

SEC Approves Major Overhaul of Form 8-K

The Securities and Exchange Commission (the "SEC") has adopted final amendments to Form 8-K that expand the nature and extent of required disclosure and accelerate the deadlines for reporting: <http://www.sec.gov/rules/final/33-8400.pdf>. The amendments become effective on August 23, 2004. The SEC expects that the amendments will cause the average public company to make approximately five additional filings per year.

A major overhaul of Form 8-K was originally proposed in June of 2002, prior to the adoption of the Sarbanes-Oxley Act of 2002, during the rocky tenure of SEC Chairman Harvey Pitt. Chairman Pitt viewed the revision of the existing disclosure model as a necessary "linchpin of reform" and advocated for a system of current disclosure that would impose an affirmative obligation on public companies "to disclose unquestionably significant information when it arises and becomes available." Ultimately, this concern was reflected in the SOX mandate for disclosure of material information on a "rapid and current basis." However, determining the shape and direction of the new disclosure system raised some old thorny questions: should the SEC embrace radical reform and require a company to provide disclosure essentially as a "motion picture," disclosing all information of any kind that the company judges to be material? Or should the approach be a more moderate one that adheres to the current structure, but expands the list of enumerated events that trigger disclosure?

Although the SEC's June 2002 proposal adopted the more moderate approach, the

disclosure triggers originally proposed were often vague and the disclosure required extensive analysis, both of which seemed problematic in the face of the proposed two-business day filing deadline. Fortunately, in response to public comments, the SEC has, in the final amendments, significantly mitigated the most troubling aspects of the original proposal. The final amendments completely reorganize Form 8-K by adding eight new triggering events that are reportable on Form 8-K, transferring two events previously reported in periodic reports to Form 8-K and expanding disclosures under two existing Form 8-K items. The SEC also has shortened the Form 8-K filing deadline for most items to four business days after the occurrence of a triggering event.

Generally

1. When do the amendments to Form 8-K go into effect?

The final amendments to Form 8-K (the "New Form 8-K") become effective August 23, 2004.

2. Is there a shortened filing deadline for reports filed on Form 8-K?

Yes, except in limited circumstances, the New Form 8-K imposes a four-business day deadline. The filing deadlines for disclosures under Regulation FD (new Item 7.01), voluntary disclosures (new Item 8.01) and certain exhibits remain the same.

3. If we cannot meet the four-business day deadline, may we request an extension pur-

suant to Rule 12b-25 under the Securities Exchange Act of 1934, as amended (the "Exchange Act")?

No. While the SEC's original proposal contemplated a two-business day filing deadline with the possibility of an extension under Rule 12b-25, the SEC accelerated the filing deadline by two business days and eliminated the availability of Rule 12b-25 for New Form 8-K.

4. Does the New Form 8-K look the same with the exception of some new items?

No. The New Form 8-K has been reorganized into topical categories with a new numbering system. The topics include "Registrant's Business and Operations," "Financial Information," "Securities and

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Trading Markets,” “Matters Related to Accountants and Financial Statements,” “Corporate Governance and Management,” “Regulation FD,” “Other Events” and “Financial Statements and Exhibits.”

5. If we are required to respond to more than one item, do we have to file two reports?

No. The company may file a single New Form 8-K to satisfy one or more disclosure items, provided that the company identifies by item number and caption all applicable items being satisfied and provides all of the substantive disclosures required by each of the items.

6. If we are amending a Form 8-K filed prior to August 23, 2004, should we use the numbering system of the New Form 8-K?

Yes. Beginning August 23, 2004, amendments to reports that were filed before August 23, 2004 must use the new numbering system.

7. If our Form 8-K (filed either before or after August 23, 2004) includes financial statements, must the chief executive officer and chief financial officer append a SOX 906 certification to the report?

No. The adopting release expressly confirms that certifications filed pursuant to Section 906 of SOX are not required for Forms 8-K (or Forms 6-K or 11-K).

8. What are the triggering events for New Form 8-K?

See *inset*.

SECTION 1. Business and Operations

ITEM 1.01.

Entry into a Material Definitive Agreement

1. Must we file a New Form 8-K for each agreement we sign?

No. Item 1.01 of New Form 8-K requires a company to disclose the entry into, or a material amendment of, a material definitive agreement not made in the ordinary course of business.

The triggering events under New Form 8-K are organized under the following section headings and numbering system:

Section 1: Registrant's Business and Operations

- Item 1.01 Entry into a Material Definitive Agreement
- Item 1.02 Termination of a Material Definitive Agreement
- Item 1.03 Bankruptcy or Receivership

Section 2: Financial Information

- Item 2.01 Completion of Acquisition or Disposition of Assets
- Item 2.02 Results of Operations and Financial Condition
- Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant
- Item 2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement
- Item 2.05 Costs Associated with Exit or Disposal Activities
- Item 2.06 Material Impairments

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
- Item 3.02 Unregistered Sales of Equity Securities
- Item 3.03 Material Modifications to Rights of Security Holders

Section 4: Matters Related to Accountants and Financial Statements

- Item 4.01 Changes in Registrant's Certifying Accountant
- Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

