

# SEC ADDS ADDITIONAL FORM 8-K DISCLOSURE REQUIREMENTS

In compliance with the “real time issuer disclosure” directive of the Sarbanes-Oxley Act, the SEC recently adopted new disclosure obligations increasing the number of events that are reportable on Form 8-K.

## WHAT ARE THE NEW FORM 8-K DISCLOSURE REQUIREMENTS?

The SEC added to Form 8-K eight new items and transferred two items from the periodic reports. These are briefly summarized below:

### Section 1 Registrant’s Business and Operations

#### Item 1.01 Entry into a Material Definitive Agreement

New Item 1.01 requires companies disclose material definitive agreements (or amendments to such agreements) that are not made in the ordinary course of business. Upon entry into, or material amendment of, a material definitive agreement, a company must disclose the following information:

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

Material definitive agreements 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 other parties to the agreement, regardless of whether the material definitive agreement is subject to stated conditions. The material definitive agreement need not be filed as a Form 8-K exhibit.

#### Item 1.02 Termination of a Material Definitive Agreement

This new Form 8-K item requires disclosure if a material definitive agreement not made in the ordinary course of business 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 such agreement. In such an event, the company must disclose the following information:

- the date of the termination;
- the identity of the parties to the agreement and a brief description of any material relationship between the company or its affiliates and any of the parties;
- a brief description of the material terms;
- a brief description of the material circumstances surrounding the termination; and
- any material early termination penalties incurred by the company.

No disclosure is required during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated. In addition, no disclosure is required 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.

#### Item 1.03 Bankruptcy or Receivership

This item retains the basic substantive requirements required by former Item 3 of Form 8-K regarding a company’s bankruptcy or receivership.

### Section 2 Financial Information

#### Item 2.01 Completion of Acquisition or Disposition of Assets

This item retains most of the substantive requirements included in former Item 2 of Form 8-K, requiring disclosure

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if a company has acquired or disposed of a significant amount of assets outside the ordinary course of business.

### **Item 2.02 Results of Operations and Financial Condition**

Item 2.02 retains all of the substantive requirements of former Item 12 of Form 8-K regarding public announcements or releases of material non-public information regarding 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**

This new item requires disclosure if the company becomes obligated under a direct financial obligation that is material to the company. A "direct financial obligation" is any of the following:

- a long-term debt obligation, a capital lease obligation, or an operating lease obligation (each as defined in Item 303 of Regulation S-K); or
- a short-term debt obligation (generally less than one year) that arises other than in
- the ordinary course of business.

The company's disclosure obligations include:

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

In addition, if the company becomes directly or con-

tingently liable for a material obligation arising out of an "off-balance sheet arrangement" (as defined in Item 303 of Regulation S-K) it must provide the following information:

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

### **Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement**

This new item requires a company to file a Form 8-K report if a triggering event causing the increase or acceleration of a material direct financial obligation of the company occurs. In such case, the company must provide the following information:

- the date of the triggering event and a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;
- a brief description of the triggering event;

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- the amount of the direct financial obligation, as increased if applicable, and the terms of payment or acceleration that apply; and
- any other material obligations of the company that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the direct financial obligation.

If a triggering event occurs causing a company's obligation under an off-balance sheet arrangement to increase or be accelerated, or causing 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, it must disclose the following information:

- the date of the triggering event and 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, and the terms of payment or acceleration that apply; and
- any other material obligations of the company that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the obligation under the off-balance sheet arrangement or its becoming a direct financial obligation of the company.

For purposes of Item 2.04, the term "direct financial obligation" also includes an obligation arising out of an off-balance sheet arrangement that is accrued under the SFAS 5 as a probable loss contingency.

### **Item 2.05 Costs Associated with Exit or Disposal Activities**

This new item requires disclosure when the board, or authorized officers if board action is not required, 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 GAAP. The item requires a company to disclose:

- the date of the commitment to the course of action and a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;
- for each major type of cost associated with the course of action 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.

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 file the Form 8-K report describing the company's commitment to a course of action under which it will incur a material charge. Within four business days after the company makes such an estimate, the company must amend the Form 8-K filing to include the estimate.

