



SEC Adopts Additional Form 8-K Disclosures and Accelerates Filing Date to Four Business Days

IN RESPONSE TO THE "REAL TIME ISSUER DISCLOSURE" MANDATE OF SECTION 409 OF THE SARBANES-OXLEY ACT, the SEC adopted new rules governing current disclosures on Form 8-K. The new rules are intended to provide investors better, faster disclosure of material events by: (i) adding eight new disclosure events to Form 8-K; (ii) expanding the scope of two existing disclosure events; (iii) moving two disclosure events from annual and quarterly reports to Form 8-K; (iv) accelerating the Form 8-K filing deadline for all required disclosures to four business days after the reportable event; and (v) creating a limited safe harbor for certain violations of the Form 8-K requirements.

The new rules become effective on August 23, 2004. They do not apply to foreign private issuers.



NEW AND EXPANDED DISCLOSURE ITEMS

The eight new events that will trigger the need for a filing on Form 8-K are:

- Entry into a material definitive agreement not made in the ordinary course of business;
- Termination of a material definitive agreement not made in the ordinary course of business;
- Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Material costs associated with exit or disposal activities;
- Material impairments;
- Notice of delisting or failure to satisfy listing standards; and
- Non-reliance on previously issued financial statements, related audit reports or completed interim reviews.

Two existing disclosure events have been expanded:

- The requirement to report certain director resignations now requires disclosure concerning resignation of

a director for any reason, the election of a new director, and the appointment or departure of a principal officer; and

■ The requirement to disclose a change in a company's fiscal year has been amended to require disclosure of any amendments to a company's articles of incorporation or bylaws.

We explain each of these new and expanded disclosure items in detail below.

MOVED AND RETAINED DISCLOSURE ITEMS

Two events that were previously required to be reported on

quarterly or annual reports – unregistered sales of equity securities and material modifications to rights of security holders – must now be reported on Form 8-K.

The new Form 8-K retains, with only minor revisions, the following reportable

events from the old Form 8-K: (i) changes in control of a registrant; (ii) completion of an acquisition or disposition of assets; (iii) bankruptcy or receivership; (iv) changes in accountants; (v) optional "other event" filings; (vi) Regulation FD disclosure; (vii) amendments to or waivers from codes of ethics; (viii) suspension of trading under benefit plans; and (ix) announcements about results of operations or financial condition (e.g., earnings releases).



ACCELERATED FILING

Previously, companies had from five to fifteen days to file a Form 8-K, depending on the nature of the triggering event. The new rules accelerate the period within which a company must file a Form 8-K to *four business days* from any triggering event. This change significantly shortens the filing deadline for several disclosure items, particularly those that were previously disclosed in periodic reports but that now must be disclosed in a current report on Form 8-K. The accelerated filing requirement does not apply to filings under Regulation FD, voluntary

disclosures and certain exhibits, nor does it affect the deadline for filing financial statements and pro forma information in connection with a material business acquisition, which continue to have to be filed within 75 days.

SAFE HARBOR

The SEC recognized that several of the new Form 8-K disclosure items may require management to assess, on an expedited basis, the materiality of an event or to determine whether a disclosure obligation has been triggered. To address this burden, the SEC adopted a limited safe harbor from public and private claims under Section 10(b) of the Exchange Act and Rule 10b-5 for failure to file timely seven of the new items on Form 8-K. The overview chart at the end of this Client Alert identifies the seven items covered by the limited safe harbor. The safe harbor does not apply to any of the other items of Form 8-K, nor does it provide protection for

violations of other provisions of the securities laws. Furthermore, because the safe harbor is premised upon the quick decision-making process management must undergo, it only applies to a failure to file a Form 8-K; material misstatements or omissions in a Form 8-K will continue to be subject to liability under Section 10(b) and Rule 10b-5.

Under the safe harbor, a company will be insulated from Section 10(b) and Rule 10b-5 liability until the due date of the periodic report (e.g., Form 10-K or Form 10-Q) of the company for the relevant period in which the Form 8-K was not timely filed. Companies must then disclose the information in the "other information" section of the applicable periodic report. For example, if an event occurred that required the filing of a Form 8-K during a particular quarter, but a company fails to make the required timely disclosure on Form 8-K, the company must provide the disclosure prescribed by the relevant Form 8-K item in its quarterly report filed for the quarter during which that event occurred.

RELATED MATTERS

Companies that fail to file timely Forms 8-K in connection with the items covered by the safe harbor will not lose their eligibility to use Form S-

2 and S-3 registration statements. However, a company must file the disclosure required by these items before the date it files such a registration statement. For those items not covered by the safe harbor, companies must still file timely Forms 8-K in order to remain eligible to use Form S-2 and S-3 registration statements.

