

Publications

SEC Requires Accelerated Disclosure of Executive Arrangements

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The Securities and Exchange Commission (SEC) just issued final rules that will require accelerated reporting for certain significant corporate events, including the adoption, amendment, or termination of an executive compensation arrangement. SEC Release 33-8400 (Mar. 16, 2004). Specifically, a Form 8-K will generally have to be filed within 4 business days following the occurrence of one of the events listed in the new rules. The SEC issued proposed rules on this topic in June 2002.

Companies required to file periodic financial reports with the SEC on Forms 10-K and 10-Q use Form 8-K to report the occurrence of a material event or corporate change that would be important to investors and that has not previously been reported. The new rules require a company to file Form 8-K if it adopts, materially amends, or terminates a compensation arrangement if the arrangement is of a type required to be filed as an exhibit to Form 10-Q or 10-K. These would generally include plans and agreements providing compensation or benefits for a company's executive officers and not for all employees (e.g., supplemental executive retirement plans and employment agreements) and equity compensation plans adopted without shareholder approval.

The official documentation for a new or amended compensation arrangement (e.g., the plan document or agreement) does not have to be filed with the Form 8-K. However, the Form must provide certain basic information, such as the parties to the arrangement and a description of its material terms and conditions. The official documentation for the arrangement would have to be filed as an exhibit to the company's next Form 10-Q or Form 10-K.

The new rules also address the existing Form 8-K requirement related to insider trading during benefit plan blackout periods. The new rules provide that a Form 8-K reporting an insider trading prohibition must be filed within 4 business days (the prior rule was 5 business days) of the company's receipt of the ERISA 30-day advance blackout notice from the plan administrator. As before, if the company does not receive a blackout notice from the plan administrator, the Form 8-K must be filed on the same date that the company provides notice of the trading restrictions to affected officers and directors. If an updated notice on the insider trading restrictions is delivered to officers and directors, a new Form 8-K must be

filed on the date such notice is delivered.

Disclosure on Form 8-K would also be required under the SEC rules when executives in certain positions are appointed, terminated, retire, or resign, and when a company sells large amounts of unregistered securities.

We note also that, in October 2003, the SEC informally announced that the CEO and CFO certification requirements under section 906 of the Sarbanes-Oxley Act did not apply to Forms 8-K and Forms 11-K, the annual report for employee benefit plans. In its release announcing the new Form 8-K rules, the SEC states that the certifications are not required for either form.

The new Form 8-K rules become effective on August 23, 2004.