

Modifications to Form 8-K Rules Become Effective

As noted in our October 10, 2006 Alert – “SEC Issues Final Rules to Executive Compensation Disclosure and Related Areas,” on November 7, 2006, certain modifications to the Form 8-K rules regarding executive compensation and related areas went into effect. The most significant change, as described below, is the moving of the reporting of executive compensation from Item 1.01 “Entry into a Material Definitive Agreement” to Item 5.02 “Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers; Compensatory Arrangements of Certain Officers.” In addition, a materiality threshold has been added regarding certain executive compensation disclosure.

New Item 5.02(e)

Since the Form 8-K rules were revised in 2004, the Securities and Exchange Commission (the “Commission”) has been tying together Item 1.01 “Entry into a Material Definitive Agreement” and Item 601(b)(10) of Regulation S-K which has resulted in a dramatic increase in Form 8-K filings for executive compensation agreements that are not material to the registrant or its investors. Under new Item 5.02(e), if the registrant “enters into, adopts, or otherwise commences a material compensatory plan, contract or arrangement (whether or not written), as to which the registrant’s principal executive officer, principal financial officer, or a named executive officer participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, or a material grant or award under any such plan, contract or arrangement to any such person is made or materially modified, then the registrant shall provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.” Therefore, agreements that are not material or amendments that are not material do not require disclosure under Item 5.02(e). However, these immaterial agreements and amendments are still to be filed as exhibits to the applicable Form 10-K/10-Q in accordance with Item 601 of Regulation S-K.


Although Item 5.02 in general relates to disclosure of the appointment or departure of directors and certain officers, disclosure under Item 5.02(e) is required independent of whether an officer is newly appointed. See Item 5.02(c) below regarding the appointment of certain officers.

Subject to Item 5.02(c) below, the instructions to new Item 5.02(e) clarify that grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement, involving cash or equity, that are materially consistent with the previously disclosed terms of the plan, contract or arrangement do not need to be disclosed under Item 5.02(e). An undisclosed grant, award or modification shall be disclosed when required pursuant to Item 402 of Regulation S-K. In addition, no disclosure need be made regarding plans, contracts and arrangements that do not discriminate in scope, terms or operation in favor of executive officers or directors and are generally available to all salaried employees.

It is important to note that Item 5.02(e) does not apply to executive compensation for directors. Therefore, subject to Item 5.02(d) below, director compensation is not included in a Form 8-K, but rather is to be disclosed when required pursuant to Item 402 of Regulation S-K. The exhibit filing requirements for director compensation for the applicable Form 10-K/10-Q will still be subject to compliance with Item 601 of Regulation S-K.

Revisions to Item 5.02(b)

Item 5.02(b) has been revised to specifically add named executive officers (“NEOs”). Now, disclosure is required if a registrant’s principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar function, or any NEO, retires, resigned or is terminated.



This alert is for informational purposes only and is not intended to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. For more information about Haynes and Boone and our practices, please visit www.haynesboone.com

Revisions to Item 5.02(c)

Item 5.02(c) also has been revised to require additional disclosure upon the appointment of a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions. The additional disclosure involves a brief description of any material plan, contract or arrangement (whether or not written) to which such an officer is a party or in which such an officer participates that is entered into or a material amendment to such a plan, contract or arrangement that is entered into in connection with the appointment or any grant or award to such officer or modification thereof in connection with the appointment. Note that Item 5.02(c) requires disclosure of any grant or award whereas new Item 5.02(e) only requires disclosure of material grants or awards. Also note that the instruction to new Item 5.02(e) regarding not needing to disclose any grants or awards that are materially consistent with previously disclosed terms does not apply to Item 5.02(c). Therefore, Item 5.02(c) may require disclosure that is not required pursuant to new Item 5.02(e).

Revisions to Item 5.02(d)

Item 5.02(d) has been revised to require additional disclosure upon the appointment of a new director other than by a vote of securities holders. Upon such appointment, the registrant is to provide a brief description of any material plan, contract or arrangement (whether or not written) to which the director is a party or in which he or she participates that is entered into or a material amendment to such plan, contract or arrangement is entered into in connection with the appointment of the director or any grant or award to such director or modification thereto in connection with the appointment. Note that the instruction to new Item 5.02(e) regarding not needing to disclose any grants or awards that are materially consistent with previously disclosed terms does not apply to Item 5.02(d) since new Item 5.02(e) applies to officers but not directors.

New Item 5.02(f)

If pursuant to the new executive compensation rules, the salary or bonus of an NEO cannot be calculated as of the most recent practicable date and is omitted from the Summary Compensation Table in accordance with the instructions to such table, when there is a payment, grant, award, decision or other occurrence as a result of which such previously omitted amounts become calculable, the registrant is to disclose the information under new Item 5.02(f). The registrant shall also provide a new total compensation amount for such NEO to update the amount previously reflected on the Summary Compensation Table.

Determining the NEOs

For the purpose of Item 5.02, NEOs refers to the NEOs for whom disclosure was required in the registrant's most recent Securities Act filing that required disclosure pursuant to Item 402(c) of Regulation S-K.

Safe-Harbor

The safe-harbor for Item 1.01 regarding Section 10(b) and Rule 10b-5 liability and Form S-3 eligibility for a late filing applies to the new Item 5.02(e) but not to the remaining sections of Item 5.02. In addition, Item 1.01 does not need to be included in a Form 8-K if the substantive disclosure that would be included in Item 1.01 is included under other items in the Form 8-K. However, the opposite is not true as Item 1.01 disclosure does not excuse the failure to disclose under other applicable Form 8-K items.

Updated Form 8-K Chart

Attached hereto as an appendix is a chart showing a brief description of the updated Form 8-K items. You should review the text of Form 8-K for more specifics on each item.

If you should have any questions regarding the updated Form 8-K rules, please contact any of the following members of the Public Companies Practice Group.



This alert is for informational purposes only and is not intended to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. For more information about Haynes and Boone and our practices, please visit www.haynesboone.com

Brian D. Barnard
(817) 347-6605
brian.barnard@haynesboone.com

Arthur S. Berner
(713) 547-2526
arthur.berner@haynesboone.com

Nancy Brenner
(212) 659-4969
nancy.brenner@haynesboone.com

Michael M. Boone
(214) 651-5552
michael.boone@haynesboone.com

Arthur A. Cohen
(202) 654-4559
arthur.cohen@haynesboone.com

Garrett DeVries
(214) 651-5614
garrett.devries@haynesboone.com

William R. Hays, III
(214) 651-5561
bill.hays@haynesboone.com

Harvey Kesner
(212) 659-4973
harvey.kesner@haynesboone.com

Christopher E. Kirkpatrick
(214) 651-5447
chris.kirkpatrick@haynesboone.com

Bryce D. Linsenmayer
(713) 547-2007
bryce.linsenmayer@haynesboone.com

Judithe Little
(713) 547-2235
judithe.little@haynesboone.com

W. Bruce Newsome
(214) 651-5119
bruce.newsome@haynesboone.com

David H. Oden
(972) 739-6929
david.oden@haynesboone.com

Benjamin S. Reichel
(212) 659-4988
ben.reichel@haynesboone.com

Gregory R. Samuel
(214) 651-5645
greg.samuel@haynesboone.com

Janice V. Sharry
(214) 651-5562
janice.sharry@haynesboone.com

W. Scott Wallace
(214) 651-5587
scott.wallace@haynesboone.com

Jennifer Thoman Wisinski
(214) 651-5330
jennifer.wisinski@haynesboone.com

Tom Yang
(214) 651-5545
tom.yang@haynesboone.com

Guy Young
(713) 547-2081
guy.young@haynesboone.com



This alert is for informational purposes only and is not intended to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. For more information about Haynes and Boone and our practices, please visit www.haynesboone.com

APPENDIX – Summary Chart for Form 8-K Rules, as Revised, Effective November 7, 2006 – See Text of Form 8-K for Further Information

Item	Summary
Registrant's Business and Operations	
1.01 Entry into a Material Definitive Agreement	Disclose entry into or material amendment of each material definitive agreement not made in the ordinary course of business. See Item 5.02(e) regarding material definitive agreements with officers. See the boxes on the cover page of Form 8-K if the Form 8-K contains all the information required by Rule 165 of the Securities Act of 1933 and Rule 14a-12 or Rule 14d-2(b) of the Securities Exchange Act of 1934.
1.02 Termination of a Material Definitive Agreement	Disclose the termination of a material definitive agreement that was not made in the ordinary course of business unless the agreement is terminated by a specified termination date or as a result of all the parties completing their obligations under the agreement.
1.03 Bankruptcy or Receivership	Disclose entry into bankruptcy or receivership.
Financial information	
2.01 Completion of Acquisition or Disposition of Assets	Disclose the acquisition or disposition of a significant amount of assets other than in the ordinary course of business. An acquisition includes the purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition, including the indirect acquisition through the acquisition of securities. Disposition includes the sale, disposition by lease, exchange, merger, consolidation, mortgage, assignment or hypothecation of assets, including the indirect disposition through the disposition of securities. See Item 9.01 ("Financial Statements and Exhibits") for requirements for filing financial statements and exhibits relating to the acquisition or disposition. The requirements for filing under Item 2.01 are different from the requirements for filing under Item 1.01 ("Entry into a Material Definitive Agreement") such that there may be a filing under Item 1.01 due to an acquisition or disposition but not under Item 2.01.
2.02 Results of Operations and Financial Condition	Disclose public announcements or releases of material non-public information about results of operations and financial condition for a completed fiscal period. This information is considered "furnished" and not "filed" so it is not incorporated into any of the registrant's other filings
2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	Disclose entry into a material direct financial obligation, defined to include a long-term debt obligation, a capital lease obligation, an operating lease obligation, or a short-term debt obligation that arises other than in the ordinary course of business, or an obligation for which the registrant is directly or contingently liable that is material to the registrant and arises out of an off-balance sheet arrangement. This disclosure includes material drawdowns under facilities that have previously been disclosed.
2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	Disclose any triggering event that causes (i) the increase or acceleration of a direct financial obligation if the consequences are material, (ii) the obligation of the registrant under an off-balance sheet arrangement to increase or be accelerated or (iii) a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation if the consequences are material.
2.05 Costs Associated with Exit or Disposal Activities	Disclose any commitment to an exit or disposal plan or other disposal of a long-lived asset or termination of employees under SFAS 146 under which material charges will be incurred under GAAP.
2.06 Material Impairments	Disclose any material charge for asset impairment, including impairments of securities or goodwill, that is required under GAAP. No disclosure is required if the conclusion is made in connection with the preparation, review or audit of financial statements at the end of fiscal quarter or year end and that plan is disclosed in the Securities Exchange Act report for that period.

