

### **Securities and Exchange Commission Issues Final Rules on Additional 8-K Requirements and Accelerated 8-K Filing Deadlines**

The Securities and Exchange Commission has issued final rules amending the disclosure requirements and filing deadlines for Current Reports on Form 8-K. The Commission intends the new disclosure requirements to provide investors with accelerated access to a greater range of reliable information, consistent with Section 409 of the Sarbanes-Oxley Act of 2002.

#### **Executive Summary**

The final rules add eight new items to Form 8-K, move two disclosure items currently required on Form 10-K and Form 10-Q to Form 8-K and expand two pre-existing items. Each of these items is summarized in further detail below. Companies must comply with the new disclosure requirements beginning August 23, 2004. The new requirements apply to all domestic issuers, including small business issuers.

The final rules reflect some significant changes from the proposed rules. The Commission did not adopt the provision originally proposed in several of the new items that would have required management's analysis of a reported event (the so-called "Mini-MD&A"), although it specified that Form 8-K disclosure must include all information necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading. Companies will have four business days, rather than the proposed two business days, to file Form 8-Ks, with no extensions available under Rule 12b-25. The adopted regulations do not require disclosure of letters of intent or other non-binding agreements, which would have been required under the proposed rules. In addition, the final rules do not require disclosure of the termination or reduction of a business relationship with a customer.

The Commission adopted a limited safe harbor from liability under Section 10(b) of the Exchange Act and Rule 10b-5 for failure to file a Form 8-K. The safe harbor is limited to seven specific disclosure items. The safe harbor is not applicable to material misstatements or omissions made in a filed Form 8-K and is effective only until the company's next periodic report is due. The final rules also carve out from the eligibility requirements for Forms S-2 and S-3 any failure to timely file with respect to the same items to which the safe harbor applies. The Commission also amended Rule 144 to clarify that a company need not have filed all required Form 8-K reports to rely on the safe harbor.

#### **New Disclosure Requirements**

The following eight items represent new events that will trigger a Form 8-K filing.

**1. Item 1.01: Entry Into a Material Definitive Agreement.** Under this item, companies must disclose their entry into definitive agreements that are material under the standard currently used to determine when an agreement must be filed as an exhibit under Item 601(b)(10) of Regulation S-K. Material amendments to a material agreement must also be disclosed under this item. Companies must disclose:

- the date on which the agreement was entered into or amended;
- the identity of the parties to the agreement;
- a brief description of any material relationship of the company or its affiliates with any of the parties to the

agreement (other than the agreement or amendment itself); and

- a brief description of the terms and conditions of the agreement or amendment that are material to the company.

Unlike the proposed Form 8-K amendments, the final rules do not require disclosure of letters of intent and other non-binding agreements. Only agreements that are material to and enforceable by or against the company must be disclosed.

The final rules do not require companies to file a material definitive agreement as an exhibit to a Form 8-K. This is intended to allow companies time to assess the need for, and to prepare a request for, confidential treatment and for the process of converting lengthy documents into EDGAR format. A material definitive agreement must instead be filed in the company's next periodic report under the same requirements that existed previously. However, the Commission encourages companies to file agreements that are disclosed in a Form 8-K as an exhibit to the filing, particularly when the company is not requesting confidential treatment of the agreement.

It is important to note that material amendments to a material definitive agreement may trigger a disclosure requirement even though the initial entry into the material definitive agreement occurred prior to the effectiveness of the amendment to the Form 8-K.

Additionally, new Item 1.01 requires disclosure of all material definitive agreements, including business combinations. The filing of the Form 8-K may constitute the first "public announcement" for purposes of making an offer of securities, communications prior to commencement of a tender offer or a solicitation prior to sending a proxy statement, and thus trigger filing obligations under Rules 165 of the Securities Act, Rule 14d-2(b) or Rule 14a-12 of the Exchange Act. To avoid duplicative filings under those rules, Form 8-K was amended to enable a company to check one or more boxes on the cover page to indicate that it is simultaneously satisfying its filing obligation under these rules, provided that in such case the Form 8-K must contain all of the information required by the rules.

**2. Item 1.02: Termination of a Material Definitive Agreement.** This item requires disclosure of the termination of a material definitive agreement not made in the ordinary course of business if such termination is material to the company. Termination by expiration on a stated termination date or as a result of all parties completing their obligations under an agreement need not be disclosed.

