

## Amendments to Form 8-K Rules Effective as of November 7, 2006

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As part of its broader effort to revamp executive and director compensation disclosure requirements, the Securities and Exchange Commission (the "SEC") adopted certain amendments to Form 8-K in an effort to focus real-time disclosure on executive compensation matters that are "unquestionably or presumptively material." These new amendments are effective as of November 7, 2006. (We have previously addressed other aspects of the SEC's executive compensation rulemaking in our Client Alerts entitled "Executive Compensation and Related Person Disclosure" and "Stock Option Grant Practices Under Scrutiny – the SEC Weighs In," both available at [www.paulhastings.com](http://www.paulhastings.com).)

### BACKGROUND

In August 2004, the SEC expanded significantly the number of events reportable on Form 8-K under the Securities and Exchange Act of 1934, as amended by adding eight new items, transferring two items from other periodic reports and expanding disclosure under two existing Form 8-K items.

Form 8-K Item 1.01 requires public companies to disclose, within four business days, the company's entry into a material agreement outside of its ordinary course of business, or any material amendment of a material agreement. As adopted in August 2004, Item 1.01 used the pre-existing standards of Item 601(b)(10) of Regulation S-K to determine the types of agreements that are material to a company. The SEC noted at the time that such standards had been in place for a number of years, and issuers were familiar with them. Item 610(b)(10)(iii) specifically refers to employment compensation arrangements and therefore, under the current rules in effect prior to the current rulemaking, requires a company to file a Form 8-K with respect to any of the following:

- any management contract or compensatory plan in which any named executive officer or director participates [with no exception for immateriality];
- any other management contract or any other compensatory plan in which any other executive officer participates, unless immaterial in amount or significance; and
- any compensation plan adopted without the approval of security holders pursuant to which equity may be awarded in which any employee participates, unless immaterial in amount or significance.

Incorporating the standards of Item 610(b)(10)(iii) into Item 1.01 resulted in frequent executive compensation disclosures that in some cases fell short of the "unquestionably or presumptively material" standard set by the SEC when it adopted the expanded Form 8-K items.

### ITEM 1.01. ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT

Under the new amendments, employment compensation arrangements have been eliminated from the scope of Item 1.01 altogether, and are now covered under Item 5.02. This change also applies to Item 1.02 Termination of a Material Definitive Agreement, to the extent employment compensation arrangements are terminated.

### ITEM 5.02. DEPARTURE OF DIRECTORS OR CERTAIN OFFICERS; ELECTION OF DIRECTORS; APPOINTMENT OF CERTAIN OFFICERS; COMPENSATORY ARRANGEMENTS OF CERTAIN OFFICERS

As amended, Item 5.02 requires disclosure of the following events:

### ***Retirement, Resignation or Termination***

Disclosure is required regarding the retirement, resignation or termination of the principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any persons performing similar functions (each, a “Covered Officer”), or any named executive officer or any director.

For purposes of Item 5.02 disclosure, “named executive officers” are the persons for whom disclosure was required in the most recent filing with the SEC that required disclosure under Item 402 (c) of Regulation S-K or Item 402(b) of Regulation S-B (generally the company’s last proxy statement).

### ***Appointment of Director or Covered Officer Including Any Material Plan, Contract or Arrangement***

As amended, Item 5.02 continues to require disclosure of the appointment of a director or a Covered Officer, and also requires disclosure of any material plan, contract or arrangement (whether or not written) to which a director or Covered Officer is a party or in which he or she participates, that is entered into or modified in connection with the election or appointment of such director or Covered Officer. **(Note that disclosure here is not limited to compensatory arrangements.)**

### ***Material New or Amended Compensatory Plan or Contract, or New Grant or Award***

Disclosure is required regarding (i) the company’s entry into any new material compensatory plan, contract or arrangement (whether or not written) in which the principal executive officer, principal financial officer or any named executive officer is a party or may participate in, or (ii) any new grant or award, or materially modified grant or award, to the principal executive officer, principal financial officer or any named executive officer, whether or not it was made in connection with the election or appointment of such officer. Grants or awards need not be disclosed if they are consistent with the terms of previously disclosed plans and are disclosed the next time the company is required to provide new disclosure under Item 402 of Regulation S-K.

The effect of the amendments is to eliminate any Form 8-K requirement to disclose compensatory arrangements with executive officers who are not Covered Officers or named executive officers.

### ***Salary/Bonus***

Salary or bonus of a named executive officer that was not able to be calculated and therefore omitted from the Summary Compensation Table must be disclosed once there is a payment, award decision or other occurrence that results in such amounts becoming determinable. This disclosure must also include a new total compensation recalculation to reflect the new salary or bonus information that was previously provided.

### **EXTENSION OF SAFE HARBOR**

The safe harbors regarding Section 10(b) and Rule 10b-5 and Form S-3 eligibility have been extended to cover a late filing of a report required by Item 5.02 (e) of Form 8-K requiring disclosure of material new or amended compensatory plans or new or materially modified grants or awards with respect to the principal executive officer, principal financial officer or named executive officer.

### **CAPTION HEADINGS**

General Instruction D to Form 8-K requires that the numbers and captions of all applicable items be included in the Form 8-K. Companies are now permitted to omit the Item 1.01 heading in a Form 8-K that also discloses another item so long as the substantive disclosure required by Item 1.01 is included in the Form 8-K.

#### **Practice Tips:**

*Descriptions may be kept brief; the disclosure need not comply with Regulation S-K, Item 402.*

*No need to file any Form 8-K for an executive officer who is not a Covered Officer or a named executive officer.*

*Don’t forget to review employment agreements and changes in compensation for required filings on Forms 10-Q and 10-K. Unless immaterial in amount or significance, any management contract or any other compensatory plan in which an executive officer participates is a material agreement under Regulation S-K Item 601(b)(10)(iii).*

*Although a change in director compensation does not require a Form 8-K filing (unless it was done in connection with the appointment of a director), it must be filed as an exhibit in the next 10-Q or 10-K.*

*Review and update internal controls and procedures to address the changes to the Form 8-K requirements with respect to individuals covered.*

*File standard forms of award agreements on Form 10-Q, Form 10-K or Form S-8 in order to avoid Form 8-K disclosure of standard awards.*

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