SEC Adopts Final Rules
Expanding Form 8-K Disclosure Requirements and Accelerating Filing Deadlines

On March 16, 2004, the Securities and Exchange Commission (SEC) adopted amendments to Form 8-K designed to provide investors with better and faster disclosure of important corporate events. The amendments have been adopted in furtherance of the “real time issuer disclosure” mandate of Section 409 of the Sarbanes-Oxley Act of 2002.

These amendments relate back to the SEC’s proposed rulemaking on June 17, 2002, prior to the passage of the Sarbanes-Oxley Act. As finally adopted, they represent a significant expansion of the use of Form 8-K as a critical component of the disclosure regime of reporting companies and, according to Alan Beller, the Director of the SEC’s Division of Corporation Finance, the “beginning of a different approach to disclosure.”

The new rules add eight new items to Form 8-K, expand the disclosure requirements of two existing items on Form 8-K and transfer to Form 8-K two additional items currently required in periodic reports on Forms 10-K and 10-Q. The new rules also reorganize the Form 8-K disclosure items into topical categories and shorten the filing deadlines for most items to four business days after the occurrence of a reportable event. Finally, the new rules provide a limited safe harbor from liability for failure to file a Form 8-K for certain required items.


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**What are the new reportable events that trigger a filing requirement on Form 8-K?**

The eight new items that result in a reporting obligation on Form 8-K are as follows:

- Entry into a material definitive agreement;
- Termination of a material definitive agreement;
- Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase a direct financial obligation, or an obligation under an off-balance sheet arrangement, the consequences of which are material to the company;
- Costs associated with exit or disposal activities that will result in a material charge;
- Material impairments of assets;
- Notice of delisting or failure to satisfy a continued listing rule or standard, or a transfer of listing; and
- Determinations that previously issued financial statements or a related audit report or completed interim review no longer should be relied upon.

**What agreements must be disclosed under the new reporting requirements?**

New Item 1.01 requires a company to disclose its entry into a “material definitive agreement” not made in the ordinary course of business and the entry into a material amendment of such an agreement, including: (i) information concerning the parties to such agreement; (ii) any material relationship between the company and such parties; and (iii) a brief description of the material terms and conditions of the agreement or amendment, as the case may be. Notably, disclosure of a material amendment may be required under Item 1.01 even if the underlying agreement previously has not been disclosed by the company. For example, disclosure will be required if an agreement was entered into prior to the effective date of the new Form 8-K disclosure requirements and there is a subsequent material amendment, or an amendment results in an agreement becoming a material definitive agreement of the company.

A “material definitive agreement” is defined as an agreement that provides for obligations that are material to and enforceable against the company, or rights that are material to the company and enforceable by the company against one or more other parties to the agreement, in each case whether or not subject to conditions. Importantly, in response to comments, the SEC eliminated the requirement of the proposed rule that companies disclose entry into non-binding agreements and letters of intent under this item. With regard to the types of agreements that are material to a company, this item parallels existing exhibit requirements of Item 601(b)(10) of Regulation S-K.

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3 The SEC noted in the adopting release, however, that there may be instances under other rules, regulations or case law where non-binding agreements are required to be disclosed.
The proposed rules would also have required a company to file as an exhibit to Form 8-K an agreement or amendment required to be disclosed under Item 1.01. Under the final rule, this requirement is deferred, in effect, so that a company must file such agreement or amendment as an exhibit only with its next periodic report or registration statement. However, in the adopting release, the SEC encourages companies to file the exhibit with the Form 8-K when feasible, particularly when no confidential treatment is requested.

The SEC noted in the adopting release that, with regard to agreements relating to business combinations and other extraordinary corporate transactions, the filing of a Form 8-K may constitute a company’s first “public announcement” for purposes of Rule 165 under the Securities Act or Rule 14d-2(b) or Rule 14a-12 under the Exchange Act and thereby trigger a filing obligation under those rules. In order to avoid duplicative filings, the SEC amended Form 8-K to enable a company to check one or more boxes on the cover page to indicate that it is simultaneously satisfying its filing obligations under those rules as well, provided that the Form 8-K contains all of the information required by those rules.

When does termination of an agreement result in a reporting obligation?