The following information is required to be disclosed:

- the date of the termination of the material definitive agreement, the identity of the parties to the agreement and a brief description of any material relationship of the company or its affiliates with any of the parties to the agreement (other than the agreement itself);
- a brief description of the terms and conditions of the agreement that are material to the company;
- a brief description of the material circumstances surrounding the termination; and
- any material early termination penalties incurred by the company.

The final rules do not require disclosure while negotiations or discussions regarding termination are being held. Similarly, no disclosure is required if the company believes in good faith that the agreement has not been terminated unless the company has received a termination notice pursuant to the contract.

**3. Item 2.03: Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant.** This item requires disclosure of the following information if a company becomes obligated under a direct financial obligation that is material to the company:

- the date on which the company becomes obligated on the direct financial obligation and a brief description of the transaction or agreement creating the obligation;

- the amount of the obligation, including the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties; and
- a brief description of the other terms and conditions of the transaction or agreement that are material to the company.

In addition, if the company becomes directly or contingently liable for an obligation that is material to the company arising out of an off-balance sheet arrangement, it must provide the following information:

- the date on which the company becomes directly or contingently liable on the obligation and a brief description of the transaction or agreement creating the arrangement and obligation;
- a brief description of the nature and amount of the obligation of the company under the arrangement, including the material terms under which it may become a direct obligation, if applicable, or may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties;
- the maximum potential amount of future payments (undiscounted) that the company may be required to make, if different; and
- a brief description of the other terms and conditions of the obligation or arrangement that are material to the company.

The definition of “off balance sheet arrangement” for purposes of Form 8-K is consistent with the definition used in MD&A Item 303(a)(4)(ii) of Regulation S-K. The Commission defines “direct financial obligation” as long term debt obligations, capital lease obligations and operating lease obligations, as those terms are defined in MD&A Item 303(a)(5)(ii), plus short term debt obligations.

**4. Item 2.04: Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.** This item requires a company to report a triggering event that causes the increase or acceleration of a direct financial obligation if the event is material to the company. The following information must be provided:

- the date of the triggering event and a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;
- a brief description of the triggering event;
- the amount of the direct financial obligation, as increased if applicable, and the terms of payment or acceleration that apply; and
- any other material obligations of the company that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the direct financial obligation.

Companies must also report under this item a triggering event that causes an off-balance sheet arrangement to increase or be accelerated or that causes a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company if the consequences are material to the company.

Under this item no disclosure is required if the company believes, in good faith, that no triggering event has occurred, unless the company has received a notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement.

**5. Item 2.05: Costs Associated with Exit or Disposal Activities.** This item requires disclosure when a company commits to an exit or disposal plan, otherwise disposes of a long-lived asset, or terminates employees under a plan of termination under which the company will incur charges under GAAP. Under this item, companies must disclose:

- the date of commitment to the course of action and a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;
- for each type of cost associated with the course of action (for example, one-time termination benefits, contract termination costs and other associated costs), an estimate of the total amount or range of amounts expected to be incurred in connection with the action;
- an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and
- the company's estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

A company need not disclose an estimate of the amount of the charges at the time of filing if it is unable to make a good faith estimate at that time. However, it must nevertheless file a Form 8-K with a description of the company's commitment to a course of action under which it will incur a material charge. The company must amend such a filing to include the estimate within four business days of the time the estimate is calculated.

**6. Item 2.06: Material Impairments.** This item requires disclosure when a company concludes that a material charge for impairment to one or more of its assets, including an impairment of securities or goodwill, is required under GAAP. Under this item a company must disclose:

- the date of the conclusion that a material charge is required, a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required;
- the company's estimate of the amount or range of amounts of the impairment charge; and
- the company's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures.

The Commission recognized that the test for impairments or recoverability often occurs in conjunction with the preparation, review or audit of financial statements. The final rules do not require Form 8-K disclosure if a company's conclusion regarding a material charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or year and such conclusion is disclosed in the company's Exchange Act report for that period.

**7. Item 3.01: Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.** Under this item, a company must report its receipt from the national securities exchange or association that maintains the principal listing for any class of its common equity of a notice indicating that the company does not satisfy a rule or standard for continued listing, that the exchange has applied to the Commission for delisting the company's equity securities, or that the association has taken all necessary steps under its rules to delist the security. A company that receives this type of notice must disclose:

- the date that it received the notice;
- the rule or standard for continued listing on the national securities exchange or national securities association that the company fails, or has failed, to satisfy; and
- any action or response that, at the time of filing, the company has determined to take in response to the notice.

