

SECURITIES UPDATE

SEC's Division of Corporation Finance Issues Consolidated and Updated Interpretations on Form 8-K

April 28, 2008

The Securities and Exchange Commission's Division of Corporation Finance has posted a consolidated set of interpretations on the filing requirements for Current Reports on Form 8-K, as last updated April 10, 2008. See <http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>. This set of interpretations replaces interpretations regarding Form 8-K that previously appeared in three sources:

- The Form 8-K interpretations in the July 1997 Manual of Publicly Available Telephone Interpretations;
- The June 13, 2003, Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures; and
- The November 22, 2004, Form 8-K Frequently Asked Questions.

As a result, there is now a single source to consult for SEC staff guidance on Form 8-K interpretive issues. In some cases, the previously published positions have been updated, refined or otherwise revised. In others, new interpretative material has been added and some obsolete material has been deleted.

Questions and Answers of General Applicability

The first section of the interpretations consists of questions and answers of general applicability for each item of Form 8-K. Highlights of the new or modified material in this section includes the following:

ITEM 1.01: ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT

- Material definitive agreements must be summarized in the body of a Form 8-K filed under Item 1.01, even if the agreement is filed as an exhibit to the Form 8-K.
- As a result of the deletion of compensatory arrangements from Items 1.01 and 1.02 and the addition of revised requirements concerning compensatory arrangements in Item 5.02, the questions and answers dealing with compensatory matters in the November 2004 FAQ have been either deleted or changed and moved to the section dealing with Item 5.02. (While the deleted material is no longer relevant to Form 8-K, it still presumably represents

the staff's interpretative position in the exhibit requirements of Regulation S-K, Item 601(b)(10)(iii)).

ITEM 3.02: UNREGISTERED SALES OF EQUITY SECURITIES

- If a grant of stock options pursuant to an employee stock option plan does not constitute a sale or offer to sell, the grant does not have to be reported under Item 3.02 of Form 8-K.
- If a registrant sells shares of a class of equity securities that is not currently outstanding in an unregistered transaction, the volume threshold under Item 3.02 (generally 1 percent or more of the number of shares outstanding of the class of equity securities sold; 5 percent in the case of smaller reporting companies) would be exceeded and a Form 8-K would be required.

ITEM 4.02: NON-RELIANCE ON PREVIOUSLY ISSUED FINANCIAL STATEMENTS OR A RELATED AUDIT REPORT OR COMPLETED INTERIM REVIEW

- The Item 4.02 filing requirement does not apply to *pro forma* information. If an error is detected in *pro forma* financial information, an amendment to the form containing such information may be required to correct the error.

ITEM 5.02: DEPARTURE OF DIRECTORS OR CERTAIN OFFICERS; ELECTION OF DIRECTORS; APPOINTMENT OF CERTAIN OFFICERS

- Notice of a decision to resign, retire or refuse to stand for re-election triggers a Form 8-K requirement even if such notice is conditional or subject to acceptance.

A board policy that all directors must provide any such notice to the corporate secretary is suggested as an appropriate disclosure control and procedure for this purpose.

- A Form 8-K is triggered under Item 5.02(b) if a person identified as a “named executive officer” in the most recent filing retires, resigns or is terminated from the position that the executive officer is listed as holding in the most recent filing. This does not mean that current disclosure is triggered when the officer's relative level of total compensation no longer requires that he or she be included in the summary compensation table on a going-forward basis.
- If a director is elected to the board other than by a vote of security holders, the Form 8-K under Item 5.02(d) is triggered as of the date of the election, even though the term may begin on a later date. The Form 8-K should disclose the date the director's term begins.
- The setting of specific performance goals and business criteria for named executive officers under a cash bonus plan does not require disclosure pursuant to Item 5.02(e) of Form 8-K if the specific performance goals and business criteria set for the performance period are materially consistent with the previously disclosed terms of the plan.
- If a Form 8-K is needed to report an annual non-equity incentive plan award under Item 5.02(e), specific target levels do not need to be disclosed with respect to specific quantitative or qualitative performance-related factors, or any other factors or criteria involving confidential

trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant.

- Item 5.02(e) Form 8-K is not triggered by a discretionary bonus where a previously disclosed employment agreement provides that the officer is entitled to receive a cash bonus in an amount determined by the compensation committee.
- Termination of an executive compensation plan must be disclosed under Item 5.02(e) of Form 8-K if it constitutes a material amendment or modification of the executive compensation plan.

