



# What's in a Name? Disclosure Implications for "Officers," "Executive Officers" and "Named Executive Officers" under SEC Rules

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This Practice Note examines the definition of "officer" for purposes of Section 16 of the Exchange Act and the definitions of "executive officer" and "named executive officer" under Items 401 and 402 of Regulation S-K and the related Securities Act and the Exchange Act disclosure obligations. This Note also discusses Form 8-K reporting requirements for events involving certain officers.

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The SEC's rules and regulations mandate specific disclosure for officers of a public company who are:

- "Officers" for purposes of Section 16 of the Securities Exchange Act of 1934 (Exchange Act).
- "Executive officers" under Item 401 of Regulation S-K.
- "Named executive officers" under Item 402 of Regulation S-K.

In addition, Form 8-K imposes reporting obligations on public companies for events involving certain officers.

The analysis of which of a company's officers fits into each of these categories can be complicated. The determination is not based solely on a person's official title but often requires an examination of the surrounding facts and circumstances. In addition, though the various categories of officers set out in the SEC's disclosure rules are related to one another, each has subtle differences that practitioners should be familiar with.

This Practice Note serves as a brief primer on how to identify the officers that fit into each category and the related disclosure implications.

As a matter of good corporate governance, a public company's:

- Board of directors should adopt annual resolutions formally designating which company officers are considered to be Section 16 officers.
- Disclosure committee, or other members of management responsible for preparing the company's SEC filings under the Securities Act of 1933 (Securities Act) and the Exchange Act, should carefully review and periodically determine which

company officers are executive officers, named executive officers and officers that may trigger a Form 8-K filing requirement.

These steps should help the company ensure continued compliance with its SEC disclosure obligations.

## SECTION 16 OFFICERS

Section 16(a) of the Exchange Act requires officers and directors of certain reporting companies to file beneficial ownership reports with the SEC. In addition, under Section 16(b) of the Exchange Act, Section 16 officers are subject to liability for profits realized from their purchases and sales of company equity securities within a period of less than six months.

### Definition under Rule 16a-1(f) under the Exchange Act

The term "officer" is defined in Rule 16a-1 of the Exchange Act as:

- A company's:
  - president;
  - principal financial officer; or
  - principal accounting officer (or, if there is no principal accounting officer, the controller).
- Any:
  - vice president of a company in charge of a principal business unit, division or function (such as sales, administration or finance);
  - other officer of a company who performs a policy-making function; or
  - other person who performs similar policy-making functions for the company.

The question of whether an officer performs policy-making functions is a factual one and companies should carefully analyze

which officers fit into this category. Companies should also note that under Rule 16a-1, officers of a company's parent(s) or subsidiaries are deemed officers of the company if they perform policy-making functions for the company.

To help clarify which individuals at a company are subject to Section 16 reporting requirements, the company's board of directors (or compensation committee, if this responsibility has been delegated to the committee) should formally designate which members of management are considered to be Section 16 officers. This designation should be made by formal board resolution on an annual basis. An annual resolution naming Section 16 officers can be an effective tool for the company's legal team to help ensure compliance with SEC reporting requirements.

For a standard form of resolutions for the board of directors or compensation committee of a public company designating executive officers for purposes of Section 16, see *Standard Clause, Board Resolutions: Designating Section 16 Officers* (<http://us.practicallaw.com/1-518-0284>).

### Disclosure Implications

Individuals that are deemed Section 16 officers are subject to Section 16 of the Exchange Act and are required to periodically report their beneficial holdings of the company's equity securities on Form 3, Form 4 and Form 5, regardless of how many shares they own. For more information on these reporting requirements, see *Practice Note, Section 16 Reporting: Why, How and When to Do It* (<http://us.practicallaw.com/2-386-1726>).

Section 16 officers are also subject to potential liability under Section 16(b) for realizing short-swing profits (see *Practice Note, Section 16(b) Short-swing Profit Liability: The Perils of Turning a Quick Profit* (<http://us.practicallaw.com/8-503-3911>)).

### EXECUTIVE OFFICERS

A public company must disclose biographical information about its directors and its executive officers in Part III of its Annual Report on Form 10-K. This disclosure, required under Item 401 of Regulation S-K, may be set out in the company's Form 10-K or may instead be incorporated by reference to the proxy or information statement for its annual meeting of stockholders.

Disclosure of biographical information about a company's directors and executive officers under Item 401 may also be required in the registration statement for a securities offering registered under the Securities Act, depending on the disclosure requirements set out in the relevant Securities Act form.

#### Definition under Rule 3b-7 under the Exchange Act

The definition of executive officer is found in Rule 3b-7 under the Exchange Act. This definition tracks the definition of officer for purposes of Section 16, except that it **does not** specifically include the company's:

- Principal financial officer.
- Principal accounting officer or controller.

Many companies find that their lists of Section 16 officers and executive officers are identical. However, some companies may determine that the principal accounting officer or controller does not have a policy-making function and therefore is not an executive officer under Rule 3b-7.

### Disclosure Implications

Item 401 of Regulation S-K requires detailed disclosure about a company's executive officers. Specifically, Item 401 requires a company to disclose, among other information:

- The names and ages of all its executive officers and all persons chosen to become executive officers.
- All positions and offices with the company held by each executive officer.
- The term of office of each executive officer and the period during which he or she has served as an executive officer.
- Any arrangement or understanding between any executive officer and any other person(s) (naming that person) under which the executive officer was or is to be selected as an executive officer.
- Each executive officer's business experience during the past five years, including:
  - the executive officer's principal occupations and employment;
  - the name and principal business of any corporation or other organization in which those principal occupations and employment were carried on; and
  - whether any of those corporations or organizations is a parent, subsidiary or other affiliate of the company.