Section 5: Corporate Governance and Management

- Item 5.01 Changes in Control of Registrant
- Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers
- Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year
- Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans
- Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics

Section 7: Regulation FD

- Item 7.01 Regulation FD Disclosure

Section 8: Other Events

- Item 8.01 Other Events

Section 9: Financial Statements and Exhibits

2. How do we decide if we have a material definitive agreement?

Item 1.01 of New Form 8-K parallels Item 601(b)(10) of Regulation S-K with regard to the types of agreements that are material to a company. Item 601(b)(10) of Regulation S-K defines a material contract as every contract material to the company not made in the ordinary course of business (*i.e.*, it ordinarily does not accompany the kind of business conducted by the company) including (i) contracts to which directors, officers, promoters, voting trustees, security holders named in the report, or underwriters are parties other than certain asset purchase agreements, (ii) contracts upon which the company is substantially dependent such as contracts to sell the major part of the company's products or services, or franchises or licenses or other agreements to use a patent, formula, trade secret, process or trade name upon which the company's business depends to a material extent, (iii) any contract for the acquisition or disposition of property, plant or equipment for consideration exceeding 15% of the consolidated fixed assets of the company, and (iv) any material lease. In addition, certain management contracts and compensatory plans, contracts and arrangements are deemed to be material contracts.

3. If on or after August 23, 2004 we amend in a material respect a material definitive agreement which was entered into prior to August 23, 2004, must we file the amendment on New Form 8-K?

Yes. A material amendment to a material definitive agreement would trigger a filing requirement even if the agreement was entered into prior to the effective date of New Form 8-K. Similarly, an amendment to a previously unfiled immaterial agreement may cause the agreement to become a material definitive agreement requiring a filing on New Form 8-K.

4. What information must be disclosed in New Form 8-K with respect to material definitive agreements or amendments to material definitive agreements?

The New Form 8-K disclosure must include:

- ▶ the date on which the material definitive agreement or amendment was entered into;
- ▶ the identity of the parties to the material definitive agreement;
- ▶ a brief description of any material relationship between the company or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and
- ▶ a brief description of the terms and conditions that are material to the company.

5. Must we disclose the specific rights and obligations of the parties, the duration and termination provisions under the material definitive agreement?

No. Although SEC had originally proposed to disclose each party's rights and obligations under a material definitive agreement as well as the duration and termination provisions, these requirements were not included in the final amendments. The SEC, however, cautions that any disclosure made in a New Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in light of the circumstances under which it was made, not misleading.

6. Am I required to file a New Form 8-K if the company enters into a non-binding letter of intent?

No. New Form 8-K applies only to material "definitive" agreements. If a company enters into a non-binding letter of intent or memorandum of understanding that also contains some binding, but non-material elements, such as a confidentiality agreement or a no-shop agreement, the letter of intent or memorandum of understanding does not need to be filed on New Form 8-K because, according to the SEC, the binding provisions are not material. The SEC has clarified that only agreements that provide for obligations that are material to and enforceable against a company, or rights that are material to the company and enforceable by the company against one or more other parties to the agreement, are required to be disclosed pursuant to Item 1.01 of New Form 8-K.

7. If the material definitive agreement contains closing conditions, would a company still have to file a New Form 8-K within four business days of execution by the parties?

Yes. If a material definitive agreement is subject to customary closing conditions, such as opinions or regulatory approval, then the company must disclose the agreement on New Form 8-K when it is enforceable against or by the company even though all of the conditions have not yet been satisfied.

8. Must the company file the material definitive agreement as an exhibit to New Form 8-K?

No. In response to concerns that, among other things, companies would not be able to timely file confidential treatment requests, the SEC eliminated the proposed requirement of filing the material definitive agreement as an exhibit to New Form 8-K. Companies are nonetheless encouraged to file the agreement with the New Form 8-K, if possible. If not filed with the New Form 8-K, the company is required to file the agreement with the company's next periodic report.

9. If the material definitive agreement involves a business combination and the New Form 8-K is the first public announcement of the transaction for purposes of Rule 165 under the Securities Act of 1933, as amended (the "Securities Act") and Rule 14d-2(b) or Rule 14a-12 under the Exchange Act, must the company make two filings?

No. With respect to business combination agreements, if the filing of New Form 8-K constitutes the first "public announcement" for purposes of Rule 165 and Rule 14d-2(b) or Rule 14a-12, the New Form 8-K permits 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, provided that the New Form 8-K contains all of the information required by those rules, including legends. This change reverses a telephone interpretation of the Division of Corporation Finance (Q&A No. I.B.13 in the Manual of Publicly Available Telephone Interpretations, Third Supplement, July 2001), which provides that a company filing information

regarding a business combination on Form 8-K may be required to make a separate filing under Rule 425 under the Securities Act.

ITEM 1.02.

Termination of a Material Agreement

10. If the company terminates a material definitive agreement, must it file a New Form 8-K?

Yes. If a material definitive agreement is terminated, other than by expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under the agreement, and the termination of the agreement is material to the company, the company must file a New Form 8-K under Item 1.02. Disclosure is also required of a termination of a material definitive agreement even if the original agreement predated the effective date of the new rules.

