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A legal update from Dechert's Corporate and Securities Group

SEC Staff Updates Its Form 8-K Guidance

On April 10, 2008, the staff of the Securities and Exchange Commission's Division of Corporation Finance updated and replaced its existing guidance regarding Current Reports on Form 8-K.¹ This new staff interpretation replaces prior telephone interpretations and frequently asked questions (FAQs) on the topic with one comprehensive update that includes some additional interpretive guidance, as well as some minor clarifications and corrections to existing guidance.

The following are some of the highlights of new guidance contained in the staff interpretation, presented in order of the applicable Form 8-K item (parenthetical references are to the particular questions (Q) or interpretive responses (IR)).

Item 1.01—Entry into a Material Definitive Agreement

A material definitive agreement must be summarized in the body of the Form 8-K. It is not sufficient to merely incorporate the agreement by reference to an exhibit (Q. 102.03).

¹ The new interpretations, which can be found at <http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>, replace the Form 8-K interpretations in (i) the July 1997 Manual of Publicly Available Telephone Interpretations, (ii) the June 2003 Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures and (iii) the November 2004 Form 8-K Frequently Asked Questions.

Item 2.01—Completion of Acquisition or Disposition of Assets

Instruction 1 to paragraph (iii) to Item 2.01 states that a Form 8-K is not necessary to report the sale of securities to the public by a company's wholly-owned subsidiary. However, the staff clarified that a Form 8-K is required to report a sale of the subsidiary's equity if following the transaction it would no longer be wholly-owned by the company (IR 205.05).

Item 2.02—Results of Operations and Financial Condition

The 48-hour safe harbor provided by an Item 2.02(b) Form 8-K is really 48 hours, not two business or calendar days (IR 206.01).

Item 2.04—Triggering Events That Accelerate or Increase a Direct Financial Obligation

A voluntary redemption of convertible notes by a company does not require an Item 2.04 Form 8-K (IR 208.01).

Notice of default is a triggering event requiring disclosure under Item 2.04 of Form 8-K, even though the company believes that no event of default has occurred and arbitration is pending (IR 208.02).

Item 3.01—Transfer of Listing

No Item 3.01 Form 8-K is necessary when a company whose common stock was traded on the OTC Bulletin Board applies to list its common stock on a stock exchange (IR 211.01).

Item 3.02—Unregistered Sales of Equity Securities

If a grant of stock options pursuant to a company's employee stock option plan does not constitute a "sale" or an "offer to sell" under Section 2(a)(3) of the Securities Act of 1933, then no disclosure is required under Item 3.02 of Form 8-K.

A Form 8-K Item 3.02 filing is triggered if a company sells unregistered shares of a class of equity securities that is not currently outstanding; because no securities of that class were outstanding, any sale will exceed the 1% volume threshold which requires the filing (Q. 112.02).

If a company enters into an agreement to issue unregistered securities to a third party in exchange for services, a Form 8-K is required if the volume threshold in Item 3.02 is exceeded (IR 212.01).

If the volume threshold in Item 3.02 is exceeded upon an unregistered sale of warrants, options outside a stock option plan, or convertible notes, a Form 8-K is necessary. (IR 212.03).

Item 3.03—Material Modifications to Rights of Security Holders

An Item 3.03 Form 8-K is required when a company issues a dividend of a preferred share purchase right pursuant to a shareholder rights plan, not when the company adopts the underlying plan. However, the adoption of the plan will trigger an Item 1.01 Form 8-K if the plan constitutes a material definitive agreement not made in the ordinary course of business (IR 213.01).

Item 4.02—Non-Reliance on Previously Issued Financial Statements

If a company determines that previously filed pro forma financial information can no longer be relied upon, no Item 4.02 Form 8-K is necessary. However,

an amendment to the previously filed form containing the information may be required to correct the error (Q. 115.02).

Item 5.02—Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

The staff clarified that an Item 5.02(b) Form 8-K, which is triggered by a notice of a director's decision to resign, retire, or refuse to stand for re-election, is needed even if such action is conditional or subject to the board's acceptance (Q. 117.01).

An Item 5.02(d) Form 8-K is required within four business days of a director's election other than by stockholders at a meeting even if the director's term will begin on a later date (Q. 117.07).

After a company has disclosed the adoption of a material cash bonus plan in an Item 5.02(e) Form 8-K, disclosure in an additional Form 8-K of the board's subsequent adoption of specific performance goals and business criteria for a performance period is not required, provided that the goals and criteria are materially consistent with the previously disclosed terms of the plan (Q. 117.10).

When disclosing an annual non-equity award incentive plan award a company need not disclose specific quantitative or qualitative performance target levels if such disclosure would result in competitive harm to the company (Q. 117.12).

If a compensation committee awards a discretionary cash bonus to an executive, as allowed pursuant to the executive's previously disclosed employment agreement, no Item 5.02 Form 8-K is necessary to report the amount of the bonus (Q. 117.13). This bonus information will appear in the company's CD&A.

Disclosure of the termination of an executive compensation plan is required under Item 5.02(e) of Form 8-K (Q. 117.14).

If a principal financial officer (PFO) temporarily steps down, a Form 8-K is necessary to report that change (under 5.02(b)) and that a replacement has been appointed (under 5.02(c)). If the original PFO returns to the position, an additional Form 8-K is necessary to

report the departure of the temporary officer and the reappointment of the original PFO (IR 217.02).

A Form 8-K filing requirement is triggered when a director who is designated by a majority stockholder gives notice that he or she will resign if such stockholder sells its entire holdings of company stock (IR 217.03).

No Form 8-K is needed to report the death of a director or listed officer (IR 217.04).

A Form 8-K filing requirement is triggered when a company delivers notice of termination of employment, not when the executive's employment terminates (IR 217.05).

An Item 5.02(c) Form 8-K is required when a new principal accounting officer is appointed, but it may be delayed until a public announcement of the appointment is made. However, the required 5.02(b) Form 8-K reporting the retirement, resignation or termination of the prior principal accounting officer,

which is triggered by the notice of such decision, may not be delayed (IR 217.06).

General guidance

The staff clarified that general instruction 4 to Form 8-K, which requires companies to file a copy of the report with each exchange on which any of the company's securities are registered, applies only to domestic exchanges (Q. 101.03).



The staff update is a helpful comprehensive compilation of prior and new staff guidance regarding Form 8-K. We suggest that reporting companies review this guidance, as well as revisit their internal disclosure procedures to ensure that they are equipped to comply with both the disclosure and timely filing requirements of Form 8-K.

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