The SEC amended Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the twelve months preceding a sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition.

The SEC and the Department of Justice jointly concluded that Section 906 of the Sarbanes-Oxley Act does not apply to Form 8-K.

NEW DISCLOSURES

The amendment adds eight new events that must be reported on Form 8-K.

I. Material Definitive Agreements.

Companies must now disclose when they enter into or amend material definitive agreements outside the ordinary course of business. For purposes of the new Form 8-K, the term "material definitive agreement" means an agreement that provides for obligations that are material to and enforceable against the company, or rights that are material to and enforceable by the company against one or more other parties to the agreement, in each case whether or not subject to conditions. The standards for materiality and ordinary course of business are those used under Item 601 of Regulation S-K, with which companies must already comply when they file periodic reports.

A material definitive agreement that is subject to customary closing conditions, such as the delivery of legal opinions or comfort letters, completion of due diligence or regulatory approval, must be disclosed when the agreement is enforceable by or against a company, despite the fact that such conditions have not yet been satisfied. On the other hand, a company is not required to disclose non-binding agreements and

letters of intent. (If a company enters into a non-binding letter of intent that also contains some binding, but non-material elements, such as a confidentiality or no-shop agreement, the letter does not need to be filed because the binding provisions are not material.) The obligation to disclose a material amendment may be triggered even if a company has not disclosed the original agreement.

Disclosure must include the date of the agreement or amendment, the identity of the parties, a brief description of any other material relationship between the company or its affiliates and the parties, and a brief description of the material terms and conditions of the agreement or amendment.

Companies do not need to file the agreements or amendments as exhibits to the Form 8-K. Rather, a company must file the documents with its next periodic report or registration statement, as was the case prior to the changes to Form 8-K. The process for requesting confidential treatment of the terms of the agreements or amendments also remains the same.

2. Termination of Material Definitive Agreements.

If a material definitive agreement that was made outside the ordinary course of business is terminated – other than by expiration of the agreement on its stated termination date, or as a result of the fulfillment of all parties' obligations under the agreement – a company must disclose the termination if the termination is material to the company. This disclosure must include the date of the termination, the identity of the parties, a description of any other material relationship between the parties and the company or its affiliates, a description of the material terms and conditions of the agreement, a description of the material circumstances surrounding the termination, and any material early termination fees incurred by the company.

3. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of the Company.

If a company becomes obligated under a material, direct financial obligation, it must disclose the date of the obligation, a description of the transaction creating the obligation, the amount of the obligation (including terms of payment),

the terms under which the obligation may be accelerated or increased, the nature of any recourse provisions, and other material terms and conditions. For purposes of the new Form 8-K, the term "direct financial obligation" means any long-term debt obligation, capital lease obligation, or operating lease obligation (each as defined under Item 303 of Regulation S-K), or a short-term debt obligation that arises outside the ordinary course of business.

Similar disclosure requirements apply when a company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement. (For purposes of new Form 8-K, the term "off-balance sheet arrangement" has the same meaning given that term under the recently revised Item 303 of Regulation S-K.) A company must disclose the date the company becomes directly or contingently liable on the obligation, describe the transaction or agreement creating the arrangement and obligation, as well as the nature and amount of the obligation under the arrangement, the material terms under which it may

become a direct obligation, if applicable, or may be accelerated or increased, the nature of any recourse provisions, the maximum potential amount of future payments that may be required, if different, and other material terms and conditions.

A company must disclose this information regardless of whether or not it is a party to the transaction or agreement creating the contingent obligation arising under the off-balance arrangement. If neither the company nor any of its affiliates is a party to the transaction or agreement, the four business day period for reporting the event on Form 8-K will begin on the earlier of (i) the fourth business day after the contingent obligation is created or arises, and (ii) the day on which an executive officer of the company becomes aware of the contingent obligation.

4. Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

A company must file a Form 8-K report if certain triggering events occur and the consequences of the event are material

to the company. Triggering events are events, including events of default, events of acceleration or similar events, as a result of which (i) a direct financial obligation of the company, or an obligation of the company arising under an off-balance sheet arrangement, is increased or becomes accelerated, or (ii) a contingent obligation of the company arising out of an off-balance sheet arrangement becomes a direct financial obligation of the company. Disclosure regarding such events must include, as applicable, the date of the triggering event, a description of the transaction or agreement under which the direct financial obligation was created and is increased or accelerated, a description of the off-balance sheet arrangement, a description of the triggering event, the amount of the obligation, the terms of payment or acceleration, and other material

consequences of the triggering event. Consistent with other new Form 8-K items, a company must report material triggering events in connection with off-balance sheet arrangements whether or not it is a party to the transaction or agreement under which the triggering event occurs.