Interpretive Responses Regarding Particular Situations

The second portion of the SEC staff's Form 8-K interpretations consists of responses regarding particular situations. These interpretations address very specific questions. Highlights of these new or modified interpretations include:

ITEM 1.01: ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT

- When a Form 8-K is required to be filed after the end of a registrant's first quarter but before the registrant is required to file its Form 10-Q for that quarter, if the material contract is not filed with the Form 8-K, the registrant is required to file the agreement as an exhibit to its second quarter Form 10-Q.

ITEM 2.01: COMPLETION OF ACQUISITION OR DISPOSITION OF ASSETS

- The sale of a subsidiary's equity to the public, if it constitutes a significant amount

of the assets of the public company, would require a report under Item 2.01 of Form 8-K. This is so because the subsidiary would not be wholly owned after the transaction is completed and thus would not be within the exception provided by Instruction 1(iii).

ITEM 2.02: RESULTS OF OPERATIONS AND FINANCIAL CONDITION

- The safe harbor contained in Item 2.02(b) provides that a Form 8-K is not required to report the disclosure of material, nonpublic information that is disclosed orally, telephonically, by webcast, by broadcast or by similar measures in a presentation that is complementary to, and initially occurs within 48 hours following, a related written announcement or release that has been furnished on an Item 2.02 Form 8-K. This safe harbor applies only to such 48 hour period — it is not a two business days or two calendar days test.

ITEM 2.04: TRIGGERING EVENTS THAT ACCELERATE OR INCREASE A DIRECT FINANCIAL OBLIGATION OR AN OBLIGATION UNDER AN OFF-BALANCE SHEET ARRANGEMENT

- A voluntary redemption of convertible notes by a registrant does not trigger a Form 8-K filing requirement.
- A Form 8-K is required if a notice of default is received, even if the registrant believes in good faith that there is no default and submits the matter to arbitration.

ITEM 3.02: UNREGISTERED SALES OF EQUITY SECURITIES

- An Item 3.02 Form 8-K filing requirement is triggered by an unregistered sale of

warrants to purchase equity securities (or an unregistered sale of options outside a stock option plan) if the volume threshold under Item 3.02 is exceeded, or by an unregistered sale of convertible notes (convertible into equity securities) if the volume threshold under Item 3.02 of the underlying equity security issuable upon conversion is exceeded. If the Item 3.02 Form 8-K that discloses the initial sale of the warrants, options or convertible notes also discloses the maximum amount of the underlying securities that may be issued through the exercise of the warrants, options or notes, then a subsequent Item 3.02 Form 8-K filing requirement is not triggered upon such exercise.

ITEM 5.02: DEPARTURE OF CERTAIN DIRECTORS OR CERTAIN OFFICERS; ELECTION OF DIRECTORS; APPOINTMENT OF CERTAIN OFFICERS; COMPENSATORY ARRANGEMENTS OF CERTAIN OFFICERS

- If the duties of a principal financial officer are temporarily turned over to another person, the registrant must file a Form 8-K both under Item 5.02(b), to report that the original principal financial officer has temporarily stepped down, and under Item 5.02(c), to report that the temporary replacement principal financial officer has been appointed. If the original principal financial officer returns to the position, then the registrant must again file a Form 8-K under Item 5.02(b), to report the departure of the temporary replacement principal financial officer, and under Item 5.02(c), to report the “re-appointment” of the original principal financial officer.
- If a director who is designated by an issuer’s majority shareholder gives notice

that he or she will resign if the majority shareholder sells its entire holdings of issuer stock, such notice triggers an obligation to file an Item 5.02(b) Form 8-K.

- If the appointment of a director to the board and a committee assignment were disclosed under Item 5.02(d) of Form 8-K, a change in that director’s committee assignment does not trigger a new 8-K filing as long as the change was not contemplated at the time of the director’s initial election to the board and initial committee assignment.
- The automatic renewal of an employment agreement pursuant to its terms does not trigger an Item 5.02(e) Form 8-K filing requirement.

If you have any questions regarding the applicability of the Form 8-K interpretations, please contact any of the attorneys listed below or any other member of our Corporate & Securities group.

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