

NEW FORM 8-K REPORTING REQUIREMENTS APPLY TO MANY COMPENSATION ARRANGEMENTS

New rules promulgated by the Securities and Exchange Commission (“SEC”) requiring expanded and accelerated Form 8-K disclosure became effective on August 23, 2004. The new rules expand the list of events requiring Form 8-K disclosure by registrants under the Securities Exchange Act of 1934 (the “Exchange Act”) and shorten the deadline for most filings to four business days following the event. Among other things, the new rules require, under Item 1.01 of Form 8-K, disclosure for the adoption, amendment or termination of many compensation plans, contracts and similar arrangements. This memorandum outlines the new reporting requirements as they apply to such arrangements.¹

Types of Compensation Arrangements Covered by the New Rules

The new Form 8-K disclosure requirements apply to the adoption, amendment or termination of any “material definitive agreement,” which includes any compensatory plan, contract or arrangement that is required to be filed as an exhibit to a registrant’s quarterly or annual report pursuant to Item 601(b)(10) of Regulation S-K, specifically:

1. Any management contract or any compensatory plan, contract or arrangement, including option and other equity compensation plans, pension, retirement and deferred compensation plans and any bonus, incentive and profit sharing plans in which any director or named executive officer of the registrant participates;
2. Any other management contract or any compensatory plan, contract or arrangement in which *any other* executive officer of the registrant participates, *unless* immaterial in amount or significance; and
3. Any compensatory equity plan, contract or arrangement adopted without the approval of shareholders in which any *employee* of the registrant participates, *unless* immaterial in amount or significance, including a plan assumed by the registrant in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make further awards of its equity securities.²

¹ Failure to file timely reports under Item 1.01 of Form 8-K will not cause companies to lose their eligibility to use Form S-2 and S-3 registration statements. Additionally, Item 1.01 filings are protected under a limited safe harbor. For a more general discussion of the new Form 8-K disclosure requirements, see our Memorandum to Clients entitled “SEC Adopts Expanded and Accelerated 8-K Reporting Requirements” (March 29, 2004).

² While Item 601(b)(10) covers most compensatory agreements for which Form 8-K disclosure is required, it is not an exclusive list. For example, the SEC has indicated informally that agreements may be material for other than monetary reasons.

Consistent with an instruction to Item 601(b)(10), the SEC has indicated informally that individual equity awards need not be disclosed if a form of award agreement containing the same material terms and conditions as the individual awards has already been filed with the SEC. Individual awards that deviate from the form agreement will require scrutiny to determine whether Form 8-K disclosure is required.³

Adoption, amendment or termination of the following types of plans, contracts or arrangements does *not* require Form 8-K disclosure.

1. Ordinary purchase and sales agency agreements.
2. Agreements with managers of stores in a chain or similar organization.
3. Contracts providing for labor or salesmen's bonuses or payments to a class of security holders.
4. Any compensatory plan, contract or arrangement that pursuant to its terms is available to employees, officers or directors generally and that in operation provides for the same method of allocation of benefits between management and nonmanagement participants.
 - This type of plan would include, for example, 401(k) plans and broad-based employee stock purchase plans. However, the adoption, amendment or termination of supplemental executive retirement plans (SERPs) and director deferred compensation plans will require Form 8-K disclosure.
5. Any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information on an aggregate basis on Form 20-F.
6. Any compensatory plan, contract or arrangement if the registrant is a wholly owned subsidiary of a company that itself is a reporting company under the Exchange Act.

When disclosure is required for adoption or amendment of a compensatory plan, contract or arrangement, the Form 8-K must include: (i) the date the plan, contract or arrangement was adopted or amended; (ii) the identity of the parties to the plan, contract or arrangement; (iii) a brief description of any material relationship between the company and the parties to the plan, contract or arrangement; and (iv) a brief description of the terms and conditions of the plan, contract or arrangement that are material to the company. If such a plan, contract or arrangement is *terminated*, Form 8-K disclosure is required only if the consequences of termination are material to the registrant. For example, no disclosure is required upon the expiration of a plan or contract on its stated expiration date or completion of the obligations of the parties under the plan or contract. Moreover, no disclosure is required during negotiations or discussions regarding the termination of a plan or contract.

³ We understand that the SEC may release further guidance to clarify ambiguities relating to disclosure of compensation arrangements and other aspects of the new 8-K rules.

When a registrant is required to report the termination of a plan, contract or arrangement, the Form 8-K must disclose: (i) the date of termination, the identity of the parties to the plan, contract or arrangement and a brief description of any material relationship between the registrant and any of the other parties; (ii) a brief description of the terms and conditions of the plan, contract or arrangement that are material to the registrant; (iii) a brief description of the circumstances surrounding the termination; and (iv) any material early termination penalties incurred by the registrant.

Shortened Filing Deadline

The new rules require that current reports on Form 8-K be filed within four business days of a triggering event. For most compensation arrangements of the type described above, the triggering event will be the execution of an agreement binding all parties (such as an employment agreement) or the adoption of a plan or arrangement (such as an executive bonus plan) by the Board of Directors of the registrant. The SEC has indicated informally, however, that where an arrangement is subject to shareholder approval (such as an equity compensation plan), disclosure can be delayed until after shareholder approval is obtained.

Exhibits

Registrants are not required to file copies of the plans, contracts or arrangements that trigger the Form 8-K filing until the company files its next periodic (quarterly or annual) report or registration statement, though voluntary filing is encouraged by the SEC. Companies should be careful when deciding whether to voluntarily file a document as an exhibit to Form 8-K, as the document may contain confidential information. Given the short filing deadline, it may be difficult to evaluate the document and the need to prepare a confidential treatment request.

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If you have questions about this memorandum or wish to obtain additional information regarding application of the new Form 8-K reporting requirements to compensation arrangements, please contact Frank A. Daniele (212-728-8216, fdaniele@willkie.com), J. Pasco Struhs (212-728-8109, pstruhs@willkie.com) or the partner with whom you regularly work.

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