5. Costs Associated with Exit or Disposal Activities.

A company must disclose when its board, a board committee or an authorized officer commits the company to an exit or disposal plan, otherwise disposes of a long-lived asset, or terminates employees under a plan of termination (as described in SFAS No. 146), under which the company will incur material charges under generally accepted accounting principles applicable to the company. The disclosure must include the date of the company's commitment to, and a description of, the course of action, the circumstances leading to the course of action and its expected completion date, an estimate of the total amount expected to be incurred for each major type of cost associated with the course of action, an estimate of the total amount to be incurred in connection with the action,

and an estimate of the charge that will result in future cash expenditures. If a company cannot make a good faith estimate of the costs, it must nevertheless file a Form 8-K describing the company's commitment to the course of action and then, within four days of formulating the estimate, file an amendment to the Form 8-K to include the estimate.

6. Material Impairments.

A company must disclose when its board, a board committee or an authorized officer concludes that a material charge for impairment to one or more of the company's assets (including, without limitation, an impairment of securities or goodwill) is required under generally accepted accounting principles applicable to the company. The disclosure must include the date the company decided a material

charge is required, a description of the impaired asset(s), the circumstances leading to the conclusion that an impairment charge is required, an estimate of the amount of the charge, and an estimate of the amount of the charge that will result in future cash expenditures. As with the requirements regarding disclosure of exit or disposal activities, if a company cannot make a good faith estimate, it must still disclose on a Form 8-K that it has concluded that a material charge for impairment has been made and, within four days of formulating the estimate, file an amendment to the Form 8-K to include the estimate.

The SEC recognized that tests for impairment or recoverability often occur in conjunction with the preparation,

review or audit of financial statements that will be made available to the public in a periodic report. Accordingly, the SEC added an instruction to new Form 8-K indicating that no disclosure is required if a company's conclusion regarding the material charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or year, the

conclusion is disclosed in the company's Exchange Act report for that period, and the report is timely filed.

7. Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

A company must disclose its receipt of a notice of delisting or noncompliance with a rule or listing standard from the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity. A company has to make similar disclosures if it notifies the exchange or association of any material noncompliance with listing standards or if it takes action regarding delisting. The disclosure must include the date of the receipt or transmission of the notice, the rule that the company has failed or fails to satisfy and any

action that the company, at the time of the filing, has decided to take in response to the notice or noncompliance. If the exchange or association issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard, the company must state the date and summarize the contents of the communication. Disclosure is also required when a company decides to transfer its listing to another exchange or association.

8. Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

A company must disclose when its board, a board committee or an authorized officer concludes that previously issued financial statements covering one or more years or interim periods should no longer be relied upon because of an error in the financial statements (as addressed in APB Opinion No. 20). Similarly, disclosure is required when the company's independent auditor notifies the company that disclosure should be made or action should be taken to prevent future reliance on a previously issued

audit report or completed interim review. Such disclosure should include the date of the company's conclusion or the auditor's notification, identification of the financial statements that should no longer be relied upon, a brief description of the facts underlying the board's conclusion or the information provided by the auditor, and a statement about whether the board, the audit committee or an authorized officer discussed the subject matter giving rise to the disclosure with the company's independent auditor. If the disclosure is triggered by an auditor's notification, the company must provide the auditor with the disclosure no later than the same day the Form 8-K is filed, and it must ask the auditor promptly to provide a letter addressed to the SEC stating whether or not the auditor agrees with the company's disclosure and, if not, why not. The company then has to amend its Form 8-K within two business days of its receipt of the auditor's letter and include the letter as an exhibit to the amended Form 8-K.

EXPANDED DISCLOSURES

The SEC also expanded the scope of disclosure of two existing Form 8-K events.

I. Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers.

The old Form 8-K required disclosure regarding a director's departure only when the departure was due to a disagreement and the director provided a letter describing the disagreement and requested disclosure of the matter. The revised Form 8-K requires disclosure if a director has resigned or refuses to stand for re-election to the board since the date of the last annual meeting of shareholders because of a disagreement with the company, known to an executive officer of the company, on any matter relating to the company's operations, policies or practices, or if a director has been removed for cause from the board, whether or not the departing director provides a letter of disagreement to the company. Disclosure must include the date of the director's resignation, refusal to stand

for re-election or removal, committee positions held by the director at that time, and a description of the circumstances representing the disagreement that management believes caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal. In addition, if the director furnishes the company with any written correspondence concerning the circumstances surrounding his or her resignation, refusal or removal, the company must file a copy of the correspondence as an exhibit to the Form 8-K, regardless of whether the director requests that the company take such action.