New Item 1.02 requires disclosure upon termination of a material definitive agreement not made in the ordinary course of business, other than by reason of expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under the agreement, where such termination is material to the company. In such an event, the company must disclose information including: (i) the identity of the parties to the agreement; (ii) any material relationship between the company and such parties; (iii) a brief description of the material terms and conditions of the agreement; (iv) a brief description of the material circumstances surrounding the termination; and (v) any material early termination penalties incurred by the company.

In response to comments, the final rules do not require a company to disclose management’s analysis of the effect of the termination on the company, or provide a “mini-MD&A,” as was originally proposed. The SEC cautioned (here and with regard to other new disclosure requirements), however, that any disclosure made in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading.

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4 Rule 165 provides an exemption from Section 5 of the Securities Act for communications relating to a business combination made before the filing of a registration statement in connection with that business combination if all written communications are filed under Rule 425 of the Securities Act. Rule 14d-2(b) allows communications by the bidder before the commencement of a tender offer provided that all written communications are filed. Rule 14a-12 allows solicitations to be made before a proxy statement is furnished to security holders if the written solicitations are filed.

5 Disclosure of the termination of an agreement may be required under this item even if the agreement were not previously disclosed, for example, if the agreement was entered into prior to the effectiveness of the new Form 8-K disclosure items.

6 See Rule 12b-20 under the Exchange Act.
Also, to satisfy concerns that these disclosure requirements could be used as a negotiating tool by parties to an agreement, instructions to Item 1.02 provide that no disclosure is required during negotiations or discussions regarding termination of an agreement unless and until the agreement has been terminated. Also, no disclosure is required if the company believes in good faith that the agreement has not been terminated, unless the company has received notice of termination pursuant to the terms of the agreement.

**What are the disclosure requirements regarding the creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement?**

New Item 2.03 requires disclosure if a company becomes obligated under a direct financial obligation that is material to the company, including: (i) a brief description of the transaction or agreement creating the obligation; (ii) the amount of the obligation, the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased; (iii) the nature of any recourse provisions that would enable the company to recover from third parties; and (iv) a brief description of the other material terms and conditions of the transaction or agreement.

A “direct financial obligation” is defined as any of the following:

- a long-term debt obligation;\(^7\)
- a capital lease obligation;\(^8\)
- an operating lease obligation;\(^9\) or
- a short-term debt obligation that arises other than in the ordinary course of business.\(^10\)

If a company becomes directly or contingently liable for an obligation that is material to the company arising out of an off-balance sheet arrangement, as that term is defined and used in MD&A,\(^11\) it must provide information including: (i) a brief description of the transaction or agreement creating the arrangement and obligation; (ii) 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; (iii) the nature of any recourse provisions that would enable the company to recover from third parties; (iv) the maximum potential amount of future payments (undiscounted) that the company may be required to make; and (v) a brief description of the other material terms and conditions of the arrangement.

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7 As defined in Item 303(a)(5)(ii)(A) of Regulation S-K.
8 As defined in Item 303(a)(5)(ii)(B) of Regulation S-K.
9 As defined in Item 303(a)(5)(ii)(C) of Regulation S-K.
10 A “short-term debt obligation” is defined, for most companies, as a payment obligation under a borrowing arrangement that is scheduled to mature within one year.
11 As defined in Item 303(a)(4)(ii) of Regulation S-K.
What are the disclosure requirements regarding triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement?

New Item 2.04 requires disclosure of an event that accelerates or increases a direct financial obligation if the consequences of the event are material to the company. Required disclosures in such event include disclosures similar to those required by Item 2.03, as well as the date of the “triggering event,” 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.

Similar disclosures must also be provided if a triggering event causes a company’s obligation under an off-balance sheet arrangement to increase or be accelerated, or causes a company’s contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, and the consequences of such event are material to the company.

As with Item 1.02, the SEC eliminated the requirement of the proposed rule that management provide an analysis of the effect of the triggering event on the company, but reminded companies of their obligation that disclosure in a Form 8-K must include all material information necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading.

What are the disclosure requirements about costs associated with exit or disposal activities?

New Item 2.05 requires disclosure when a company’s board of directors, a board committee, or an authorized officer commits the company to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination under which material charges will be incurred under generally accepted accounting principles (GAAP). Required disclosure in such event includes: (i) a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date; (ii) for each major type of cost associated with the course of action, an estimate of the amount or range of amounts expected to be incurred in connection with the action; (iii) an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and (iv) the company’s estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

If at the time of filing, the company is unable to make a good faith estimate of the amount of the charges, it need not disclose an estimate at that time, but must nevertheless file the Form 8-K report describing the

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12 For purposes of Item 2.04, the term “direct financial obligation” includes an obligation arising out of an off-balance sheet arrangement that is accrued under the FASB Statement of Financial Accounting Standards No. 5, Accounting for Contingencies as a probable loss contingency.

