns or is terminated from that position, the Form 8-K disclosure under Item 5.02(b) need only include the fact that the officer has retired, resigned or been terminated and the effective date of the retirement, resignation or termination. (Item 5.02(b).) The disclosure does not need to include a description of the circumstances surrounding the retirement, resignation or termination. However, if the officer's employment agreement is terminated in connection with the officer's departure, disclosure is also required under Item 1.02 (*Termination of a Material Definitive Agreement*).⁶ In the case of an officer's retirement or resignation, the reporting obli-

⁴ A company must file a Form 8-K for the appointment of these specific officers even if the company does not consider such officer to be an "executive officer" for purposes of Items 401 or 404 of Regulation S-K. (FAQ Question 28.)

⁵ The company must provide the information required by Items 401(b), (d) and (e) and Item 404(a) of Regulation S-K, or Items 401(a)(4), (a)(5), (c) and Items 404(a) and (b) of Regulation S-B.

⁶ Item 1.02 requires disclosure regarding the "material circumstances surrounding the termination." The Securities and Exchange Commission has indicated that it is sufficient for a company to state in its Item 1.02 disclosure that the employment agreement was terminated in conjunction with the officer's departure. The company must nevertheless disclose other "material circumstances" surrounding the termination, such as resulting termination, severance or other payments, or other consequences. (FAQ Question 27.)

gation is triggered by the officer's "notice of a decision"⁷ to retire or resign, whether or not such notice is written. (FAQ Question 24.)

14. Do we need to file a Form 8-K if an officer's duties and responsibilities are removed or reassigned to other personnel in the company but the officer remains employed by the company and retains his or her title as an officer?

If a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or other officer performing similar functions is demoted or has his or her duties and responsibilities removed such that he or she no longer functions in the position of that officer, that demotion or removal of responsibility is treated as a "termination" of that officer from that position and must be disclosed on a Form 8-K. (FAQ Question 29.)

DIRECTOR AND OFFICER COMPENSATION MATTERS

COMPENSATION SUBJECT TO ITEM 1.01 OF FORM 8-K

15. What kind of director and officer compensation arrangements does Item 1.01 address?

In considering whether a particular compensation arrangement should be disclosed under Item 1.01, the following compensation arrangements (subject to the exclusions described in Item 601(b)(10)(iii)(C) of Regulation S-K (see footnote 9 below)) are covered under that Item:

- (1) "any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing [whether or not written] in which any director or any of the named executive officers⁸ ["NEOs"]... participates;"
- (2) "any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer... participates... unless immaterial in amount or significance;" and
- (3) "any compensatory plan, contract or arrangement adopted without [shareholder] approval pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights [whether or not written], in which any employee (whether or not an executive officer of the registrant) participates... unless immaterial in amount or significance." (Item 601(b)(10)(iii)(A) and (B) of Regulation S-K.)

⁷ See footnote 3.

⁸ A company's "named executive officers" may generally be described as the chief executive officer and the four most highly compensated officers of the company (other than the CEO). (See Item 402(a)(3) of Regulation S-K.) Keep in mind that although your NEOs were identified in your 2004 proxy statement, the identity of your company's NEOs may have changed as of the end of your most recently completed fiscal year. Also, if you have added a new CEO, the new CEO will automatically be considered a NEO.

ORAL COMPENSATION ARRANGEMENTS

16. Do we need to file a Form 8-K when an oral compensation arrangement is created for one of our NEOs, directors or other executive officers?

A Form 8-K filing requirement is generally triggered under Item 1.01 when a company enters into any compensatory plan, contract or arrangement in which a director, NEO or, except where immaterial in amount or significance, any other executive officer participates. (Item 601(b)(10)(iii)(A) of Regulation S-K.) The reporting obligation applies to both written and unwritten compensatory plans, contracts and arrangements. Where the plan, contract or arrangement involves an oral contract that would be required to be filed as an exhibit under Item 601(b)(10) of Regulation S-K if it were written, the company should describe the contract in a Form 8-K filing and file a written description of the contract as an exhibit under Item 601(b)(10) in its next registration statement or periodic report. (Telephone Interpretation I.85 in the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 1997).) The company should also include, or incorporate by reference, the written description of the contract in its subsequent registration statements and periodic reports as required by those filings. The Form 8-K disclosing an oral plan, contract or arrangement should be filed within four business days after such agreement is entered into, rather than within four business days after a written embodiment of that agreement is created. (FAQ Question 5.)