### NAMED EXECUTIVE OFFICERS

Part III of Form 10-K also requires companies to disclose the executive compensation information called for by Item 402 of Regulation S-K. This disclosure must be provided for each of a company's named executive officers. The information may be set out in the company's Form 10-K or may instead be incorporated by reference to the proxy or information statement for its annual meeting of stockholders.

Executive compensation disclosure under Item 402 may also be required in the registration statement for a securities offering registered under the Securities Act, depending on the disclosure requirements set out in the relevant Securities Act form.

#### Definition under Items 402(a)(3) and 402(m)(2) of Regulation S-K

The narrowest of the three officer definitions is that of a named executive officer.

For a company that **is not** a smaller reporting company (SRC), Item 402(a)(3) of Regulation S-K defines named executive officers as:

- All individuals serving as the company's principal executive officer or acting in a similar capacity during the last completed fiscal year (PEO), regardless of compensation level.

- All individuals serving as the company's principal financial officer or acting in a similar capacity during the last completed fiscal year (PFO), regardless of compensation level.
- The company's three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year.
- Up to two additional individuals for whom disclosure would have been provided under the immediately preceding bullet point, except that the individual was not serving as an executive officer of the company at the end of the last completed fiscal year.

The definition of named executive officer for SRCs, set out in Item 402(m)(2) of Regulation S-K, is narrower because it:

- Does not specifically include the company's PFO.
- Only encompasses two of the next most highly compensated executive officers (other than the PEO), not three.

In practice, however, for SRCs the PFO is typically deemed a named executive officer because he or she is usually one of the two most highly compensated executive officers.

Generally, a company's list of executive officers is longer than its list of named executive officers.

### Disclosure Implications

Item 402 of Regulation S-K requires detailed executive compensation disclosure for a company's named executive officers. Specifically, for a company that **is not** an SRC, Item 402 requires the company to disclose, among other information:

- A summary compensation table setting out the compensation of each named executive officer for the past three years.
- A table setting out grants of awards made to any named executive officer in the last completed fiscal year under any plan.
- A narrative description of any material factors necessary to understand the information disclosed in the two tables described above.
- A table setting out unexercised options, stock that has not vested and equity incentive plan awards for each named executive officer outstanding as of the end of the company's last completed fiscal year.
- A table setting out each exercise of stock options, stock appreciation rights and similar instruments, and each vesting of stock, including restricted stock, restricted stock units and similar instruments, during the last completed fiscal year for each of the named executive officers on an aggregated basis.
- A table setting out pension benefits and a table disclosing nonqualified defined contribution and other nonqualified deferred compensation plans of the named executive officers.
- Potential payments to the named executive officers upon termination or a change of control.

SRCs are not required to disclose all of the information described above. Instead, they need only comply with the scaled-back

executive compensation disclosure requirements for SRCs set out in Item 402. In addition, a company that is an emerging growth company (EGC) as defined under the Jumpstart Our Business Startups Act (JOBS Act) need only comply with the provisions of Item 402 of Regulation S-K that apply to SRCs.

For more information about executive compensation disclosure requirements generally, see *Practice Note, Preparation of Compensation Discussion and Analysis* (<http://us.practicallaw.com/5-385-4121>). For more information about scaled disclosure requirements applicable to SRCs and EGCs, see *Practice Notes, Determining Smaller Reporting Company Status and Understanding Key Differences in Its Disclosure and Reporting Requirements: Executive Compensation (Item 402)* (<http://us.practicallaw.com/9-506-5812>) and *JOBS Act: On-ramp to the Capital Markets for Emerging Growth Companies Summary* (<http://us.practicallaw.com/1-518-7351>).

### CERTAIN OFFICERS THAT MAY TRIGGER A FORM 8-K FILING REQUIREMENT

Most companies are aware that the appointment, termination, resignation or retirement of a company officer is an event that must be reported on Form 8-K, generally within four business days. Companies and counsel should note, however, that the Form 8-K reporting requirement is not tied to any of the three officer definitions described above. Instead, Item 5.02 of Form 8-K sets out its own classes of officers that trigger a disclosure requirement.

Specifically, Item 5.02(b) requires companies to disclose the termination, retirement or resignation of:

- A company's:
  - principal executive officer;
  - president;
  - principal financial officer;
  - principal accounting officer; or
  - principal operating officer.
- Any:
  - person performing similar functions; or
  - named executive officer.

And Item 5.02(c) requires disclosure of the appointment of:

- A new:
  - principal executive officer;
  - president;
  - principal financial officer;
  - principal accounting officer; or
  - principal operating officer.
- Any person performing similar functions.

Because the enumerated officers that trigger these Form 8-K filing requirements do not exactly track the definition of Section 16

officers, executive officers under Rule 3b-7 or named executive officers under Item 402 of Regulation S-K, whenever **any member** of management is appointed or terminated, or retires or resigns, the company should carefully review the Form 8-K requirements and determine whether a filing is needed.

For more information about Form 8-K filing requirements for officer appointments and departures, see *Checklist, Form 8-K Reporting Executive and Director Departures, Appointments and Compensatory Arrangements Checklist* (<http://us.practicallaw.com/1-519-6082>).

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