11. Our company is in discussions regarding the possible termination of a material definitive agreement, must the company file a Form 8-K immediately?

No. No disclosure is required under Item 1.02 of New Form 8-K:

- ▶ during negotiations or discussions regarding termination unless and until the material definitive agreement has been terminated, or
- ▶ if the company believes, in good faith, that the agreement has not been terminated, unless the company has received a notice of termination pursuant to the terms of the agreement.

12. May we use Form 8-K to alert the public of a potential termination despite the fact we believe the material definitive agreement to be in full force and effect?

Yes. If a company believes in good faith that a material definitive agreement has not been terminated, but determines nevertheless to make disclosure under Item 1.02 of New Form 8-K, the company may provide a statement of its good faith belief as to any relevant matter, including, for example, that not all conditions to termination have been satisfied or that a termination has otherwise not occurred. However, if the company's conclusion changes, it must file an

amendment to the New Form 8-K within four business days after the change in the company's conclusion.

13. What information must be included in the New Form 8-K regarding a termination of a definitive material agreement?

The company must disclose in the New Form 8-K:

- ▶ the date of the termination;
- ▶ the identity of the parties to the agreement;
- ▶ a brief description of any material relationship between the company or its affiliates and any of the parties, other than in respect of the agreement;
- ▶ 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.

ITEM 1.03.

Bankruptcy or Receivership

14. Were there any substantive changes to the filing requirements involving the bankruptcy or receivership involving the company?

No. As adopted, Item 1.03 of New Form 8-K includes only a few stylistic changes from the original and retains the basic substantive requirements formerly included in Item 3 of the current Form 8-K.

Section 2.

Financial Information

ITEM 2.01.

Completion of Acquisition or Disposition of Assets

1. Have the disclosure obligations in New Form 8-K changed with respect to the completion of the acquisition or disposition of assets?

Not really. Item 2.01 of New Form 8-K is substantively the same as Item 2 of the current Form 8-K, requiring disclosure if a

company, or any of its majority-owned subsidiaries, acquired or disposed of a significant amount of assets, otherwise than in the ordinary course of business. The SEC has, however, limited the disclosure in New Form 8-K in some respects. In particular, disclosure regarding the source of funding and the principle followed in determining the amount of consideration to be paid is limited to instances where a material relationship exists between the company and the source of the funding. In addition, disclosure is no longer required regarding the nature of the business in which the acquired assets were used and whether the company acquiring the assets intends to continue that use.

2. Since Item 1.01 of New Form 8-K requires the filing of material definitive agreements, does Item 2.01 of New Form 8-K trigger a filing obligation which Item 1.01 would not?

Possibly. There may be some overlap in the reporting of a transaction under Item 2.01 and Item 1.01 under New Form 8-K. Item 2.01 of New Form 8-K contains bright-line thresholds (a significant asset test) that must be exceeded before a filing is required and, therefore, may apply to a different group of agreements. However, an Item 2.01 filing is triggered by the closing of the acquisition or disposition, while Item 1.02 is triggered upon execution of the definitive agreement.

ITEM 2.02.

Results of Operations and Financial Condition

3. Do we still need to file our earnings press releases?

Yes. Item 2.02 of New Form 8-K retains all of the substantive requirements of Item 12 of current Form 8-K regarding public announcements or releases of material non-public information with respect to a company's results of operations or financial condition.

ITEM 2.03.

Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant

4. What are our filing obligations if we incur a new direct financial obligation or an obligation under an off-balance sheet arrangement?

Under Item 2.03 of New Form 8-K, a New Form 8-K must be filed if the company becomes subject to a direct financial obligation that is material to the company or to an obligation under an off-balance sheet arrangement. The company need not file a New Form 8-K under Item 2.03 until it enters into an agreement enforceable against it, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. If there is no agreement, the company must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the direct financial obligation arises or is created.

5. What is a “direct financial obligation”?

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

- ▶ a long-term debt obligation, as defined in Item 303(a)(5)(ii)(A) of Regulation S-K;
- ▶ a capital lease obligation, as defined in Item 303(a)(5)(ii)(B) of Regulation S-K ;
- ▶ an operating lease obligation, as defined in Item 303(a)(5)(ii)(C) of Regulation S-K; or
- ▶ a short-term debt obligation that arises other than in the ordinary course of business.

6. What is an “off-balance sheet arrangement”?

An “off-balance sheet arrangement” is defined by reference to the definitions used in material definitive agreement, Item 303(a)(4)(ii) of Regulation S-K.

7. What is a “short-term debt obligation”?

A “short-term debt obligation” is defined as a payment obligation under a borrowing arrangement that is scheduled to mature within one year or, for those companies that use the operating cycle concept of working capital, within a company’s operating cycle that is longer than one year.

8. What disclosure is required if a company incurs a direct financial obligation?

If the company incurs a direct financial obligation, it must disclose in a New Form 8-K:

- ▶ the date on which the company becomes obligated on the direct financial obligation;

- ▶ a brief description of the transaction or agreement creating the obligation;
- ▶ the amount of the obligation;
- ▶ the terms of its payment;
- ▶ if applicable, a brief description of the material terms under which it may be accelerated or increased;
- ▶ 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.