EMPLOYMENT AGREEMENTS

17. Do we need to file a Form 8-K whenever we enter into or amend an employment agreement with one of our officers or directors?

If the company enters into an employment agreement (or any amendment to an employment agreement that is material to the company) with a director or NEO, that agreement or amendment must be disclosed under Item 1.01 unless the agreement or amendment is not required to be disclosed under Item 601(b)(10)(iii)(C) of Regulation S-K.⁹ (FAQ Question 6.)¹⁰ In addition, if the company enters into an employment agreement (or an amendment thereto that is material to the company) with an executive officer other than a NEO, that agreement must be disclosed under Item 1.01 if such agreement (or amendment) is not "immaterial in amount or significance" unless the agreement (or amendment) is not required to be disclosed under Item 601(b)(10)(iii)(C) of Regulation S-K. Whether an agreement or amendment is

⁹ Item 601(b)(10)(iii)(C) of Regulation S-K provides that the following agreements need not be filed: (a) ordinary purchase and sales agency agreements; (b) agreements with managers of stores in a chain organization or similar organization; (c) contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such; (d) any compensatory plan, contract or arrangement that pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants; (e) any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information on an aggregate basis as permitted by General Instruction 1 to Item 402 or by Item 11 of Form 20-F; or (f) any compensatory plan, contract, or arrangement if the registrant is a wholly owned subsidiary of a company that has a class of securities registered pursuant to section 12 or files reports pursuant to section 15(d) of the Exchange Act and is filing a report on Form 10-K and Form 10-KSB or registering debt instruments or preferred stock that are not voting securities on Form S-2.

¹⁰ With respect to an amendment to an employment agreement with a NEO or director, we note that in the FAQ, the SEC indicates that only amendments that are material to the company need be reported. While this position is consistent with the language in Item 1.01(a) of Form 8-K, it appears to conflict with Item 601(b)(10)(iii)(A) of Regulation S-K, which deems any management contract or compensatory plan, contract or arrangement in which a director or NEO participates to be material.

“immaterial in amount or significance” must be considered from the perspective of a reasonable investor and in light of established standards of materiality. (FAQ Question 7.)

18. Do we need to disclose our board of director’s decision to increase a NEO’s salary on a Form 8-K if the increase is at the discretion of the board as provided in an employment agreement for the officer?

It is unclear based on the Securities and Exchange Commission’s current rules and interpretations whether an increase in a NEO’s salary, if granted by the board of directors or an authorized officer pursuant to discretion provided under the NEO’s employment agreement (which discretion was noted on the Form 8-K previously reporting the employment agreement), triggers a Form 8-K filing obligation under Item 1.01. We believe that, until further guidance is provided by the Securities and Exchange Commission on this issue, it would be prudent to disclose on a Form 8-K any such increase in a NEO’s salary. The increase should be reported within four days after the determination is made to increase the salary. (See footnote 10).

EQUITY INCENTIVE PLANS AND OTHER FORMAL COMPENSATION PLANS¹¹

19. Our board of directors has adopted a new equity compensation plan for our employees (or an amendment thereto), and NEOs and directors are entitled to participate in the plan. Do we need to file a Form 8-K disclosing the adoption of the plan (or amendment)?

The adoption of an equity compensation plan (or an amendment thereto) by the board of directors must be disclosed within four business days following the board’s adoption of the plan (or amendment) unless the adoption of the plan (or amendment) is subject to shareholder approval, in which case the company must disclose the adoption of the plan (or amendment) within four days of shareholder approval of the plan (or amendment). Plans that fall within the exclusions described in Item 601(b)(10)(iii)(C) of Regulation S-K do not need to be reported on a Form 8-K. (See footnote 9 above.) (FAQ Question 8.)

20. When we file a Form 8-K disclosing the adoption of a new equity compensation plan (or amendment), what should we include in our disclosure?

The disclosure should include the date the plan was adopted, approved or amended and a description of the material terms and conditions of the plan or amendment. The company may file the plan as an exhibit to the Form 8-K or alternatively file the plan as an exhibit to its next periodic report or registration statement. (General Instruction B.4. to Form 8-K.) If the plan provides broad discretion as to the terms of its awards, the company should also file forms of award agreements or notices used under the plan for awards to executive officers and directors, assuming the company does not want to file individual award agreements for each grant that is consistent with the material terms and conditions of the plan and the form(s) of award agreement(s). (See Question 21 below.)

