

SEC Staff Issues FAQs on New Form 8-K Requirements

The SEC Division of Corporation Finance has issued helpful guidance in its responses to 30 frequently asked questions (“FAQs”) raised by the new Form 8-K requirements that became effective in August 2004. “Current Report on Form 8-K Frequently Asked Questions” is available at <http://www.sec.gov/divisions/corpfin/form8kfaq.htm>. Of particular significance are the following interpretations:

Material Definitive Agreements

- Any employment agreement with a named executive officer (“NEO”) is a material definitive agreement requiring a Form 8-K filing. Any employment agreement with an executive officer other than an NEO likewise triggers a Form 8-K filing *unless* “immaterial in amount or significance” within the meaning of Item 601(b)(10)(iii)(A) of Regulation S-K. [FAQ Nos. 6 and 7]
- Board adoption of an equity compensation plan or a cash bonus plan involving NEOs triggers a Form 8-K filing, even if no awards have been made. If, however, the plan is subject to shareholder approval (as is the case with most, if not all, equity compensation plans under NYSE and NASDAQ rules), the obligation to file the Form 8-K would not be triggered until receipt of shareholder approval. [FAQ Nos. 8 and 12]
- An award grant to a director, NEO or other executive officer under an equity compensation plan triggers a Form 8-K filing *unless* the plan and, if some material information is only in the form of award agreement and not in the plan, the form of award agreement have been filed as material contract exhibits under Item 601(b)(10)(iii)(A) or (B) of Regulation S-K and the grant is consistent with the plan and form of award agreement.* [FAQ Nos. 9 – 11]
- Pay-outs under a cash bonus plan will not trigger a Form 8-K filing *if* the plan’s adoption, as well as the specific performance goals and business criteria for the performance period (*e.g.*, EBITDA, return on equity), were disclosed in a prior filing. Registrants are not required to disclose in the Form 8-K the specific target levels under the performance goals, or any business criteria or confidential information that would have an adverse effect on the registrant. [FAQ Nos. 13 and 14]
- Material definitive agreements include both written and unwritten agreements. The FAQ states that if a “summary sheet” sets forth the terms of what is in fact an agreement between the registrant and the directors as to director fees and other compensation information, the “summary sheet” would be subject to Form 8-K disclosure and filing as a material contract exhibit under Item 601(b)(10) of Regulation S-K. [FAQ No. 5]
- Receipt of a notice of termination of a material definitive agreement triggers a Form 8-K filing even though the registrant believes in good faith that through negotiations the agreement ultimately will not be terminated. In other cases, whether renewal or non-renewal of a material definitive agreement triggers a Form 8-K filing will depend on the contract language. [FAQ No. 15]

* FAQ No. 9 states that the filing of an award agreement as a material contract exhibit is necessary “if the plan provides broad discretion as to the terms of its awards.” As this statement suggests, there are situations where the filing of an award agreement is not required, as for example, where the material terms and conditions of plan awards are set forth in the plan. In fact, many issuers have not previously filed award agreements as material contract exhibits, based on Instruction 1 to Item 601(b)(10) of Regulation S-K, which provides that an agreement need not be filed unless disclosure of particular provisions in the agreement is necessary for an investor’s understanding of that individual’s compensation under the plan. However, to avoid judgments as to materiality, registrants may want to consider filing all forms of award agreements used for directors and executive officers as material contract exhibits. These filings may be made in a Form 8-K or any other periodic report such as the registrant’s Form 10-K.

Election/Appointment or Departure of Directors or Principal Officers

- The safe harbor permitting a registrant to delay filing a Form 8-K until the day it publicly announces the appointment of a principal officer likewise permits such delay with respect to the disclosure of the officer's employment agreement or the officer's appointment to the board. [FAQ No. 26]
- Notice, whether written or oral, by a director or a principal officer of a decision to resign, retire or refuse to stand for re-election is sufficient to trigger a Form 8-K filing. Mere discussions or consideration of resignation, retirement or refusal to stand for re-election, however, would not require a Form 8-K filing. The line between "notice" and "discussions or consideration" is admittedly murky, requiring a facts and circumstances determination. Note also that a registrant's decision not to nominate a director for re-election is not considered "removal," "refusal to stand for re-election" or "termination" and thus would not need to be reported on a Form 8-K. Based upon this guidance, CEOs and corporate governance/nominating committees should exercise caution in conversations with existing directors to avoid inadvertently triggering Form 8-K obligations. For instance, if a director does not wish to stand for re-election, the registrant's action (after consultation with the director) in not nominating the director would not trigger a Form 8-K filing; conversely, in the same situation, the director's notification to the registrant of a decision not to stand for re-election would trigger a Form 8-K filing. [FAQ Nos. 24 and 25]
- The termination triggering event giving rise to a Form 8-K filing focuses on the duties of a principal officer and does not require loss of title or termination of employment. Accordingly, a Form 8-K is required where a principal officer retains his title but no longer has the duties and responsibilities of that office. [FAQ No. 29]

Other Interpretations

- A Form 8-K is not required when a registrant restates its articles of incorporation without making any substantive amendment. Registrants should file the restated articles of incorporation as an exhibit in their next periodic report. [FAQ No. 30]
- With two exceptions, a registrant may disclose a triggering event in its Form 10-Q or Form 10-K, rather than in a Form 8-K, if the triggering event occurs within four business days before the registrant's filing of the periodic report and the report includes the disclosure required under Form 8-K. However, Item 4.01, "Changes in Registrant's Certifying Accountants" and Item 4.02, "Non-Reliance on Previously Issued Financial Statements or a Related Report or Completed Interim Review" must be reported on Form 8-K. [FAQ No. 1]
- Whether a refinancing of a material financial obligation requires a Form 8-K filing under Item 2.03 depends on the facts and circumstances. A filing is not required if the registrant concludes that the new financial obligation is not material based on the similarity of the terms of the financings, the impact on covenants, liquidity, debt capacity and other relevant factors. [FAQ No. 19]
- The mere occurrence of an event of default under a financial obligation would not trigger a Form 8-K filing under Item 2.04 ("Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement") if the contract language further requires the counterparty to declare or provide notice of the default in order to accelerate the indebtedness. In that case, the declaration or notice of default would trigger the Form 8-K filing requirement. [FAQ No. 20]

For Further Information

If you would like to learn more about these interpretations, please contact the following attorneys or another member of the Corporate and Securities Group:

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