

# Stay Current.

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## SEC Form 8-K Disclosure Rules For Executive and Director Compensation

By Robert R. Carlson, Eric R. Keller, J. Mark Poerio, and Michael L. Zuppone

On November 23, 2004, the staff of the SEC's Division of Corporation Finance issued answers to frequently asked questions ("FAQs") concerning the implementation and interpretation of its recently adopted revisions to its Form 8-K disclosure rules.<sup>1</sup> The new Form 8-K requirements accelerate the due dates for required filings, and significantly expand the items that trigger filings.

The FAQs, provide interpretive guidance, among other things, on the new requirements as they relate to executive and director compensation, employment agreements and termination from service. As indicated in the tables below, the SEC staff has taken a broad interpretation of the term "material definitive agreement."

In its FAQs, the SEC staff states that the purpose of the Form 8-K revisions was "to increase the number of unquestionably or presumptively material events that must be disclosed currently, in accordance with the goals of Section 409 of the Sarbanes-Oxley Act of 2002" ("SOX"). The SEC is also urging registrants to "assure that they have implemented appropriate disclosure controls and procedures . . . to ensure that information required to be disclosed by Form 8-K is brought to the attention of management and disclosed within the timeframes contemplated by Form 8-K."<sup>2</sup>

### Disclosure Required Under FAQs for 8-K Rules

| Item                               | Events Triggering 8-K Disclosure and 8-K Disclosure That is Required  |
|------------------------------------|---|
| Director Compensation <sup>3</sup> | <ol style="list-style-type: none"> <li>1. A written summary sheet that sets forth "an agreement between the registrant and the director" as to meeting fees or other compensation. An agreement could be a written or a verbal understanding or arrangement with a director.</li> <li>2. A written description of any compensatory plan or contract that is not set forth in a formal document.</li> </ol>  |
| Employment Agreements              | <p>Any new or amended employment agreement with –</p> <ol style="list-style-type: none"> <li>1. a named executive officer ("NEO") or director.</li> <li>2. an executive officer other than an NEO unless it is "immaterial in amount or significance" or is not required to be disclosed under Item 601(b)(10)(iii) of Regulation S-K.<sup>4</sup></li> </ol> <p>Any written notice to terminate an employment agreement or to avoid an automatic renewal, even if the parties believe in good faith that they will negotiate a new agreement or renew the existing one.<sup>5</sup></p> <p>Entry into a separation agreement with a NEO.</p> |

| Item                                   | Events Triggering 8-K Disclosure and 8-K Disclosure That is Required  |
|--|---|
| Equity Compensation <sup>6</sup>       | <p>1. Adoption of a new plan in which NEOs or directors are eligible to participate, at the time of Board approval if the plan is not subject to shareholder approval.</p> <p>2. Adoption is deemed to occur on the date on which shareholder approval occurs, for a plan or awards that are subject to such approval.</p>  |
| Grants under Equity Plans <sup>7</sup> | Individual award agreements with directors and NEOs that are “materially different” from a form already filed with the SEC.   |
| Cash Bonus Plans <sup>8</sup>          | <p>Any new or amended cash bonus plan with –</p> <ol style="list-style-type: none"> <li>1. a NEO or director.</li> <li>2. an executive officer other than an NEO unless it is “immaterial in amount or significance” or is not required to be disclosed under Item 601(b)(10)(iii) of Regulation S-K.</li> </ol> <p>Board approval of specific performance goals for a previously-approved plan. The performance measures and business criteria must be disclosed, but target levels and confidential commercial or business information are not required to be disclosed.</p> <p>Pay-outs under cash bonus plans that are discretionary or have not been previously disclosed as performance-based plans.</p> <p>Payments under performance-based plans if the amount paid is greater than the formula amount.</p> |
| Termination from Service               | A “notice of a decision to resign, retire, or refuse to stand for re-election provided by a director or executive officer.” <sup>9</sup> Note that the disclosure must specify the effective date of the resignation or retirement.   |

