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## CHANGES TO FORM 8-K EXECUTIVE COMPENSATION DISCLOSURE

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### SUMMARY OF CHANGES TO EXECUTIVE COMPENSATION DISCLOSURE ON FORM 8-K

The Securities and Exchange Commission recently adopted final rules that substantially alter the scope and substance of disclosures relating to executive compensation. As part of these new rules, the SEC implemented certain changes to the disclosure requirements of Form 8-K, including:

- movement of disclosures covering executive compensation arrangements from Items 1.01 and 1.02 to a reformulated Item 5.02;
- revisions regarding the specific persons for whom compensation arrangements must be disclosed; and
- revisions of the events triggering a Form 8-K filing.

The amendments to Form 8-K will be effective for triggering events that occur on or after November 7, 2006.

#### *Disclosure of Executive Compensation Moved to Item 5.02*

Items 1.01 and 1.02 currently require the filing of a Form 8-K if a company enters into, amends or terminates a “material definitive agreement.” Employment agreements and compensation plans and arrangements between a company and any of its directors or named executive officers were deemed to be material agreements and, consequently, have been filed routinely under Items 1.01 and 1.02. The new rules eliminate the need to disclose these compensatory arrangements under Items 1.01 and 1.02 and instead require disclosure of them under an expanded Item 5.02, with some important modifications.

First, the commencement, material amendment, or termination of employment and compensatory arrangements need only be disclosed if the arrangement is material to investors. In the past, all employment and compensatory arrangements with named executive officers and most employment and compensatory arrangements with other executive officers were presumptively material and therefore had to be disclosed under Items 1.01 and 1.02. The SEC has eliminated this presumption of materiality and Form 8-K will now require companies to

evaluate the materiality of employment and compensatory arrangements to determine whether a Form 8-K filing obligation exists.

Second, the reformulated Item 5.02 does not require disclosure of employment and compensatory arrangements for *all* executive officers. Instead, the new rules limit disclosure to material arrangements with the principal executive officer, the principal financial officer or any of the other “named executive officers.” Arrangements with executive officers who are not “named executive officers” are no longer required to be disclosed on Form 8-K.

For purposes of the new Item 5.02, “named executive officers” are those persons for whom compensation disclosure was required in the company’s last proxy statement, Form 10-K or registration statement, including:

- any person who served at any time during the fiscal year as the principal executive officer;
- any person who served at any time during the fiscal year as the principal financial officer;
- the three other most highly compensated executive officers who were serving as executive officers at the end of the fiscal year; and
- up to two additional persons who served as executive officers during, but not at the end of, the fiscal year, whose total compensation for the fiscal year was higher than that of any of the three most highly compensated executive officers described above.

The SEC has linked identification of the named executive officers to a company’s last required proxy statement, Form 10-K or registration statement. This should eliminate some of the confusion under the old rules, which occasionally required a company to determine its named executive officers for Form 8-K purposes before total compensation for the previous fiscal year could be calculated.

#### *New Disclosures and Triggering Events Under Item 5.02*

The new rules expand the disclosure of the departure of principal officers to include all named executive officers. Previously, only the departure of a director or a principal executive officer, president, principal financial officer, principal accounting officer or person performing similar functions was required to be disclosed.

Additionally, when a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions is appointed, or a director is appointed or elected (other than at a shareholder meeting), a company must file under Item 5.02 a brief description of:

- any material plan, contract or arrangement to which the officer or director is a party or in which he or she participates that is entered into or materially amended in connection with the triggering event; and
- any grant or award to any such person or modification thereto under any such plan, contract or arrangement in connection with any such event.

The SEC emphasized in the adopting release that disclosure of compensatory arrangements under revised Item 5.02 of Form 8-K requires only a “brief description” of the specified matter as opposed to the fuller executive compensation narratives (required by Item 402 of Regulation S-K) in a proxy statement, Form 10-K or registration statement.

Additionally, under the new rules, if a named executive officer’s salary or bonus for the most recent fiscal year has not yet been determined when the company files its proxy statement, Form 10-K or registration statement, the company must subsequently file a Form 8-K to update the affected columns of the summary compensation table (including the “total compensation” column) to reflect the payment, decision or other occurrence that makes the salary or bonus calculable. Therefore, when salary or bonus information is omitted from the summary compensation table, a company should have proper controls and procedures in place to ensure that a Form 8-K is filed within four business days after such amounts are finalized.

### **EXPANSION OF SAFE HARBOR**

The safe harbor from public and private claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder for companies that fail to file certain Form 8-K reports in a timely manner has been expanded to apply to new Item 5.02(e), which covers compensatory arrangements with any person qualifying as a named executive officer. The safe harbor would also protect a company from losing its eligibility to file a Form S-3 registration statement in the event of a failure to timely file a Form 8-K pursuant to Item 5.02(e). Please note that this safe harbor does not extend to the required disclosure of compensatory arrangements entered into, or amended, in connection with the appointment of certain new principal officers or the appointment or election of directors (other than at a shareholder meeting) pursuant to Item 5.02(c) or (d).

The limited safe harbor applies only to a failure to file a report on Form 8-K. Material misstatements or omissions in a Form 8-K that has been filed will continue to be subject to Section 10(b) and Rule 10b-5 liability. Additionally, the safe harbor extends only until the due date of the periodic report of the company for the relevant period in which the Form 8-K should have been filed. If, for example, an event occurs during a quarter and is not reported on a Form 8-K, it must be disclosed in the company’s Form 10-Q for that period (or in the case of the fourth quarter, the company’s Form 10-K) or else the company would lose the safe harbor from liability and lose its eligibility to file Form S-3 registration statements.

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