

Corporate and Securities Alert

SEC Moves More Toward Annual-Based Reporting Approach to Compensation Disclosures

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The staff of the Securities and Exchange Commission (“the Staff”) is engaged in a general movement away from taking an event-based reporting approach to compensation disclosures on Form 8-K in favor of taking an annual-based reporting approach. The Staff may no longer require a report under Item 5.02(e) of Form 8-K for discretionary bonuses paid to named executive officers (“NEOs”) even when those officers do not meet performance criteria. However, the Staff will still require the registrant to disclose such compensation decisions to stockholders before the next annual meeting.

A hypothetical illustrates the Staff’s movement to annual-based reporting of compensation disclosures:

Assume a registrant maintains an omnibus incentive plan (“OIP”) under which cash-based or equity-based awards subject to performance-based vesting are granted to the registrant’s NEOs. The OIP contemplates payment of discretionary bonuses, as do other plans, contracts, or arrangements with the registrant’s NEOs. NEO’s do not achieve the applicable performance goals. Nonetheless, the registrant determines to pay material discretionary cash bonus to NEO’s. Must the registrant disclose these bonus payments under Item 5.02(e) of Form 8-K?

The Hypothetical Bonus Payment under the Old Event-Based Reporting Approach

According to Compliance and Disclosure Interpretation 17.11 (April 2, 2008), if the registrant exercised discretion to pay a bonus even though an NEO did not achieve the applicable performance goals, the registrant would be required to report that payment under Item 5.02(e) on Form 8-K. Even if the applicable plan permitted the exercise of discretion in determining bonuses, Interpretation 17.11 appeared to require the registrant to report the bonus payment.

The Hypothetical Bonus Payment Under the New Annual-Based Reporting Approach

The Staff’s position now appears to be that as long as the registrant pays the bonus pursuant to an express right to exercise discretion in determining bonus payments under the OIP or pursuant to some non-OIP

exercise of discretion (where the possible exercise of discretion has been previously disclosed) the registrant would **not** need to report this discretionary bonus payment under Item 5.02(e) on Form 8-K. The Staff views the payments as being materially consistent with the terms and conditions of the OIP (or a prior disclosure of the possible exercise of discretion), and the fact that the registrant does not have a practice of paying discretionary bonuses to NEOs upon failure to fulfill performance criteria does not make the bonus payment materially inconsistent with the OIP (or prior disclosure).

Practical Advice

To avoid the need to file a Form 8-K, registrants should consider disclosure of the possible exercise of discretion in order that future compensation decisions will be viewed as materially consistent with such disclosures. The registrant must, however, still disclose and justify discretionary compensation decisions in the annual Compensation Discussion & Analysis under Item 402 of Regulation S-K. This may involve difficult disclosures where the exercise of discretion is used to award bonuses where performance goals have not been achieved.

You should consult with your Fenwick & West LLP contact prior to making the type of compensation decisions discussed above to determine the appropriate disclosures.

For more information, you may contact any attorney in the [Executive Compensation and Employee Benefits Group](#).

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