The company must also: (i) provide the director with a copy of the disclosures it is making no later than the day that the company files the Form 8-K; (ii) provide the director with the opportunity to furnish a letter addressed to the company as promptly as possible stating whether he or she agrees with the company's disclosure and, if not, why not; and (iii) if the director provides such a letter, the company must amend its Form 8-K within two days of its receipt and

include the letter as an exhibit to the amended Form 8-K.

New Form 8-K also requires disclosure when: (i) a director retires, resigns, is removed, or declines to stand for re-election and the company is not required to provide the disclosure described above in the case of a disagreement; (ii) a new director is elected to the board, except by a vote of security holders at an annual meeting or a special meeting convened for such purpose; or (iii) the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or when any such person retires, resigns, or is terminated from that position. Disclosure must include the date of the event and, for new appointments, the position of the officer, information regarding his or her background, certain related transactions with the company, and a brief description of the material terms of any employment agreement between the company and the officer. In order to provide for a smooth transition of authority, a company may delay disclosure regarding the appointment of an officer until the day on which the company first makes public announcement of the appointment.

2. Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

A company with a class of equity securities registered under Section 12 of the Exchange Act must disclose amendments to its articles of incorporation or bylaws unless a proposal for the amendment was previously disclosed in a filed proxy or information statement. Disclosure must include the effective date of the amendment and a description of the provision adopted or changed and, if applicable, the previous provision. A company must also file a Form 8-K if it determines to change its fiscal year from that used in its most recent filing with the SEC, by means other than a submission to a vote of security holders through the solicitation of proxies or otherwise, or by an amendment to its articles of incorporation or bylaws. Disclosure must include the date of the determination, the date of the new fiscal year end, and the form (e.g., Form 10-K or Form 10-Q), on which the report covering the transition period will be filed.

CLIENT ALERT

FORM 8-K – OVERVIEW OF CHANGES

New Form 8-K Item No.		Old Form 8-K Item No.
Section 1 - Registrant's Business and Operations		
Item 1.01	Entry into a Material Definitive Agreement <i>Note – Safe Harbor Applicable</i>	New Item
Item 1.02	Termination of a Material Definitive Agreement <i>Note – Safe Harbor Applicable</i>	New Item
Item 1.03	Bankruptcy or Receivership	Item 3
Section 2 - Financial Information		
Item 2.01	Completion of Acquisition or Disposition of Assets	Item 2
Item 2.02	Results of Operations and Financial Condition	Item 12
Item 2.03	Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant <i>Note – Safe Harbor Applicable</i>	New Item
Item 2.04	Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement <i>Note – Safe Harbor Applicable</i>	New Item
Item 2.05	Costs Associated with Exit or Disposal Activities <i>Note – Safe Harbor Applicable</i>	New Item
Item 2.06	Material Impairments <i>Note – Safe Harbor Applicable</i>	New Item
Section 3 - Securities and Trading Markets		
Item 3.01	Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing	New Item
Item 3.02	Unregistered Sales of Equity Securities	Moved from periodic reports
Item 3.03	Material Modifications to Rights of Security Holders	Moved from periodic reports
Section 4 - Matters Related to Accountants and Financial Statements		
Item 4.01	Changes in Registrant's Certifying Accountant	Item 4
Item 4.02	Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review <i>Note – Safe Harbor Applicable to Paragraph (a)</i>	New Item
Section 5 - Corporate Governance and Management		
Item 5.01	Changes in Control of Registrant	Item 1
Item 5.02	Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers	Item 6 (expanded)
Item 5.03	Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	Item 8 (expanded)
Item 5.04	Temporary Suspension of Trading Under Registrant's Employee Benefit Plans	Item 11
Item 5.05	Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.	Item 10
Section 6 - [Reserved]		
Section 7 - Regulation FD <i>Note – Four Day Filing Deadline Does Not Apply</i>		
Item 7.01	Regulation FD Disclosure	Item 9
Section 8 - Other Events <i>Note – Four Day Filing Deadline Does Not Apply</i>		
Item 8.01	Other Events	Item 5
Section 9 - Financial Statements and Exhibits		
Item 9.01	Financial Statements and Exhibits	Item 7

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