### **Item 2.06 Material Impairments**

This new item requires disclosure when a company's board, or authorized officers if board action is not required, concludes that a material charge for impairment to one or more of its assets (such as an impairment of securities or goodwill) is required under GAAP. Specifically, the company must disclose:

- the date of the conclusion that a material charge is required and describe the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required;

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- 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.
- a rule or standard for continued listing that the company fails, or has failed, to satisfy; and
- any action or response that, at the time of filing, the company has determined to take regarding its noncompliance.

### Section 3 Securities and Trading Markets

#### Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

New Item 3.01(a) requires a company to report its receipt of a notice from the exchange or market that maintains the principal listing for any class of the company's common equity, indicating that:

- the company does not satisfy a rule or standard for continued listing;
- the exchange, if listed on an exchange, has submitted an application to the SEC to delist such class of the company's securities; or
- Nasdaq, if listed on Nasdaq, has taken all necessary steps under its rules to delist the security.

A company that receives this type of a notice must disclose the following information:

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

In addition, under Item 3.01(b), if the company has notified the exchange or market that maintains the principal listing for any class of the company's common equity that the company is aware of any material noncompliance with a rule or standard for continued listing, the company must disclose:

- the date that the company provided such notice;

Under Item 3.01(c), if an exchange or market in lieu of suspending trading in or delisting such class of the company's securities, issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard, the company must state the date and summarize the contents of the letter or communication.

Finally, Item 3.01(d) requires that, if the company's board, or the authorized officers if board action is not required, has taken definitive action to cause the listing of a class of its common equity to be withdrawn from the exchange or market, the company must describe the action taken and state the date of the action.

Item 3.01 does not apply, however, to companies whose common equity is listed only on the Bulletin Board or Pink Sheets.

#### Item 3.02 Unregistered Sales of Equity Securities

This new item requires a company to disclose the company's sale of equity securities in a transaction that is not registered under the Securities Act. This disclosure is currently required in Forms 10-Q and 10-QSB Forms 10-K and 10-KSB.

Under the new item, no Form 8-K need be filed if the equity securities sold in the aggregate since the company's last report filed under this item or last periodic report, whichever is more recent, constitute less than 1% of the company's outstanding securities of that class (or less than 5% for small business issuers). Companies will still be required to continue to report all other unregistered sales of equity securities in their periodic reports.

A company has no obligation to disclose information under Item 3.02 until the company enters into an agreement enforceable against it, whether or not subject to conditions,

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under which such securities are to be sold. If there is no such agreement, the company must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction under which such securities are sold.

### **Item 3.03 Material Modifications to Rights of Security Holders**

This new item requires a company to disclose material modifications to the rights of the holders of any class of the company's securities and to briefly describe the general effect of such modifications on the rights of such securityholders. The substance of the disclosure is the same as previously required by Forms 10-Q and 10-QSB.

### **Section 4 Matters Related to Accountants and Financial Statements**

#### **Item 4.01 Changes in Registrant's Certifying Accountant**

This item is substantively the same as former Item 4 of Form 8-K, requiring disclosure of the resignation, dismissal or engagement of an independent accountant.

#### **Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review**

This new item requires a company to file a Form 8-K if and when its board, or authorized officers if board action is not required, concludes that any of the company's previously issued financial statements no longer should be relied upon because of a material error in such financial statements. This item requires the company to disclose the following information:

- the date of the conclusion regarding the non-reliance and an identification of the financial statements and 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; 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.

If the company is advised by its independent accountant that disclosure should be made to prevent future reliance on a previously issued audit report or interim review related to previously issued financial statements, it must disclose the following information:

- the date on which the company was so advised;
- identification of the financial statements that should no longer be relied upon;
- a brief description of the information provided by the accountant; and
- a statement of whether the audit committee, or 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.

If the company receives such advice from its independent accountant, the company must also:

- provide the independent accountant with a copy of the disclosures no later than the same day it files such disclosures with the SEC;
- request the independent accountant to 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 respects in which it does not agree; and
- amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K within two business days of the company's receipt of the letter.

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### **Section 5 Corporate Governance and Management**

#### **Item 5.01 Changes in Control of Registrant**

This item is substantially the same as former Item 1 of Form 8-K regarding a change in control and arrangements for a change in control.