### NO Disclosure Required Under FAQs for 8-K Rules

| Item                                    | 8-K Disclosure That is NOT Required   |
|---|---|
| Director Compensation <sup>10</sup>     | Internal proposals, including written summary sheets, the Board does not approve or establish as an agreement with directors.   |
| Employment Agreements <sup>11</sup>     | <p>Any new or amended employment agreement with an executive officer other than an NEO if the agreement is “immaterial in amount or significance.”</p> <p>Automatic renewal in accordance with the agreement’s terms, provided renewal does not require written notice.<sup>12</sup></p> <p>Termination of an employment agreement in accordance with its terms.<sup>13</sup></p> |
| Equity Compensation <sup>14</sup>       | Adoption of a new plan that is subject to shareholder approval (provided that the disclosure is made at the time of the shareholder approval).  |
| Grants under Equity Plans <sup>15</sup> | Individual award agreements that do not differ materially from a form already filed with the SEC.   |
| Cash Bonus Plans <sup>16</sup>          | Pay-outs that occur under performance-based plans provided that the registrant –  |
|   | <ol style="list-style-type: none"> <li>(i) made proper prior disclosure of the plan, and</li> <li>(ii) has not exercised discretion to pay bonuses greater than the formula amount.</li> </ol>  |
| Termination from Service                | Discussions or consideration of a decision to resign, retire, or refuse to stand for re-election provided by a director or executive officer. <sup>17</sup>   |

## Strategies for Compliance:

The FAQs should remove any doubt that the SEC has dramatically expanded the circumstances under which registrants are required to disclose executive and director compensation information on Form 8-K. Notably, to be compliant, registrants need not make 8-K filings for every individual award or change in director or executive compensation.

To avoid the need to file a Form 8-K to disclose individual awards every time they are made, registrants should publicly file each of the forms of awards to be used under the particular plan or program. Registrants may file these forms as exhibits to a Form S-8 registration statement, a Form 10-Q or 10-K, or a separate 8-K current report.<sup>18</sup>

In addition, registrants could avoid a separate Form 8-K filing if the triggering compensatory decision is made within four days of the filing of Form 10-Q or Form 10-K periodic report. The SEC staff clarified that registrants can satisfy their Form 8-K disclosure obligations by including the required information in such periodic reports provided that they are filed before the due date of the Form 8-K.<sup>19</sup>

### Notes:

1. For a summary of the SEC's Form 8-K disclosure rules, feel welcome to contact us for copy of our June 2004 Client Alert titled "Overview of the SEC's New 8-K Disclosure Rules" by Elizabeth A. Brower and Michael L. Zuppone.
2. Page 1, "Note," to the SEC's FAQs issued November 23, 2004.
3. FAQ 5.
4. FAQs 6 and 7. The registrant must also file a disclosure under Item 5.02(c) of Form 8-K if the officer is newly appointed to one of the positions specified in that Item. *Id.*
5. FAQ 15.
6. FAQ 8.
7. FAQs 9 and 10.

In conclusion, we recommend that registrants review, and revise as warranted, their disclosure controls and procedures to ensure that they are positioned to meet the expanded Form 8-K disclosure requirements with respect to director and executive compensation, employment agreements and termination from service.

*Contact Information: For further information, please contact the following members of the firm's Securities Practice Group and Executive Compensation Practice Group.*

Robert R. Carlson (213) 683.6220  
robcarlson@paulhastings.com

Eric R. Keller (202) 508.9524  
erickeller@paulhastings.com

J. Mark Poerio (202) 508.9582  
markpoerio@paulhastings.com

Michael L. Zuppone (212) 318.6906  
michaelzuppone@paulhastings.com

8. FAQs 12 to 14.
9. FAQ 24
10. FAQ 5.
11. FAQs 6 and 7.
12. FAQ16
13. FAQ 17.
14. FAQ 8.
15. FAQs 9 and 10.
16. FAQs 12 to 14.
17. FAQ 24.
18. FAQ 11.
19. FAQ 1.

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