If the company enters into an arrangement that may give rise to direct financial obligations in connection with multiple transactions, the company must disclose its entry into the arrangement and its material obligations as they arise or are created under the arrangement (including when a series of previously undisclosed individually immaterial obligations become material in the aggregate).

ITEM 2.04. **Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement**

9. What are our disclosure obligations if we become directly or indirectly liable for a material obligation arising out of an off-balance sheet arrangement?

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 disclose in a New Form 8-K:

- ▶ the date on which the company becomes directly or contingently liable on the obligation;
- ▶ 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;

- ▶ the material terms under which the contingent obligation may become a direct obligation, if applicable, or may be accelerated or increased;
- ▶ 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 (which may not be reduced by the effect of any amounts that may possibly be recovered by the company under recourse or collateralization provisions in any guarantee agreement, transaction or arrangement); and
- ▶ a brief description of the other terms and conditions of the obligation or arrangement that are material to the company.

The disclosure required regarding off-balance sheet arrangements must be provided whether or not the company is a party to the transaction or agreement creating the contingent obligation.

10. What is an example of a filing obligation in connection with a material contingent obligation arising out of an off-balance sheet arrangement?

The SEC has provided the following example:

Assume Company A enters into an agreement with Bank B pursuant to which Company A agrees with Bank B that Company C, an unconsolidated subsidiary of Company A, will maintain equity of at least \$1. Six months later, Company C borrows \$100 million from Bank B. Three months later, Company C defaults on its debt obligation to Bank B. In this fact pattern, upon entering into the initial agreement with Bank B, Company A would generally have no disclosure requirement under Item 2.03 on New Form 8-K. However, when Company C borrows \$100 million from Bank B, Company A will be required to file a New Form 8-K under Item 2.03 as Company A has become contingently liable for an obligation arising out of an off-balance sheet arrangement, assuming such contingent obligation is material to Company A. Upon Company C’s

default on its debt obligation to Bank B, a further New Form 8-K filing obligation will be required under Item 2.04, as discussed below, as a contingent obligation of Company A has become a direct financial obligation, assuming such direct financial obligation is material to Company A.

11. Does the company have to make a filing when it is not a party to the off-balance sheet arrangement?

It depends. If neither the company nor any affiliate of the company is a party, the four-business day period for reporting would begin on the earlier of:

- ▶ the fourth business day after the contingent obligation is created or arises, and
- ▶ the day on which an executive officer (as defined in Rule 3b-7) becomes aware of the contingent obligation.

If the obligation is a security, or a term of a security, that has been or will be registered for sale, the company is not required to file a New Form 8-K, provided that the prospectus relating to the sale contains the information required by this item and is filed within the required time period under Rule 424.

12. Do we need to file a New Form 8-K if facts or events occur that cause our obligations to increase or accelerate?

Yes. New Item 2.04 requires a company to file a New Form 8-K:

- ▶ if a triggering event occurs that:
 - ▶ causes the increase or acceleration of a direct financial obligation of the company;
 - ▶ causes a company's obligation under an off-balance sheet arrangement to increase or accelerate; or
 - ▶ causes a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company; and
- ▶ in each case above, the consequences of the event are material to the company.

As with to Item 2.03 of New Form 8-K, the filing would be required whether or not the

company is a party to the transaction or agreement under which the triggering event occurs.

13. What is the definition of "direct financial obligation" for purposes of Item 2.04 of New Form 8-K?

The term "direct financial obligation" has the same definition used under Item 2.03, except the term used for purposes of Item 2.04 also includes an obligation arising out of an off-balance sheet arrangement that is accrued under the SFAS No. 5, Accounting for Contingencies, as a probable loss contingency. "Off-balance sheet arrangement" has the same definition used for purposes of Item 2.03.

14. What is a "triggering event"?

A "triggering event" is defined as an event, including an event of default, event of acceleration or similar event, which results in the increase, acceleration or other defined consequence.

15. When does our filing obligation arise with respect to triggering events?

No disclosure is required unless and until a 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 occurrence of a triggering event and the satisfaction of all conditions to the occurrence, except the passage of time. The company may, however, state its good faith belief as to any relevant matter including, for example, that not all conditions to occurrence of a triggering event have been satisfied or that a triggering event otherwise has not occurred. Similar to the requirements under Item 1.02, an amendment to the filed New Form 8-K may be required if the company's conclusion changes due to a loss of, or change in, its good faith belief.

If a company is subject to an off-balance sheet obligation, whether or not disclosed pursuant to Item 2.03, and a triggering event occurs as a result of which, under that obligation, an accrual for a probable loss is required under SFAS No. 5, the obligation

becomes a direct financial obligation for purposes of Item 2.04 of New Form 8-K. In this situation, if the consequences are material to the company, disclosure is required.

16. If we experience a triggering event relating to an increase or acceleration of a direct financial obligation, what must we disclose?

