

August 22, 2006

## **NEW SEC RULES REVISE FORM 8-K DISCLOSURE OF EXECUTIVE COMPENSATION ARRANGEMENTS**

As part of the Securities and Exchange Commission's landmark overhaul of executive and director compensation disclosure, current disclosure of executive compensation arrangements on Form 8-K has been significantly modified. The new rules eliminate employment compensation arrangements from the scope of Item 1.01 and expand Item 5.02 to cover only those compensatory arrangements with executive officers and directors that are "unquestionably or presumptively material." The revised filings under Item 5.02 must still be disclosed within four business days of the triggering event. The revised rules are effective 60 days after the final rules are published in the *Federal Register*.

### ***Background***

In an effort to disseminate more information to the investment public in a shorter period of time about significant corporate events, including executive compensation arrangements, the SEC expanded Form 8-K filings effective August 23, 2004 to include a broader range of items and accelerated the filing deadline generally to four business days.<sup>1</sup> The SEC has now amended these rules in conjunction with its massive overhaul of executive and director compensation disclosure to reduce the current disclosure of executive compensation arrangements on Form 8-K.

### ***Modification of Items 1.01 and 5.02 of Form 8-K***

Item 1.01 required companies to disclose entry into, amendments to and termination of material definitive agreements that are not made in the "ordinary course of business."<sup>2</sup> It was the SEC's belief that the 2004 changes to Form 8-K would benefit markets by increasing the number of unquestionably or presumptively material events relating to executive compensation that must be disclosed currently. In interpreting this standard, however, companies disclosed a much greater number of matters, transforming Form 8-K into a continually updated proxy statement.

With its adoption of revisions to the Form 8-K rules on July 26, 2006, the SEC has effectively set out to narrow the scope of Form 8-K disclosure as it relates to employment compensation arrangements.<sup>3</sup> The revised rules eliminate employment compensation arrangements from the scope of Item 1.01 and consolidate such information under a single item - Item 5.02. The SEC's desired result is a more balanced approach to Form 8-K disclosure which is designed to elicit unquestionably or presumptively material information on a real-time basis, while seeking to limit Form 8-K required disclosure of information below that threshold.

<sup>1</sup> See our firm's letter dated August 19, 2004 that is available on our website at [http://www.fwcook.com/alert\\_letters/8-19-04--Additional%20Form%208-K%20Disclosure%20Requirements....pdf](http://www.fwcook.com/alert_letters/8-19-04--Additional%20Form%208-K%20Disclosure%20Requirements....pdf)

<sup>2</sup> The SEC adopted Item 1.01 to use the standards of Item 601(b)(10) of Regulation S-K with regard to the types of agreements covered.

<sup>3</sup> The revisions will uncouple Item 601(b)(10)(iii) from the current disclosure requirements of Form 8-K.

The revised Item 5.02 requires the following:

- Continued disclosure when a new director is elected or when an existing director resigns or refuses to stand for re-election for any reason including due to a disagreement or removal for cause
  - Note that Form 8-K disclosure is not needed for director compensation unless in conjunction with the director's appointment or departure
- Continued disclosure when certain new officers are appointed or when existing officers retire, resign or are terminated (i.e., principal executive officer, president, principal financial officer, principal accounting officer and principal operating officer)
  - Expanded disclosure to include all persons falling within the definition of named executive officer for the company's previous fiscal year
    - Note that disclosure is eliminated for all other executive officers not mentioned above
- With respect to any named executive officer, expanding the disclosure to include a brief description of any material new or amended compensatory plan, contract or arrangement, or new grant or award thereunder whether or not such occurrence is in connection with a triggering event specified in Item 5.02 (i.e., appointment, resignation, retirement, termination, etc.)
  - Note that disclosure is not required of grants or awards if they are consistent with the terms of previously disclosed plans or arrangements and are disclosed as required in a subsequent proxy statement
- With respect to a covered officer or director, expanding disclosure items beyond employment agreements to require a brief description of any material plan, contract or arrangement (or grant or award made to any covered person thereunder) that is entered into or amended in connection with an appointment or election

The SEC reiterated that disclosure under Item 5.02 need not require the information necessary to comply with Item 402 (i.e., proxy disclosure rules). Instead, the SEC requires only a brief description of the specified matter.

### ***Effective Date***

Companies must conform to these new rules beginning 60 days after the final rules are published in the *Federal Register*.

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This letter is intended to alert compensation professionals about developments that may affect their companies, and should not be considered or relied upon as legal advice. Specific questions about the applicability of the revised Form 8-K rules should be discussed with appropriate legal counsel. General questions about this letter can be addressed to Louis C. Taormina in our New York office at 212-299-3717 or by e-mail at [lctaormina@fwcook.com](mailto:lctaormina@fwcook.com). Copies of this letter and published materials are available on our website at [www.fwcook.com](http://www.fwcook.com).