#### **Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers**

Under Item 5.02(a), if a director has resigned or refuses to stand for re-election to the board of directors since the date of the last annual shareholders 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 from the board of directors, the company must disclose:

- the date of the director's resignation, refusal to stand for re-election or removal;
- any positions held by the director on any committee of the board of directors at such date; and
- a brief description of the circumstances representing the disagreement that management believes caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal.

If the director furnishes the company with any written correspondence concerning the circumstances surrounding his or her resignation, refusal or removal, the company must file a copy of the correspondence as an exhibit to the report on Form 8-K.

The company must provide the director with a copy of the disclosures it is making in response to Item 5.02(a) no later than the day that the company files the disclosures with the SEC. The company must also provide the director with the opportunity to furnish a letter addressed to the company as promptly as possible stating whether the director agrees with the company's disclosures in response to Item 5.02(a).

Finally, the company must file as an amendment to the Form 8-K previously filed any letter it receives from the director within two business days after receipt by the company.

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 performing similar functions retires, resigns, or is terminated from that position. The item also requires disclosure when a director retires, resigns, is removed or declines to stand for re-election and the company is not required to provide disclosure under Item 5.02(a).

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 performing similar functions. The company must disclose the officer's name, position, the date of the appointment, information regarding the background of the officer and certain related transactions with the company, and a brief description of the material terms of any employment agreement between the company and the officer.

Item 5.02(d) requires that if a new director is elected to the board, except at a shareholders meeting, disclosure of the new director's name, the election date, a brief description of any arrangement pursuant to which the new director was selected as a director, any committees to which the new director has been, or is expected to be, named, and information regarding certain related transactions between the new director and the company.

#### **Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year**

Item 5.03(a) requires a company to disclose any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement or information statement. The item requires the company to disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and, if applicable, the previous provision.

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If the company determines to change the fiscal year by other than a vote of security holders through the solicitation of proxies or otherwise, or by an amendment to its articles of incorporation or bylaws, Item 5.03(b) requires the company to state 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.

### **Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans**

This Item 5.04 is substantially the same as former Item 11 of Form 8-K.

### **Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics**

This Item 5.05 is substantially the same as former Item 10 of Form 8-K.

### **Items 7.01 Disclosure Under Regulation FD and 8.01 Other Disclosure**

Item 7.01, disclosure under regulation FD, and Item 8.01, disclosure of other events, remain substantially the same as under former Item 9 and Item 5, respectively. The SEC reserved Item 6.

### **Item 9.01 Financial Statements and Exhibits**

Item 9.01 is substantially the same as former Item 7 of Form 8-K, updated to reflect the additional disclosures as described above.

### **WHAT ARE THE NEW FILING DEADLINES?**

The new rules shorten the Form 8-K filing deadline for most items to four business days after the occurrence of an event triggering the disclosure requirements of Form 8-K.

### **WHEN ARE THE NEW RULES EFFECTIVE?**

The new rules are effective August 23, 2004.

### **WHAT IF THE COMPANY FAILS TO FILE THE FORM 8-K?**

Several of the Form 8-K reporting obligations are triggered based on subjective criteria. Coupled with the short time period in which management has to determine whether a particular transaction triggers a Form 8-K filing, the SEC included in the new rules certain protections.

### **Safe Harbor from Rule 10b-5 Liability**

To protect a company against potential liability under Rule 10b-5 arising from the company's failure to file a required Form 8-K, the SEC adopted a new limited safe harbor from public and private claims under Rule 10b-5 for a failure to file a Form 8-K regarding Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a). The safe harbor only applies to a failure to file a report on Form 8-K. Material misstatements or omissions in a Form 8-K will continue to be subject to Rule 10b-5 liability.

Furthermore, this safe harbor extends only until the due date of the periodic report of the company for the relevant period in which the Form 8-K was not timely filed. Failure to make such disclosure in the periodic report will subject a company to potential liability under Rule 10b-5, in addition to the potential liability for failing to file required Exchange Act reports.

### **Form S-3 Eligibility**

Companies that fail to file timely reports required by Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a) will not lose their eligibility to use Form S-2 and S-3 registration statements. However, a company must be current in its Form 8-K filings with respect to such items at the actual time of filing a Form S-2 or S-3.

### **Form 144**

The SEC amended Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the 12 months preceding a sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition.