



FENWICK & WEST LLP

Corporate and Securities Law Update

SEC Issues FAQ Release on Form 8-K Filings

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The SEC Division of Corporation Finance issued a “Frequently Asked Questions” release on November 23, 2004, regarding the Current Report on Form 8-K rules that became effective August 23, 2004. In this update we briefly address the interpretations in the new FAQ that are most likely to be relevant to public companies in high-technology industries. For a discussion of the Form 8-K rules generally, please refer to our Corporate and Securities Law Update entitled “Form 8-K Disclosure Requirements and Practical Implications for Technology Companies,” dated August 5, 2004: http://www.fenwick.com/docstore/Publications/Corporate/sec/Corp_Sec_08-05-04.pdf. The SEC’s FAQ release is available at <http://www.sec.gov/divisions/corpfin/form8kfaq.htm>.

Resignation or Appointment of Officers and Directors

It is frequently the case, of course, that an officer will give advance notice of his or her intention to retire. The release states that the Form 8-K filing obligation for listed officers is triggered by the company’s *receipt of this notice*, whether written or oral, rather than the effective date of the resignation or retirement. No disclosure is required of discussions or consideration of resignation or retirement plans, but the determination of whether those discussions effectively amount to notice of resignation or retirement is a facts and circumstances determination. This interpretation imposes a significant burden on companies because it is more difficult to implement than a disclosure trigger based on the actual date that the termination is effective. As a result, companies will now be required to have disclosure controls and procedures in place that are effective to ensure that communications regarding termination of employment are quickly evaluated to determine whether they represent a disclosable event. (Question 24)

Form 8-K Item 5.02(c) allows companies to delay Form 8-K reporting of the appointment of a new listed officer until the public announcement of that appointment is made. The FAQ applies the same principle to Item 1.01 disclosure that might be required in connection with that appointment. It

clarifies that when the company enters into an employment agreement with the new listed officer, it can delay reporting that material agreement under Form 8-K Item 1.01 until the day of the public announcement of hiring the new officer. (Question 26)

Compensation Agreements and Arrangements

The FAQ states that a “summary sheet” provided to directors setting forth meeting fees and basic compensation information is a material agreement requiring disclosure under Item 1.01. It also notes that an oral contract may be regarded as a material agreement and a written summary must be filed. The upshot of this discussion appears to be that the staff requires disclosure of the establishment or change of director compensation, as the staff regards the setting of these fees as a contract with the director. (Question 5)

With respect to equity awards to executive officers and directors, the release provides that board adoption of an equity plan requires an Item 1.01 Form 8-K filing, even if awards have not yet been made. When the board adopts a plan subject to stockholder approval, no report need be filed until such approval occurs. (Question 8)

With respect to individual plan awards to executive officers, the FAQ endorses the practice of reporting individual discretionary awards only if they differ from a form of award agreement for the plan that is on file. This is because Regulation S-K Item 601(b)(10) would not require individual award agreements to be filed as exhibits if the form of plan agreement is on file and the award is consistent with the form. If the award agreement contains terms that are materially different than what is contained in the plan agreement on file, Form 8-K reporting may be required. The staff noted that standard vesting schedules were one of the terms that need not be set forth in the form of plan agreement on file. On the other hand, we believe that change of control or other extraordinary vesting provisions

should be included in the form that is filed. ([Questions 9 and 10](#))

The release considers grants (and sometimes payments of) cash bonus awards as material agreements under Item 1.01. Specifically:

- Adoption of a cash bonus plan in which executive officers may participate must be disclosed, provided that if the plan is adopted subject to stockholder approval the trigger date for filing is the date of such stockholder approval;
- Performance factors that trigger cash awards must be disclosed, even if formulated subsequent to the adoption of the plan, but disclosure is not required of specific quantitative or qualitative factors where the disclosure would have an adverse effect on the company;
- Payment of a cash bonus award must be reported if the company exercised discretion to pay the bonus where specified performance criteria (presumably those on file) were not satisfied. ([Questions 12, 13 and 14](#))

Exit or Disposal Activities

The express provisions of Item 2.05 of Form 8-K require disclosure when a restructuring plan has been adopted by the Board or authorized officers. However, the FAQ states that if employees are being terminated in connection with the plan, the company can defer disclosing the plan until it has informed affected employees. ([Question 22](#))

Other Provisions

The FAQ clarifies that companies may disclose many Form 8-K events in a Form 10-K or Form 10-Q that is filed before the Form 8-K disclosure deadline. It also addresses the application of the disclosure rules to subsidiaries, termination of material agreements, incurrence of direct financial obligations, non-reliance on previously issued financial statements and other provisions of the Form 8-K rules.

Should you have any questions about these new requirements or if you would like to obtain a detailed reference chart summarizing the Form 8-K requirements, please feel free to contact any member of your Fenwick & West team. You may also contact Dan Winnike (dwinnike@fenwick.com), Horace Nash (hnash@fenwick.com), Scott Spector (sspector@fenwick.com) or Rob Freedman (rfreedman@fenwick.com), each of whom contributed to this update.

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