13 No disclosure is required unless and until the triggering event has occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including, if required, the sending to the company of notice of the occurrence of a triggering event and the satisfaction of all conditions to such occurrence. Also, no disclosure is required if the company believes, in good faith, that no triggering event has occurred unless the company has received the requisite notice thereof.

14 As described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146 Accounting for Costs Associated with Exit or Disposal Activities.
company’s commitment to a course of action under which it will incur a material charge. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate.

For this item as well, the SEC eliminated the “mini-MD&A” requirement that management analyze the effect of the event on the company, subject to the cautionary note that the disclosure must include all material information necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading.

**What new disclosure is required regarding material impairments?**

New Item 2.06 requires disclosure when a company’s board of directors, a board committee, or an authorized officer concludes that a material charge for impairment to one or more of its assets, including, without limitation, an impairment of securities or goodwill, is required under GAAP. In such an event, the company must disclose information including: (i) the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required; (ii) the company’s estimate of the amount or range of amounts of the impairment charge; and (iii) the company’s estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures.\(^{15}\)

Here, again, the “mini-MD&A” requirement of the proposed rule has been eliminated. Also, no disclosure is required, if the 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 and the conclusion is disclosed in the company’s periodic report for that period.

**What disclosure is required regarding a notice of delisting or failure to satisfy listing standards or the transfer of listing?**

New Item 3.01 requires disclosure in circumstances relating to the trading market for a company’s securities. It requires a company to report if it has received notice from the national securities exchange or national securities association that maintains the principal listing for a class of the company’s common equity that: (i) the company or a class of its securities no longer satisfies its listing requirements; (ii) the exchange has submitted an application to the SEC to delist such class of the company’s securities; or (iii) the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system.\(^{16}\) If it receives such a notice, a company must report information including the listing requirement

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\(^{15}\) As with disclosures required under Item 2.05, if at the time of filing, the company is unable to make a good faith estimate of the amount of the charges, it need not disclose an estimate at that time, but must nevertheless file the Form 8-K report describing the company’s conclusion that a material charge is required. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate.

\(^{16}\) Instructions to Item 3.01, provide that the company is not required to report where the delisting is a result of one of the following: (i) the entire class of the security has been called for redemption, maturity or retirement or has been redeemed or paid at maturity or retirement; (ii) the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if true, the right to receive an immediate cash payment; or (iii) all rights pertaining to the entire class of the security have been extinguished. These exceptions are specifically referenced in Rule 12d2-2, the rule pursuant to which national securities exchanges file applications with the SEC to delist a security from the exchange.
it fails or failed to satisfy, and any action that, at the time of filing, the company has determined to take in response to the notice.

Similar disclosure is required under this item if a company has notified its national securities exchange or national securities association that the company is aware of material noncompliance with a listing requirement.17

In addition, if a company’s national securities exchange or national securities association, in lieu of suspending trading in or delisting such class of the company’s common equity, issues a public reprimand letter or similar communication indicating that the company has violated a listing requirement, the company must report that action and summarize the contents of the communication.

Finally, Item 3.01 requires that a company report, if the company’s board of directors, a board committee, or an authorized officer has taken definitive action to cause the listing of a class of its common equity to be withdrawn from the national securities exchange, or terminated from the automated inter-dealer quotation system of a national securities association, including as a result of an action to transfer such listing or quotation to another securities exchange or quotation system.

What disclosures are required with respect to financial statements determined to be unreliable?

New Item 4.02 requires disclosure on Form 8-K if the board of directors, 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 as provided in Accounting Principles Board Opinion No. 20. Similar disclosure is required if an independent accountant notifies the company that it should take action to prevent future reliance on an audit report or review related to previously issued financial statements. In these events, a company will have to identify the unreliable financial statements and describe the facts underlying the conclusion or notice and, as applicable, the information provided by the accountant. It will also be required to disclose whether the audit committee, board of directors, or authorized officer discussed with the company’s independent accountant the subject matter giving rise to the conclusion or notice.