If a triggering event relates to the increase or acceleration of a direct financial obligation, the company must disclose in the New Form 8-K:

- ▶ the date of the triggering event;
- ▶ a brief description of the agreement or transaction under which the obligation was created and has been increased or accelerated;
- ▶ a brief description of the triggering event;
- ▶ the amount of the direct financial obligation, as increased, if applicable;
- ▶ 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 obligation.

17. If a triggering event relates to our obligation under an off-balance sheet arrangement, what must we disclose in the New Form 8-K?

If the triggering event relates to the a company's obligation under an off-balance sheet arrangement, the company must disclose in the New Form 8-K:

- ▶ the date of the triggering event;
- ▶ a brief description of the off-balance sheet arrangement;
- ▶ a brief description of the triggering event;
- ▶ the nature and amount of the obligation, as increased, if applicable;
- ▶ 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 obligation or its becoming a direct financial obligation of the company.

18. Are we required to provide an extensive analysis of the effect of the triggering event?

No. The SEC eliminated the requirement to provide a “mini-MD&A,” or management’s analysis of the effect of the triggering event. The SEC, however, cautioned again that disclosures made in the New Form 8-K must include all material information that is necessary to make the required disclosure, in light of the circumstances made, not misleading.

ITEM 2.05.
Costs Associated with Exit or Disposal Activities

19. Is there a filing requirement in the event that we commit to an exit or disposal plan?

Yes. Item 2.05 of New Form 8-K requires the filing of a New Form 8-K when the board of directors, a committee of the board or an authorized officer, if board action is not required, commits the company to an exit or disposal plan, otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of SFAS No. 146, Accounting for Costs Associated with Exit or Disposal Activities, under which material charges will be incurred under generally accepted accounting principles.

20. What type of disclosure is required?

The company must disclose in its New Form 8-K:

- ▶ the date of the commitment to the course of action;
- ▶ a description of the course of action, including the facts and circumstances leading to the expected action;
- ▶ the expected completion date;
- ▶ for each major 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, unless the company is unable to make a good faith estimate, in which case, it need not disclose an estimate at the time of filing of the New Form 8-K; however, within four business days after the company formulates an estimate, the company must amend its earlier New Form 8-K filing to include the estimate.

21. Is there a requirement to provide a “mini-MD&A” in the New Form 8-K?

No. The proposed requirement for a “mini-MD&A” has been eliminated, but the same cautionary advice discussed under Item 2.04 regarding material omissions was expressed by the SEC with respect to Item 2.05. The disclosure requirements relating to an exit or disposal plan are designed to track the disclosures required in the footnotes to the financial statements required by SFAS No.146.

ITEM 2.06.
Material Impairments

22. Our company has experienced a material impairment of its assets. Do we have to file a New Form 8-K?

Yes. Item 2.06 of New Form 8-K requires the filing of a New Form 8-K when a company’s board of directors, a committee of the board or an authorized officer of the company, if board action is not required, concludes that a material charge is required under GAAP for impairment of one or more of its assets, including an impairment of securities or goodwill.

23. What information is required to be disclosed in the New Form 8-K?

Specifically, the company must disclose in a New Form 8-K:

- ▶ the date of the conclusion that a material charge is required;

▶ a description of the impaired asset or assets;

- ▶ 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.

24. We expect to record a charge for impairment of our company’s assets in connection with our company’s annual audit. Do we have to file a New Form 8-K?

No. A New Form 8-K is not required to be filed 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 plan is disclosed in the company’s Exchange Act report for that period.

SECTION 3.
Securities and Trading Market

ITEM 3.01.
Notice of Delivery or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

1. Our company has received a delisting notice from the Nasdaq. Do we have to file a New Form 8-K?

Yes. Item 3.01(a) of New Form 8-K requires that a company report its receipt of a notice from the national securities exchange or national securities association (or facility of the association) that maintains the principal listing for any class of the company’s common equity indicating that:

- ▶ the company or the class of its securities does not satisfy a rule or standard for continued listing on the exchange or association;
- ▶ the exchange has submitted an application to the SEC under Rule 12d2-2 to delist the class of the company’s securities; or

- ▶ the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system.

2. What information do we have to disclose in the New Form 8-K?

A company receiving a delisting notice must disclose in a New Form 8-K:

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

3. Does a New Form 8-K filing have to be made in all situations involving a delisting?

No. A New Form 8-K filing is not required under Item 3.01(a) where, generally, the delisting is a result of one of the following:

- ▶ the entire class of the security has been called for redemption, maturity or retirement and, if required by the terms of the securities, funds sufficient for the payment of all these securities have been deposited with an agency authorized to make the payments and the funds have been made available to security holders;
- ▶ the entire class of the security has been redeemed or paid at maturity or retirement;
- ▶ the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution and represent no other right, except, if true, the right to receive an immediate cash payment; or
- ▶ all rights pertaining to the entire class of the security have been extinguished.

4. If we notify the Nasdaq Stock Market that we are aware of material noncompliance with a listing standard by our company, would we be required to file a New Form 8-K?

Yes. Item 3.01(b) of New Form 8-K requires a filing if the company has notified the exchange or association that the company is aware of any material noncompliance with a rule or standard for continued listing.