In addition, if the company has notified the national securities exchange or association that the company is aware of any material noncompliance with a rule or standard for continued listing, the company must disclose:

- the date on which it provided such notice;
- the rule or standard it fails to satisfy; and

- any action or response that the company has determined to take at the time of filing.

The final rules also require disclosure if the company receives a public reprimand letter, in lieu of a trading suspension or delisting of any class of equity securities, by a national securities exchange or national securities association. Lastly, companies must disclose any definitive action they have taken to cause the listing of a class of their common equity securities to be withdrawn from a national securities exchange or terminated from the automated inter-dealer quotation system of a registered national securities association.

Companies whose securities are quoted exclusively on automated inter-dealer quotation systems, such as the over-the-counter bulletin board (OTCBB) and the Electronic Pink Sheets, are not subject to Item 3.01

**8. Item 4.02: Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.** This item requires a company to file a Form 8-K if it concludes that any of its previously issued financial statements should no longer be relied upon because of an error in the financial statements. The following information must be disclosed under this item:

- the date of the conclusion regarding non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;
- a brief description of the facts underlying the conclusion to the extent known at the time of filing; and
- a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the company's independent accountant the subject matter giving rise to the conclusion.

Similarly, if the company is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, it must disclose the following:

- the date on which the company was so advised or notified;
- identification of the financial statements that should no longer be relied upon;
- a brief description of the information provided by the accountant; and
- a statement of whether the audit committee, or board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the independent account the subject matter giving rise to the notice.

If a company receives such advice or notice from its independent accountant, it must provide the accountant the disclosure on the same day it is filed and request that the accountant provide the company as promptly as possible a letter addressed to the Commission stating whether the accountant agrees with the company's statements and, if not, the respects in which it does not agree. The company must then amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the Form 8-K within two business days of the company's receipt of the letter.

### **Items Moved from Periodic Reports to Form 8-K**

As part of the new Form 8-K requirements, the Commission also moved the following two items from other Exchange Act reports to Form 8-K.

**1. Item 3.02: Unregistered Sales of Equity Securities.** This item requires a company to file a Form 8-K including the disclosure currently required in Forms 10-Q and 10-K if equity securities sold in the aggregate since the company's last current report under this item or periodic report constitute at least 1% of the company's outstanding securities of that class. If the 1% threshold is not met, the company does not need to provide disclosure in a Form 8-K but must provide the disclosure required in its next periodic report. The applicable threshold requiring Form 8-K disclosure for small business issuers is 5%.

**2. Item 3.03: Material Modifications to Rights of Security Holders.** This item requires a company to file a Form 8-K including the same disclosure as previously required under Form 10-Q. As this item was proposed, companies would not have been required to make disclosures if the modifications were described in a proxy statement. In response to comments on the proposed rules, the final rules require disclosure whether or not the matter was described in a proxy statement. Once a company has reported a material modification to the rights of its securities holders on Form 8-K, no duplicative disclosure is required in any of its subsequently filed periodic reports.

### **Items with Expanded Disclosure**

**1. Item 5.02: Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers.** This item broadens the scope of the former Item 6 of Form 8-K, which required disclosure only if a director departed as a result of a disagreement, provided a letter to the company describing the disagreement and then requested that the company publicly disclose the matter. Under the new item, a company must file a Form 8-K if a director has resigned or refuses to stand for re-election to the board of directors 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 of directors. In any such event, the company must disclose:

- the date of the director's resignation, refusal to stand for re-election or removal;
- any positions held by the director on any committee of the board of directors at the time of the director's resignation, refusal to stand for re-election or removal; and
- a brief 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.

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 so requests. The company must also provide the director with a copy of its disclosures in response to Item 5.02 no later than the day the company files the disclosures with the Commission. Additionally, the company must 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 disclosures, and if not, the respects in which he or she does not agree. The company must file any letter it receives from the director with the Commission as an exhibit by amendment to the previously filed Form 8-K within two business days after receipt by the company.

Item 5.02 also requires disclosure when the principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions (each, a "specified officer") retires, resigns or is terminated or if a director retires, resigns or refuses to stand for re-election (other than in the circumstances described above). The final rules do not, however, require disclosure of the reasons for the specified officer's departure.