¹¹ The reporting and disclosure principles described in Questions 19-21 with respect to equity compensation plans should be similarly applied to other compensation plans, including 401(k) matching plans, pension plans, long-term incentive plans, etc.

21. Do we need to file a Form 8-K to report the grant of an equity award to a NEO, director or other executive officer under an equity compensation plan that was previously reported?

If the company has previously reported¹² all material terms and conditions of the plan and award (other than the identity of recipients, the grant date, the number of securities covered by the award, the price(s) at which the recipient may acquire the securities and the vesting schedule), and the grant is consistent with those previously reported terms and conditions, the company does not need to disclose a NEO's, director's or other executive officer's personal award agreement unless disclosure of particular provisions in the personal agreement is necessary for an investor's understanding of that individual's compensation under the plan. (FAQ Questions 9 and 11 and Instruction 1 to Item 601(b)(10) of Regulation S-K.) Where the terms of an award vary materially from the material terms and conditions of the plan and award previously reported, disclosure on a Form 8-K is required for the award. (FAQ Question 10.)

DIRECTOR COMPENSATION

22. Do we need to disclose a resolution approved by our board of directors to pay cash fees to directors for board and committee service where such cash fees have not been previously paid to directors?

Yes. The board resolution is an oral compensatory plan, contract or arrangement that would be required to be filed as an exhibit under Item 601(b)(10) of Regulation S-K if it were written, and the company should describe the contract in a Form 8-K filing and file a written description of the contract as an exhibit under Item 601(b)(10) in its next registration statement or periodic report. (See Question 16 above.)

23. Do we need to disclose a resolution approved by our board of directors to grant options to directors for board and committee service?

Not if the company has previously reported all material terms and conditions of the plan and award and the grant is consistent with those previously disclosed terms and conditions. (See Question 21 above.)

BONUS PLANS AND OTHER CASH PAYMENTS

24. What are some common scenarios related to bonus plans or other cash payments that require disclosure under the new Form 8-K rules?

The following scenarios involve bonus plans or other cash payments that require disclosure under the new Form 8-K rules:

- a board resolution or CEO's decision to pay a cash bonus to a NEO outside of any definitive bonus plan or arrangement
- a board resolution or CEO's decision to pay a cash bonus to an executive officer (other than a NEO) outside of any definitive bonus plan or arrangement, unless the bonus is immaterial in amount or significance within the meaning of Item 601(b)(10)(iii)(A) of Regulation S-K

¹² For the purposes of the Form 8-K rules, the terms "previously filed" and "previously reported" mean previously filed with, or reported in, a statement under Section 12 of the Exchange Act, a report under Section 13 or 15(d) of the Exchange Act, a definitive proxy statement or information statement under Section 14 of the Exchange Act, or a registration statement under the Securities Act of 1933. (General Instruction B.3. to Form 8-K and Rule 12b-2 of the Exchange Act.)

- a board resolution or CEO’s decision to set annual compensation matters for “at-will” employees who are NEOs, or other executive officers unless the compensation is immaterial in amount or significance within the meaning of Item 601(b)(10)(iii)(A) of Regulation S-K
- adoption by the board or shareholders (if applicable) of a cash bonus plan or arrangement in which NEOs are eligible to participate, even when no specific performance criteria, goals or bonus opportunities have been established for the plan (FAQ Question 12)
- adoption by the board or shareholders (if applicable) of a cash bonus plan or arrangement in which other executive officers are eligible to participate, unless the plan is immaterial in amount or significance within the meaning of Item 601(b)(10)(iii)(A) of Regulation S-K (FAQ Question 12)
- approval of specific performance goals, business criteria¹³ or bonus opportunities by the board for one or more participants under a cash bonus plan (FAQ Question 13), and
- a company’s discretionary payment of a cash award pursuant to a cash bonus plan where payment is made even though the previously disclosed specified performance criteria were not satisfied (FAQ Question 14).

A company’s payment of a cash bonus after a determination that previously reported performance criteria under a cash bonus plan have been satisfied does not need to be separately disclosed on a Form 8-K unless disclosure of particular provisions of the NEO’s or other executive officer’s personal agreement under the cash bonus plan is necessary for an investor’s understanding of that officer’s compensation under the plan. (FAQ Question 14 and Instruction 1 to Item 601(b)(10) of Regulation S-K.)

¹³ When disclosing the specific goals and criteria, the company is not required to include target levels with respect to specific quantitative or qualitative performance-related factors, or factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse effect on the company. (FAQ Question 13.)

CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who represents you, or:

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