If the company receives such a notice from its independent accountant, it must provide the independent accountant with the company’s Form 8-K disclosure no later than the same day it files the disclosure with the SEC and request that the accountant furnish a letter addressed to the SEC as promptly as possible stating whether the accountant agrees with the company’s disclosure and, if not, the respects in which it does not agree. The company must file that letter by amendment to the Form 8-K within two business days of receipt of the letter.

17 Instructions to Item 3.01 also provide that a company must report a failure to satisfy a listing requirement even if the company has the benefit of a grace period or similar extension period during which it may cure the deficiency that triggers the disclosure requirement. On the other hand, “early warning” notices sometimes sent by an exchange or association informing the company that it is in danger of falling out of compliance with a rule or standard for continued listing do not trigger a reporting obligation under this item.
Expansion of Existing Form 8-K Requirements

The SEC has also expanded in certain respects two of the existing Form 8-K disclosure requirements.

*What are the new disclosure requirements with respect to the departure of directors or principal officers, election of directors and appointment of principal officers?*

The new rules expand the scope of the current Form 8-K disclosure item with respect to the departure of directors and add requirements that the departure of principal officers, the election of directors, and the appointment of principal officers also be disclosed.

*What must be disclosed for a departing director?*

According to new Item 5.02(a), if a director departs due to a disagreement known to any executive officer or is removed for cause, the company must disclose any position held by the director prior to departure, and circumstances surrounding the departure.

If the director furnishes the company with correspondence concerning the circumstances surrounding his or her departure, the company must file a copy of the document as an exhibit to the Form 8-K. The company must also provide the director with a copy of the Form 8-K disclosure no later than the day it is filed and request the director to furnish a letter as soon as possible stating whether he or she agrees with the company’s disclosure and, if not, the respects in which he or she does not agree. The company must file the director’s letter by amendment to the Form 8-K within two business days after receipt.

In contrast, the current Item 6 requires disclosure on Form 8-K *only if* the departing director provides a letter describing the disagreement and requesting public disclosure.

*What must be disclosed for a departing principal officer or a director who departs under circumstances not covered by Item 5.02(a)?*

New Item 5.02(b) requires disclosure when the company’s principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person serving in an equivalent position resigns, is terminated or is reassigned. New Item 5.02(b) also requires disclosure when a director departs for any reason, other than as a result of a disagreement or removal for cause.

*What must be disclosed for the appointment of new principal officers or election of new directors?*

New Item 5.02(c) requires disclosure if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person serving an equivalent position.

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18 If an officer’s departure is the result of a disagreement with the company, the company would not be obligated to disclose the reasons for, or seek the officer’s explanation of, the departure as it would if a director departed under similar circumstances.
equivalent function. In such event, companies will have to disclose: (i) the name and position of the new officer; (ii) the date of the appointment; (iii) various information under Items 401 and 404 of Regulation S-K regarding the background of the officer and certain related party transactions; and (iv) the material terms of any employment agreement between the officer and the company.

In addition, new Item 5.02(d) requires disclosure if a new director is elected to the board other than by a vote of security holders at an annual meeting. In such event, companies will have to disclose: (i) the name of the new director; (ii) the date of the election; (iii) any arrangement or understanding between the new director and any other persons relating to the director’s election; (iv) any committees of the board of directors to which the new director has been, or is expected to be, named a member; and (v) information regarding certain related party transactions between the new director and the company.

What are the disclosure requirements with respect to amendments to the articles of incorporation or bylaws or change in fiscal year?

What must be disclosed for changes to a company’s fiscal year?

New Item 5.03(b) is a slight variation of current Item 8. Under the new rule, if the company determines to change its fiscal year from that used in its most recent filing with the SEC, by means other than a vote of its shareholders or an amendment to its articles of incorporation or bylaws, then it must disclose the date of such determination, the date of the new fiscal year end, and the form on which the report covering the transition period will be filed.

What must be disclosed for amendments to the articles of incorporation or bylaws?

New Item 5.03(a) imposes an additional reporting obligation, requiring disclosure if a company with a class of equity securities registered under Section 12 of the Exchange Act amends its articles of incorporation or bylaws, and such amendment was not proposed in any proxy or information statement previously filed by the company. In such event, companies will be required to disclose the effective date of the amendment and describe the amendment and, if applicable, the previous provision.

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19 This disclosure item does not apply to a reporting company that is a wholly-owned subsidiary of an issuer with a class of securities registered under Section 12 of the Exchange Act, or that is required to file reports only pursuant to Section 15(d) of the Exchange Act.