In that event, the company must disclose in the New Form 8-K:

- ▶ the date that the company provided the notice to the exchange or association;
- ▶ the rule or standard for continued listing that the company fails to satisfy; and
- ▶ any action or response that, at the time of filing, the company has determined to take regarding its noncompliance.

5. If we have a grace period to comply, do we still have to file a New Form 8-K?

Yes. The company must provide the required disclosure in a New Form 8-K regarding any failure to satisfy a rule or standard 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. However, an early warning notice that merely informs the company that it is in danger of falling out of compliance with a rule or standard for continued listing on the exchange or association is not a notice that the company no longer satisfies that rule or standard and will not trigger a disclosure obligation under Item 3.01(b). If the warning notice informs the company that it is out of compliance with a rule or standard for continued listing, but provides a cure period prior to delisting, that notice will trigger a New Form 8-K filing requirement.

6. Does that mean a company will have to make two filings—one at the time of the original notice and one at the time the cure period expires?

Yes. There will usually be two filings in the typical involuntary delisting process:

- ▶ An initial filing on New Form 8-K will be made when the company receives the first notice that it does not comply with a rule or standard for continued listing or when it notifies the exchange or association that it no longer complies with a rule or standard for continued listing on the exchange or association.
- ▶ Another New Form 8-K filing will be required under Item 3.01(a) upon the company's receipt of a notice regarding

the actual delisting of a class of the company's securities.

Subsequent notices or communications that continue to indicate that the company does not comply with the same rule or standard that was the subject of the initial notice are not required to be filed, but may be filed by the company voluntarily.

7. The stock exchange on which our company's stock is listed issued a public reprimand letter to the company. However, the company's stock is still listed on the stock exchange. Do we have to file a New Form 8-K to report the reprimand?

Yes. Item 3.01(c) of New Form 8-K requires that, if the exchange or association, in lieu of suspending trading or delisting, issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard of the exchange or association, the company must file a New Form 8-K disclosing the date of the letter or communication and summarizing the contents of the letter or communication.

8. Our board of directors has voted to withdraw the listing of our company's stock on the stock exchange. Do we have to disclose that action?

Yes. Item 3.01(d) of New Form 8-K requires that, if the company's board, a committee of the board or an officer authorized to take action, has taken definitive action, if board action is not required, including adoption of a relevant resolution, to withdraw or terminate the listing, the company must describe the action taken and state the date of the action. This requirement includes disclosure of action taken by a company to transfer a listing or quotation of its securities to another exchange or quotation system.

ITEM 3.02. **Unregistered Sales of Equity Securities**

9. Historically, we have disclosed our unregistered sales of equity securities in our company's Form 10-Q or Form 10-K. Has this requirement changed?

Yes. Item 3.02 of New Form 8-K moved those disclosures from Form 10-K and Form

10-Q to New Form 8-K and requires a company to disclose in New Form 8-K the information specified in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K regarding the company's sale of unregistered equity securities. Issuances of unregistered equity securities through conversion and similar transactions are included. The obligation to file has been expanded, however, to include those situations where the company enters into an agreement enforceable against it, whether or not subject to conditions, under which the equity securities are to be sold. If there is no agreement, the company must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are sold.

10. Are there any exceptions to this requirement?

Yes. A New Form 8-K is not required to be filed if the equity securities sold in the aggregate since the company's last report filed under Item 3.02(d) of New Form 8-K or the company's last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding. The "number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding, not including outstanding securities convertible into or exchangeable for equity securities. For small business issuers, the threshold is 5% of the issuer's outstanding securities of that class. Issuances not reported on New Form 8-K, however, will continue to be required to be reported in periodic reports.

ITEM 3.03.
Material Modifications to Rights of Security Holders

11. Are there other disclosures transferred from the periodic reports to the New Form 8-K?

Yes. Item 3.03 of New Form 8-K moves the disclosure by a company regarding material modifications to the rights of the holders of any class of the company's registered securities from Form 10-Q and Form 10-QSB to New Form 8-K. The substance of the

disclosure is the same as that currently mandated under those forms, requiring a brief description of the general effect of the modifications on shareholders' rights. Working capital restrictions and other limitations upon the payment of dividends must be reported under this Item. Disclosure is required even if the substance of the modification has previously been described in a proxy proposal; however, once a company has reported a material modification on New Form 8-K, the company need not make any duplicative disclosure about the modification in any of its subsequently filed periodic reports.

SECTION 4.
Matters Related to Accountants and Financial Statements

ITEM 4.01.
Changes in Registrant's Certifying Accountant

1. If our independent public accountant resigns, or is dismissed by us or we retain a new independent public accountant, are we still required to file a New Form 8-K?

Yes. Item 4.01 of New Form 8-K is substantively the same as Item 4 of current Form 8-K, requiring disclosure of the resignation, dismissal or engagement of an independent public accountant.

ITEM 4.02.
Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

2. We expect that we will have to restate our financial statements for the previous three quarters. Do we have a filing requirement under New Form 8-K?

