

SEC reporting and deferred comp

The Securities and Exchange Commission (SEC) is responsible for issuing regulations regarding disclosure rules for publicly traded corporations. Publicly traded companies need to be aware of these requirements and which disclosures are required with respect to nonqualified deferred compensation plans. SEC reporting falls into several broad categories:

- Form 8-K reporting of specific events
- Form 4 reporting of securities transactions by insiders
- Form 10-K and 10-Q periodic reporting
- Proxy disclosures
- SEC securities registration

Form 8-K, 10-K, and 10-Q reporting

On Aug. 23, 2004, the SEC issued rules expanding the list of events that can trigger required reporting using form 8-K. An 8-K must be filed within four business days of the triggering event. The SEC requires an 8-K filing for adopting or amending any compensation agreement between the corporation and any director or any of the named executive officers. It also requires disclosure of any “material definitive agreement” between the corporation and any other executive officers. The establishment of, or amendment to, a deferred comp plan typically will be considered a “material” agreement, and thus would be subject to 8-K disclosure. Although, in its instructions, the SEC encourages filing a copy of the agreement or plan as an exhibit to the 8-K, it is not required. As an alternative, the company may file a copy of the agreement as an exhibit to their subsequent periodic report 10-Q or 10-K that includes the date of the agreement. This provision may be useful to a company seeking confidential treatment of the deferred comp arrangement.

Securities registration

The Securities Act of 1933 prohibits the offer or sale of securities, unless a registration statement has been filed or an exemption is available. In 1995, the SEC stopped issuing no-action letters on deferred comp plans, which started an ongoing debate on whether a deferred comp plan is a security. Clarification has been sought from the SEC, but there’s no clear determination. It appears that the position of the SEC on whether deferred comp plans need to be registered as a security depends on the participant’s motives:

- If there are investment motives on plan participant deferrals, the plan may be a security and, therefore, be subject to registration (unless an exemption applies).
- If the motive is tax deferral, the plan may not be a security.

If it’s determined that the deferred comp plan is a security subject to registration, there are exemptions that provide relief:

- For plan participants residing in a single state
- For certain small offerings
- For transactions not involving a public offering

Plan sponsors should always consult with legal counsel regarding securities registration requirements.

Form 4 reporting

Another SEC reporting provision applies to publicly traded corporations that offer company stock as an investment option in their deferred comp plan. This provision applies whether or not corporate stock is actually held as an asset used to finance the plan. Any transactions in the plan involving company stock investments in “insiders” accounts must be reported to the SEC on Form 4. Form 4 filings must be made by the end of the second business day after the effective date of the transaction involved.

Proxy disclosures

On Aug. 11, 2006, the SEC issued regulations regarding the disclosure of executive officer and director compensation. The regulations are effective for all filings for entities with fiscal years beginning after Dec. 15, 2006. The proposed regulations are quite lengthy and require new disclosures regarding executive compensation. Included in the regulations are disclosures with respect to deferred comp:

- A new “deferred comp” table showing account activity and balance for each named executive officer
- New nonqualified defined benefit disclosures
- Reporting earnings on nonqualified plans in a new “all other compensation” disclosure
- Disclosures regarding payments upon change in control of the corporation
- A pay ratio disclosure

This summary is intended only as an overview of SEC reporting requirements for deferred comp. SEC reporting is an exceedingly complex subject area. Publicly traded companies should retain competent advisors to assist in assuring that all disclosure requirements are strictly followed.



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