Summary of Changes to Form 8-K Regarding Executive Compensation Disclosure
Questions and Answers

This legal alert is intended to provide general information regarding the new executive compensation disclosure rules. This is the fourth in a series of Questions and Answers analyzing the various components of the new disclosure rules for executive compensation adopted by the Securities and Exchange Commission (the “SEC”) on July 26, 2006. The first three legal alerts, which dealt with an overview of the new disclosure rules and compensation discussion and analysis portion of the rules, the revised compensation tables, and related person transactions and corporate governance are available at www.sablaw.com.

This legal alert specifically addresses revisions to the Form 8-K disclosure requirements relating to executive compensation which take effect beginning November 7, 2006. Form 8-K triggering events that occur on or after November 7 will be subject to these changes, and companies should review their disclosure controls to ensure they comply with the new rules. If you have any questions or would like additional information, please contact the Sutherland Asbill & Brennan LLP attorney with whom you work.

I. Material Changes and Amendments to Form 8-K Disclosure

Q: What revisions did the SEC make to Form 8-K disclosure requirements?

The SEC’s recent amendment to Form 8-K has changed the standard to apply when determining whether a compensation arrangement should be disclosed on Form 8-K as well as the Item number under which companies disclose these arrangements. The driving factor behind these revisions was the SEC’s desire to restore a more balanced and organized approach to provide investors with information regarding compensation matters that are unquestionably or presumptively material on a real-time basis.
Q: How do the SEC’s amendments change the Form 8-K disclosure requirements regarding executive compensation?

Item 1.01 of Form 8-K generally covers disclosure of a company entering into or amending a material definitive agreement outside of its ordinary course of business. Prior to the SEC’s amendments, the scope of Item 1.01 covered employee compensation arrangements and used the standards set forth in Item 601(b)(10)(iii) of Regulation S-K to determine what constituted an agreement that was material and not in the ordinary course of business. Under Item 601(b)(10)(iii), entering into a compensation agreement with any director or named executive officer or certain other executive officers or employees appeared to trigger an Item 1.01 Form 8-K filing within four business days of entering into that agreement.

The SEC’s amendments to Form 8-K have now removed employment compensation arrangements from the scope of Item 1.01 and termination of employment compensation agreements from the scope of Item 1.02. Both are now covered under new Item 5.02(e). Under Item 5.02(e), the SEC now requires only that companies disclose compensation arrangements that meet the “unquestionably or presumptively material” standard rather than the lesser standard under Item 601(b)(10)(iii) of Regulation S-K that previously applied. These changes do not impact the requirement to file these employment and compensation agreements covered by Item 601(b)(10) of Regulation S-K as exhibits to Forms 10-K and 10-Q.

Q: Why did the SEC change its standard for executive compensation disclosure?

Prior to the SEC’s amendments, Form 8-K disclosure requirements triggered disclosure of compensation arrangements with directors and named executive officers based on the standards of Item 601(b)(10)(iii) of Regulation S-K. The SEC noted, however, that in the past year companies, using this standard, were providing executive compensation disclosure regarding types of matters that do not appear always to be unquestionably or presumptively material, which is the standard the SEC set for the expanded Form 8-K disclosure events when it adopted the changes to Form 8-K in 2004. Therefore, the SEC amended the materiality standard for disclosure of compensation arrangements and moved this disclosure to a new item to clarify that companies need only file Form 8-Ks to disclose unquestionably or presumptively material compensation agreements for directors and named executive officers.

Q: What disclosure is the SEC requiring under new Item 5.02(e)?

The same disclosure previously required by Item 1.01 must now be provided under Item 5.02(e), except that disclosure is required only if the compensation agreement is unquestionably or presumptively material. Specifically, this item requires a company to file a Form 8-K when it enters into or amends or modifies a compensatory agreement or contract (oral or written) with
the company’s principal executive officer, principal financial officer, or other named executive officer and that the agreement is unquestionably or presumptively material (or was unquestionably or presumptively material when originally executed). This disclosure must include a brief description of the agreement’s terms and conditions.

A company is also required to file an Item 5.02(e) Form 8-K when a principal executive officer, principal financial officer, or other named executive officer receives a grant or award under a new compensatory plan, contract, or arrangement, or such a plan or award is modified. However, an Item 5.02(e) Form 8-K is not required if the grant or award is both materially consistent with the terms of the agreement previously disclosed by the company and will be disclosed by the company pursuant to Item 402 of Regulation S-K.

Q: Has the SEC given any guidance as to what it considers unquestionably or presumptively material for Item 5.02(e)?