Yes. Item 4.02 of New Form 8-K requires that a company file a New Form 8-K if its board of directors, a committee of the board or if board action is not required, an authorized officer, concludes that any of the company's previously issued financial statements covering one or more years or interim periods no longer should be relied upon because of an error in the financial statements as addressed in APB Opinion No. 20.

3. What types of information must the company disclose in its New Form 8-K?

Item 4.02 of New Form 8-K requires disclosure of:

- ▶ the date of the conclusion regarding non-reliance;
- ▶ 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 to the company at the time of filing (although the company may voluntarily file an amendment later to reflect any changes to the facts underlying the conclusion); and
- ▶ a statement of whether the audit committee, or the board in the absence of an audit committee, or authorized officers discussed with the company's independent accountant the subject matter giving rise to the conclusion.

Under Item 4.02(b) of New Form 8-K, 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 information in a New Form 8-K:

- ▶ 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 independent accountant; and
- ▶ a statement of whether the audit committee, or the board in the absence of an audit committee, or authorized officers discussed with the independent accountant the subject matter giving rise to the notice.

4. If we file a New Form 8-K to reflect such actions, is there anything else we must do?

Yes. If the company receives advice or a notice from its independent accountant, the

company must provide the independent accountant with a copy of the disclosures it is making under Item 4.02(b) of New Form 8-K no later than the same day it files its New Form 8-K with the SEC. The company also must request that the accountant furnish to the company, as promptly as possible, a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company and, if not, stating the portion with which it does not agree. Within two business days of the company's receipt of the letter, the company must then amend its previously filed New Form 8-K to file the independent accountant's letter as an exhibit. The SEC has eliminated the proposed requirement to disclose the company's plans to address the issue.

SECTION 5. Corporate Governance and Management

ITEM 5.01. Changes in Control of Registrant

1. A change in control of a company was previously required to be disclosed in a Form 8-K. Has that requirement changed?

No. Item 5.01 of New Form 8-K continues substantially unchanged from the current Form 8-K with only stylistic modifications.

ITEM 5.02. Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers

2. One of our directors has resigned because of a disagreement with our chief executive officer as to direction of the company. Must we disclose that resignation on a New Form 8-K?

Yes. Paragraph (a) of Item 5.02 of New Form 8-K requires the filing of a New Form 8-K if a director has resigned or refuses to stand for reelection to the board since the date of the last annual meeting 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.

3. What information do we have to disclose in the New Form 8-K?

The company must disclose in the New Form 8-K:

- ▶ the date of the director's resignation, refusal to stand for re-election or removal;
- ▶ any positions then held by the director on any committee of the board; 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.

4. What if the director expressed his or her disagreement to us in writing?

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 New Form 8-K, regardless of whether the director requests that the company do so. The company must provide the director with a copy of the New Form 8-K no later than the day of filing. The company also 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 in the New Form 8-K and, if not, the areas in which he or she does not agree. Finally, the company must file any letter it receives from the director as an exhibit by amendment to the New Form 8-K within two business days after receipt.

5. If we appoint a director to fill a vacancy, are we required to file a Form 8-K? What do we have to disclose?

Yes. Paragraph (d) of Item 5.02 requires the filing of a New Form 8-K 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 that purpose. The company must disclose:

- ▶ the new director's name,
- ▶ the election date,

- ▶ a brief description of any arrangement or understanding pursuant to which the new director was selected,
- ▶ any committees to which the new director has been or, at the time of the disclosure is expected to be, named, and
- ▶ information regarding certain related-party transactions (Item 404(a) of Regulation S-K).

6. If we fire one or more of our senior management or one or more members of our senior management resign, are we required to file a New Form 8-K?

Yes. Paragraph (b) of Item 5.02 of New Form 8-K requires that a New Form 8-K be filed when the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns or is terminated from that position. No reason is required to be given for the departure. The item also requires disclosure when a director retires, resigns, is removed or declines to stand for re-election for any reason other than as a result of a disagreement or cause.

7. If we make appointments of senior officers to our management team, do we have to file a New Form 8-K?

Yes. Paragraph (c) of Item 5.02 of New Form 8-K requires disclosure if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions. The company must disclose in its New Form 8-K:

- ▶ the officer's name,
- ▶ position,
- ▶ the date of the appointment,
- ▶ information regarding the background of the officer and certain related party transactions (Regulation S-K Items 401(b), 401(d), 401(e) and 404(a)), and
- ▶ a brief description of the material terms of any employment agreement between the company and the officer.

8. When do we have to file a New Form 8-K in such an event?

The company may delay disclosure until the day that the company first makes the public announcement of the appointment if the company intends to make a public announcement of the appointment other than by means of filing a New Form 8-K

9. We have not finalized the contractual negotiations with our new chief executive officer. What should we do?

If information regarding an employment contract of an officer is not determined or is unavailable at the time of filing the New Form 8-K, a company must include a statement to that effect in the filing and must file an amendment to the filed New Form 8-K containing the information within four business days after the information is determined or becomes available. A wholly-owned subsidiary of a reporting company is excluded from the reporting requirements of Item 5.02 of New Form 8-K.

ITEM 5.03.

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

10. We are going to amend our articles of incorporation and bylaws. Do we have to file a New Form 8-K to disclose that event?