20 If the company intends to make a public announcement of the new officer’s election by means other than a Form 8-K filing, the company may delay such filing, beyond the standard four business day deadline, until the day of the actual public announcement. In addition, to the extent information regarding employment agreement terms is not known at the time of the Form 8-K filing, the company may include a statement to that effect and file a subsequent amendment to its Form 8-K with such information within four business days after it is determined or becomes available.

21 To the extent information regarding committee assignments or related party transactions is not known at the time of the Form 8-K filing, the company may include a statement to that effect and file a subsequent amendment to its Form 8-K including such information within four business days after it is determined or becomes available.

22 Under the current Item 8, any change of fiscal year results in a Form 8-K reporting obligation.

23 Excluding, therefore, companies filing reports only pursuant to Section 15(d) of the Exchange Act.
The company need only file the text of the amendment as an exhibit to a Form 8-K report made pursuant to this disclosure item, rather than a full restatement of the articles of incorporation or bylaws. The company must file the restated articles of incorporation or bylaws as an exhibit to its next periodic report, consistent with existing periodic reporting requirements.

Transfers of Disclosure from Periodic Reports

In addition to these new and expanded reporting obligations, the new rules require that (i) unregistered sales of equity securities and (ii) material modifications to rights of security holders, both of which previously were required to be disclosed in reports on Forms 10-K and 10-Q, in some cases, now be reported on a current basis on Form 8-K.

What Form 8-K disclosure is required regarding unregistered sales of equity securities?

New Item 3.02 requires a company to disclose on Form 8-K the information specified in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K regarding a company’s unregistered sales of equity securities. This disclosure is also currently required in Forms 10-Q, 10-QSB, 10-K and 10-KSB, except that the new Form 8-K requirement will be limited to circumstances where the securities sold in the aggregate since the company’s last report filed under Item 3.02 or its last periodic report, whichever is more recent, constitute at least 1% of the company’s outstanding securities of that class. Disclosure of issuances not required to be reported on Form 8-K will continue to be required in a company’s periodic reports.

What disclosure is required regarding material modifications to rights of security holders?

Item 3.03 requires a company to disclose material modifications to the rights of the holders of any class of the company’s registered securities and to briefly describe the general effect of such modifications on such rights.

The substance of this disclosure is the same as required in Forms 10-Q and 10-QSB. Accordingly, once a company has reported a material modification to the rights of its security holders on Form 8-K, it need not make any duplicative disclosure about the modification in any of its subsequently filed periodic reports.

Other Key Features of the New Rules

What are the new filing deadlines to report items on Form 8-K?

The amendments generally require companies that are subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act, other than foreign private issuers that file annual reports on Form 20-F or 40-F, to file required current reports on Form 8-K within four business days of the occurrence of a report-

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24 Such information includes the title and amount of securities sold, the consideration furnished, the exemption from registration claimed and the terms of conversion or exercise (where the securities sold by the company are convertible or exchangeable into equity securities).

25 In the case of a small business issuer, the Form 8-K filing threshold is 5%.
able event.26 This accelerates the reporting obligation from the current five business day or 15 calendar day reporting periods for Form 8-K, but is longer than the originally proposed deadline of two business days (with an additional two business days if a Form 12b-25 filing is timely made). In contrast to the proposed rules, the final rules do not permit an extension of the Form 8-K reporting periods under Rule 12b-25.

What safe harbor protections are available regarding the new reporting requirements?

The SEC recognized that several of the new Form 8-K disclosure items may require a company’s management to quickly assess the materiality of an event or to make a determination as to whether a disclosure obligation has been triggered. It noted in the adopting release that these new Form 8-K disclosure items raise issues that are analogous to the issues the SEC considered in adopting the Exchange Act Section 10(b) and Rule 10b-5 safe harbor under Regulation FD.

Accordingly, the following disclosure items on Form 8-K are subject to a limited safe harbor from public and private claims under Section 10(b) and Rule 10b-5 for a failure to timely file a Form 8-K:27

- entry into, or termination of, a material definitive agreement;
- creation of, or triggering events that accelerate or increase, a direct financial obligation or an obligation under an off-balance sheet arrangement;
- costs associated with exit or disposal activities;
- material impairments; and
- determinations that previously issued financial statements or a related audit report or completed interim review no longer should be relied upon (in the case where a company makes the determination and does not receive a notice regarding these events from its independent accountant).