Unfortunately the SEC’s Adopting Release did not provide any definitive guidance as to what type of materiality analysis a company should take in deciding which compensation agreements meet the unquestionably or presumptively material standard. While the SEC specifically stated in the adopting release that it intended to only capture disclosure of unquestionably or presumptively material compensation agreements, it also stated that investors viewed “much of the disclosure regarding employment compensation matters required in real-time under the [pre-amendment] Form 8-K requirements” as material.

Q: About whom, and as of what time, is the SEC trying to capture compensation information under Item 5.02(e)?

For purposes of Item 5.02(e) Form 8-K disclosure, a named executive officer is any person about whom a company was required to disclose his or her compensation information pursuant to Item 402(c) of Regulation S-K in its last proxy statement, Annual Report on Form 10-K, or registration statement filed with the SEC.

Q: Do the amendments to Item 5.02(b), relating to the retirement, resignation, or termination of certain officers and directors, now require companies to disclose additional information about executives’ compensation not previously required?

While there was no change to the information companies are required to disclose under Item 5.02(b), the SEC did expand the list of persons covered under this item to include named
executive officers; previously, this item only required disclosure regarding principal officers.\footnote{Principal officers include a company’s principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions.} Therefore, now when a named executive officer retires, resigns, or is otherwise terminated from his or her position, the event will trigger a disclosure obligation. Companies should also note that such an event may also trigger disclosure under Item 5.02(e) discussed above, as retirement, resignation, or termination of a named executive officer or director may also modify or terminate compensation agreements between the company and that officer/director.

**Q:** What kind of disclosure is now required for new officers pursuant to Item 5.02(c) and new directors pursuant to Item 5.02(d) of Form 8-K?

As revised, these items require a company to disclose certain information whenever it appoints (1) a new principal executive, financial, accounting, or operating officer, a new president, or any other new person with a similar function, or (2) when it elects a new director, unless the election is pursuant to a shareholder vote. In addition to the previously required disclosure of biographical information and related party transactions, companies must now give a brief description of any material oral or written plan, contract, or arrangement that they enter into or amend in connection with the appointment or election of a director or an officer described above. Companies must also give a brief description of any grant or award given or modified under any compensation arrangement that occurs in connection with the appointment of such directors or officers. The description of a material arrangement may be given by reference to a company’s most recent Form 10-K or proxy statement; however, descriptions of material amendments, of grants, or of awards may not be done by reference. It should also be noted that the amendment appears to require disclosure of *any* grant or award, not only those that are material.

**Q:** What level of disclosure does the SEC require pursuant to Item 5.02?

In the adopting release, the SEC specifically noted that disclosure under Item 5.02 requires only a brief description of the item being disclosed. The disclosure should inform investors of the material terms of events and developments, but need not be as detailed as the narrative disclosure required under Item 402 of Regulation S-K.

**Q:** How should companies disclose executive compensation that could not be calculated at the time they filed their last Summary Compensation Tables?

The SEC created Item 5.02(f) to address how companies should go about disclosing salaries or bonuses for the most recent fiscal year where those salaries or bonuses could not be calculated at the time the company filed its Summary Compensation Table in its proxy statement, Annual...
Report on Form 10-K, or registration statement. Under such circumstances, the company must footnote the Summary Compensation Table to disclose that at the time of filing it was not able to calculate the amount of bonus or salary for the fiscal year, and it must give the date it expects the bonus or salary amount to be available. When the company does determine the amount of salary or bonus, it will then have to file an Item 5.02 Form 8-K disclosing both the amount of the salary and/or bonus and the resulting recalculated total compensation figure.

Q: Does the safe harbor that previously applied to Items 1.01 and 1.02 now extend to cover Item 5.02(e)?

Yes. The safe harbor the SEC adopted in its 2004 amendments to Form 8-K continues in effect. Specifically, it will not be a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder if a company fails to file an Item 5.02(e) Form 8-K report within the required four business days if the Item 5.02(e) Form 8-K is filed before the next Form 10-Q or 10-K filing for the period in question is due.

Additionally, the SEC revised the Form S-3 eligibility requirement so that a failure to timely file an Item 5.02(e) Form 8-K will not cause a company to lose its Form S-3 registration statement eligibility. It is important to note that there is still no safe harbor applicable to failures to file Forms 8-K required under Items 5.02(b), (c), or (d).

Q: Do companies still include an Item 1.01 heading in their Form 8-K disclosures?

No. The SEC amended General Instruction D to allow companies to omit an Item 1.01 heading in their Form 8-K disclosures so long as another item in addition to Item 1.01 is applicable. However, companies should note that this amendment does not allow companies to omit the substantive disclosure Item 1.01 requires.

This discussion was prepared by Sutherland Asbill and Brennan LLP’s Securities/Corporate Governance and Employee Benefits and Executive Compensation practice groups. If you have any questions or would like additional information, please contact the Sutherland attorney with whom you work.

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