Yes. Item 5.03 of New Form 8-K requires a company with a class of equity securities registered under Section 12 of the Exchange Act to disclose in a New Form 8-K any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy or information statement. The company must disclose:

- ▶ the effective date of the amendment,
- ▶ a description of the provision adopted or changed by amendment, and
- ▶ if applicable, the previous provision.

11. We are considering changing the company's fiscal year. If we do so, does this trigger a New Form 8-K filing?

Yes. If the company determines to change its fiscal year from that used in its most

recent SEC filing, other than by shareholder vote or by an amendment to its articles of incorporation or bylaws, the company must disclose:

- ▶ the date of that determination,
- ▶ the date of the new fiscal year end, and
- ▶ the form on which the report covering the transition period will be filed.

The company need only file the text of the amendment as an exhibit to the filing, but must then file the restated or amended articles of incorporation or bylaws, if applicable, as an exhibit to its next periodic report.

SECTION 6. Other Events

What other events trigger a filing of a Form 8-K?

The New Form 8-K also requires disclosure of the following events, all of which were previously triggering events under the current Form 8-K:

- ▶ Item 5.04 Temporary suspension of trading under the company's employee benefit plans (which includes a clarification that the report must be filed no later than the fourth business day after the company receives the ERISA notice or, if not received, after the company transmits the ERISA notice to an officer or director within the Regulation BTR time period and which also provides for updated notices);
- ▶ Item 5.05 Amendments to or waivers of the company's code of ethics;
- ▶ Item 7.01 Regulation FD;
- ▶ Item 8.01 Other events; and
- ▶ Item 9.01 Financial statements and exhibits.

SECTION 7. Proposed Items Not Adopted

Did the SEC adopt all of its proposals regarding triggering events?

No. The SEC did not adopt proposed

amendments that would have required filings of reports for a company's receipt of ratings from rating agencies or, for termination or reduction of a business relationship with a customer.

SECTION 8. Safe Harbor

1. If we file a New Form 8-K late, can we be sued for violating Section 10(b) of the Exchange Act or related Rule 10b-5?

Not necessarily. The new amendments provide a new limited safe harbor from both public and private claims under Rule 10b-5 for a failure to timely file a Form 8-K regarding 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 Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant
- ▶ Item 2.04 Triggering Events that 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 a notice described in Item 4.02(b) from its accountant)

The safe harbor applies only to a failure to file a New Form 8-K. Material misstatements or omissions in a New Form 8-K will continue to be subject to Rule 10b-5 liability. If the company has a duty to disclose information for any reason apart from the New Form 8-K requirement, the safe harbor will not provide protection for failure to satisfy

the separate obligation (such as the sale of shares while in possession of material non-public information). The safe harbor will extend only until the due date of the company's next periodic report.

2. May the company be sued for violating Section 13(a) or 15(d) of the Exchange Act for failure to timely file a New Form 8-K?

Yes. The SEC did not adopt the proposed safe harbor from liability under Section 13(a) or 15(d) of the Exchange Act.

SECTION 9.

Eligibility for Form S-3 and Rule 144

1. If we fail to timely file a New Form 8-K, does the company lose its eligibility to use Forms S-2 or S-3?

Not necessarily. In response to comments, the SEC revised the Form S-2 and S-3 eligibility requirements to provide that companies that fail to timely file reports required by Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a) of New Form 8-K will not lose their eligibility to use Form S-2 and S-3 registration statements. These are the same items that are covered by the new limited safe harbor. However, a company must be current in its New Form 8-K filings with respect to the items listed above at the actual time of filing a Form S-2 or S-3. With respect to the other New Form 8-K items not listed above, a company's failure to timely file a New Form 8-K will result in a loss of Form S-2 or S-3 eligibility for the 12 months following the New Form 8-K due date. Many of these items are currently required Form 8-K disclosure items.

2. What about the impact on Rule 144 under the Securities Act?

The SEC amended Rule 144 to clarify that a company need not have filed all required New Form 8-K reports during the 12 months preceding a sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition. As required by Rule 144(h), however, a security holder will continue to be required to represent that he or she does not have inside information.

SECTION 10.

Conforming Amendments

Were there any other changes adopted by the SEC?

Yes. There are a number of conforming amendments noted in the release. However, the most significant amendment is to Item 601 of Regulation S-K to clarify that, if a report on New Form 8-K contains disclosures under Item 2.02, Results of Operations and Financial Condition, or Item 7.01, Regulation FD Disclosure, whether or not the report contains disclosures regarding other items, all exhibits to that report relating to Items 2.02 or 7.01 will be deemed furnished, and not filed, unless the company specifies exhibits, or portions of exhibits, that are intended to be deemed filed rather than furnished.

Conclusion

Adoption of the amendments to Form 8-K will significantly impact the way companies communicate with the public by providing more information on an accelerated basis. To ensure that all triggering events become known to management on a timely basis, companies may need to modify their disclosure controls to provide for prompt "bottom-up" reporting. Companies also may need to work to develop a streamlined process for drafting and reviewing the New Forms 8-K by management, the disclosure committee and other responsible persons to meet the new deadline. ■