The item further requires disclosure if the company appoints a new specified officer, or if 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. Upon appointment of a specified officer, the company must disclose the name of the new officer, his or her position, the date of the appointment, information regarding the background of the officer and certain related party transactions,<sup>1</sup> and a brief description of the material terms of any employment agreement between the company and the officer. If the terms of the employment agreement are not available at the time of the required Form 8-K filing, the company must file an amendment containing this information within four business days after the information becomes available.

For a new director, the company must disclose the director's name, the election date, a brief description of any arrangement or understanding pursuant to which the director was selected as a director, and any committees to which the new director has been or is expected to be named.

**2. Item 5.03: Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.** This item expands former Item 8, which required disclosure on Form 8-K of a company's change in fiscal year. Item 5.03 requires a company with a class of securities registered under Section 12 of the Exchange Act to disclose any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement or information statement. Under this item a company must disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and, if applicable, the previous provision. Companies amending their articles of incorporation or bylaws must file the text of the amendment as an exhibit to the Form 8-K. If a company does so, it must file the entire restated articles of incorporation or bylaws as an exhibit to its next periodic report. Alternatively, a company may file the entire restated articles of incorporation or bylaws with the Form 8-K.

### **Safe Harbor**

The Commission, recognizing that several of the new Form 8-K disclosure items may require management to quickly assess the materiality of an event or to determine whether a disclosure item has been triggered, adopted a safe harbor from liability under Section 10(b) of the Exchange Act and Rule 10b-5 for failure to timely file a Form 8-K. The safe harbor is limited to the following items:

- **Item 1.01 - Entry into a Material Definitive Agreement**
- **Item 1.02 - Termination of a Material Definitive Agreement**
- **Item 2.03 - Creation of a Direction Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement or a Registrant**
- **Item 2.04 - Triggering Events Accelerate or Increase a Direct Financial Obligation under an Off-Balance Sheet Arrangement**
- **Item 2.05 - Costs Associated with Exit or Disposal Activities**
- **Item 2.06 - Material Impairments**
- **Item 4.02(a) – Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review** (in the case where a company makes the determination and does not receive the notice described in Item 4.02(b) from its accountant)

The safe harbor only applies to a failure to file a report on Form 8-K. Material misstatements or omissions in a Form 8-K will continue to be subject to Section 10(b) and Rule 10b-5 liability. The new safe harbor extends only until the due date of the companies next periodic report for the relevant period in which the Form 8-K was not timely filed.

The Commission also amended Form S-3 and Form S-2 to revise the eligibility requirements for those forms. Under the revised eligibility requirements, companies that fail to file timely Form 8-Ks for the same seven items that are subject to the safe harbor will not lose their eligibility to use Form S-3 and Form S-2 registration statements. It is important to note, however, that a company must be current in its disclosure to use Form S-3 or S-2. Thus, a company must have filed the disclosure required by the Form 8-K on or before the date that it files a Form S-3 or Form S-2 to satisfy the eligibility requirements of these forms.

The Commission amended Securities Act Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the 12 months preceding a sale of securities pursuant to Rule 144(h). However, a security holder will continue to be required to represent that he or she does not have inside information.

## Certification under Section 906 of the Sarbanes Oxley Act

The Commission confirmed that Section 906 certifications do not apply to Form 8-K, Form 6-K or Form 11-K. Members of the Commission's staff have been making statements to this effect for several months.

## Extended Deadline for Financial Statements Following an Acquisition

In response to the shortened timeframe for filing a Form 8-K, the Commission extended the deadline for filing financial statements following an acquisition pursuant to Item 2.01 to 71 days after the date the initial Form 8-K was required to be filed.

## Additional Sources

SEC Final Rules: *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date* (Securities Act Rel. No. 33-8400), <http://www.sec.gov/rules/final/33-8400.pdf>

SEC Proposed Rules: *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date* (Securities Act Rel. No. 33-8106), <http://www.sec.gov/rules/proposed/33-8106.htm>

## Endnotes

<sup>1</sup> Specifically, Item 5.02 requires disclosure of the information required by Items 401(b), 401(d), 401(e) and 404(a) of Regulation S-K or, in the case of small business issuers, Items 401(a)(4), 401(a)(5), 401(c) and 404(a) of Regulation S-B.

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