Item	Summary
Securities and Trading Markets	
3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing	Disclose (i) if the registrant receives a notice that it does not satisfy a rule or standard for continued listing from an exchange or securities association, the exchange has submitted an application with the SEC to delist the class of securities or the securities association has taken all steps to delist the security, (ii) if the registrant notified the exchange or securities association of material non-compliance with a rule or standard of continued listing, (iii) if the exchange or securities association issues a public reprimand letter or (iv) if the registrant has taken definitive action to withdraw the listing.
3.02 Unregistered Sales of Equity Securities	Disclose each sale or agreement to sell equity securities in a transaction that is not registered with the SEC. No Form 8-K is required if aggregate sales since the last report on Form 10-K/10-Q or Form 8-K (Item 3.02) are less than 1% (5% for small business issuers) of the outstanding shares. This item includes issuances of unreported equity securities through conversion and similar transactions.
3.03 Material Modifications to Rights of Security Holders	Disclose if the constituent instruments defining the rights of holders of registered securities have been materially modified or if the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities. This includes working capital restrictions and limitations on the payment of dividends.
Matters Related to Accountants and Financial Statements	
4.01 Changes in Registrant's Certifying Accountant	Disclose if the accountant resigns, indicates it will decline to stand for re-appointment or is dismissed, or if a new accountant has been engaged.
4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	Disclose if the registrant has concluded that any previously issued financial statements should no longer be relied upon because of an error in such financial statements or if the registrant is advised by or received notice from its accountant that disclosure should be made or action should be taken to prevent future reliance on a previous audit report or completed interim review related to previously issued financial statements.
Corporate Governance and Management	
5.01 Changes in Control of Registrant	Disclose any change in control of the registrant.
5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers; Compensatory Arrangements of Certain Officers	Disclose (i) if a director has resigned or refused to stand for re-election, including because of a disagreement with the registrant, or has been removed, including for cause from the board of directors, (ii) if the principal executive officer, president, principal financial officer, principal accounting officer, or any person performing similar functions, or any named executive officer, retires, resigns or is terminated, (iii) if a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions is appointed, (iv) if a new director is appointed other than by vote of the security holders, (v) if the registrant enters into any material agreement or material amendment with the principal executive officer, principal financial officer or a named executive officer, or (vi) if a named executive officer's salary or bonus was not available when it was disclosed in the Summary Compensation Table and the additional salary or bonus is now paid (also provide a new total compensation figure). Note that the disclosure of any material agreement or material amendment with the principal executive officer, principal financial officer or a named executive officer does not depend on if such officer was recently appointed.

Item	Summary
5.03 Amendment to Articles of Incorporation or Bylaws; Change in Fiscal Year	Disclose an amendment to the articles of incorporation or bylaws if the proposal for the amendment was not disclosed in a proxy statement or information statement. Disclose a change of the fiscal year if the change is made other than by a vote of security holders or by an amendment to the articles or incorporation or bylaws. Note the requirement under Item 601(b)(3) of Regulation S-K to provide completely restated articles of incorporation or bylaws in the next periodic report.
5.04 Temporary Suspension of Trading under Registrant's Employee Benefit Plans	Disclose the requisite information under Regulation BTR if trading of the registrant's securities is suspended under certain employee benefit plans.
5.05 Amendment to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics (Section 6 only applies to Asset-Backed Securities and is being omitted. The next Item is 7.01.)	Disclose any amendment to the code of ethics or the granting of any waiver, explicit or implicit, from the code of ethics that applies to the principal executive officer, principal financial officer, principal accounting officer or controller and relates to any element of the code of ethics as set forth in Item 406(b) of Regulation S-K. The exchanges and securities associations have broader rules regarding amending or waiving the code of ethics under certain circumstances that require additional disclosure on a Form 8-K.
Regulation FD	
7.01 Regulation FD Disclosure	Disclose information for which disclosure is not required elsewhere under Form 8-K and that the registrant desires to disclose through Form 8-K in order to satisfy Regulation FD. This information is considered "furnished" and not "filed" so it is not incorporated into other filings of the registrant
Other Events	
8.01 Other Events	Disclose information for which disclosure is not required elsewhere under Form 8-K and that the registrant desires to "file" through Form 8-K. This information is "filed" and not "furnished" and is incorporated by reference into other applicable filings.
Financial Statements and Exhibits	
9.01 Financial Statements and Exhibits	Item 9.01 pertains to the filing of the requisite financial statements of businesses which are acquired, certain pro forma financial information, certain shell company activities and exhibits. The exhibits are "filed" and not "furnished" unless they relate solely to information being "furnished" pursuant to Item 2.02 or Item 7.01.