The safe harbor specifically provides that no failure to make a report on Form 8-K with respect to these events, where such report is required solely pursuant to the provisions of Form 8-K, shall be deemed to be a violation of Section 10(b) and Rule 10b-5. However, the safe harbor only applies to failures to report on Form 8-K; therefore, material misstatements or omissions contained in a Form 8-K will still be subject to Section 10(b) and Rule 10b-5 liability. Also, pursuant to amended Forms 10-Q, 10-QSB, 10-K and 10-KSB, the new safe harbor for a failure to report extends only until the due date of the periodic report for the relevant period in which the Form 8-K was not timely filed. Finally, the safe harbor does not protect companies that have a separate duty to disclose information that is the subject of any of the Form 8-K items covered by the safe harbor28 from Section 10(b) and Rule 10b-5 liability that may result from such companies’ failure to meet such separate disclosure obligations.

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26 The amendments do not affect the filing deadlines for disclosures under Regulation FD, voluntary disclosures under New Item 8.01 (current Item 5) and certain exhibits.

27 The amendments do not, however, include the proposed safe harbor from liability under Sections 13(a) or 15(d) of the Exchange Act. As a result, the new safe harbor will not affect the SEC’s ability to enforce any of the Form 8-K filing requirements under those sections.

28 E.g., where the company is engaged in purchasing or selling its own securities while in possession of material non-public information.
Does failure by a company to timely report an event subject to a Form 8-K safe harbor disclosure item affect a company’s eligibility to use Forms S-2 or S-3?

No, as long as the company is current in its Form 8-K filings, including with respect to the safe harbor items, at the time of filing a registration statement on Form S-2 or S-3. However, if a company fails to timely file a Form 8-K for disclosure items that are not covered by the safe harbor, the company will lose its S-2 or S-3 eligibility for the 12-month period following the due date of the Form 8-K.

Does failure to timely file a Form 8-K affect a security holder’s ability to rely on Securities Act Rule 144 to resell securities?

No. The final rules also amend Securities Act Rule 144 to clarify that satisfaction of the “current public information” condition in Rule 144 for a sale of securities by a security holder pursuant to that rule does not require a company to have filed all Form 8-K reports during the 12-month period preceding such a sale of securities. However, Rule 144(h) still requires a security holder to represent that he or she does not have inside information about the company at the time of the sale.

What are the exhibit requirements under the new rules?

The new rules add to and modify in certain respects the existing requirements of Item 601 of Regulation S-K in light of the new exhibit requirements of Form 8-K, including, for example, correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review; correspondence regarding the departure of a director; and amendments to articles of incorporation and bylaws. As under existing rules generally, a company that has previously filed an exhibit with another periodic filing may incorporate the exhibit by reference into an applicable Form 8-K.

What are the requirements with regard to Section 906 certifications for Form 8-K filings?

None. The SEC noted in the adopting release that questions had been raised previously regarding the application of the certification requirements of Section 906 of the Sarbanes-Oxley Act to Form 8-K filings. The adopting release states that the Department of Justice and the SEC have jointly concluded that Section 906 does not apply to Form 8-K.

What proposed disclosure items were not adopted by the SEC?

The SEC did not adopt a proposed item that would have required certain information to be disclosed regarding ratings that companies receive from rating agencies; however, the SEC noted that it is still considering the appropriate approach to rating agencies.29 The SEC also did not adopt a proposed item that would have required disclosure regarding the termination or reduction of a business relationship with a customer, citing

comments that raised concerns regarding the determination of when such termination or reduction occurs and potential competitive harms to companies that would have had to make such disclosures.

**Conclusion**

These amendments to Form 8-K, when they take effect on August 23, 2004, will significantly alter the reporting regime of reporting companies. We recommend that companies begin now to educate key personnel on the new disclosure requirements and establish procedures to ensure compliance with the new rules. Many companies have previously established disclosure committees to manage the expanded disclosure obligations of reporting companies generally under the Sarbanes-Oxley Act and otherwise. In light of these amendments to Form 8-K, we expect that others may soon follow suit to meet the new demands of these “real time issuer disclosure” requirements. In addition, companies that already have disclosure committees may need to refine their procedures to gather the types of information enumerated in the new Form 8-K items and streamline the procedure for preparing and reviewing Form 8-K disclosures. Some corporate officials may need to remain “on call” to prepare the filing so that it can be reviewed by senior level management in time to make the filing in four business days.
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