

CORPORATE GOVERNANCE ALERT

SEC ADOPTS AMENDMENTS TO FORM 8-K



On March 11, 2004, the Securities and Exchange Commission (SEC) adopted amendments to Form 8-K, the Exchange Act form used by public companies to disclose important corporate events on a current basis.

Generally, the amendments —

- shorten the 8-K filing deadline for most items to four business days after the occurrence of an event triggering the disclosure requirements of the form;
- add 10 new events that require disclosure on Form 8-K (eight of which are new and two of which formerly were required to be disclosed on other forms);
- expand the required disclosure for many of the events currently reported on Form 8-K; and
- provide a limited safe harbor from liability under Exchange Act Section 10(b) and Rule 10b-5 for failure to timely file seven of the additional Form 8-K items.

Compliance with these amendments will be required as of August 23, 2004.

These amendments are responsive to the “real time issuer disclosure” mandate in Section 409 of the Sarbanes-Oxley Act of 2002. They are intended to provide investors with better and faster disclosure of important corporate events. The disclosure committees of many reporting companies will need to revise their procedures to ensure timely and accurate reporting under the new rules.

The following is a more detailed analysis of the amendments.

SHORTENED FILING REQUIREMENT

Most reporting companies must now file a Form 8-K within four business days following a triggering event, replacing the existing five-business-day and 15-calendar-day Form 8-K filing deadline. The Form 8-K must be filed on a business day, so for events that occur on a Tuesday or later in the week, companies may use the weekend to prepare the Form 8-K.

Foreign private issuers that file annual reports on Form 20-F or Form 40-F are not subject to the shortened filing requirement. Further, the amendments do not affect the filing deadline for disclosures under Regulation FD (Item 7.01), voluntary disclosures (Item 8.01) and certain exhibits.

EXPANSION OF FORM 8-K ITEMS

The SEC added eight new events to the list of events that require filing of a Form 8-K and transferred, in part, two items from other periodic reports. The new events that must be reported on Form 8-K are:

- entry into a material definitive agreement entered into outside the ordinary course of business. These agreements generally are of the type required to be filed as Item 10 exhibits to periodic reports. Amendments to these agreements also trigger disclosure and filing on Form 8-K;
- termination of a material definitive agreement not made in the ordinary course of business if it is material to the company. No report needs to be filed if the termination is the result of the expiration of the agreement at its stated termination date or the completion of the parties' obligations;
- creation of a direct financial obligation that is material to the company;
- events that accelerate or increase a direct financial obligation that is material to the company;
- material costs associated with exit or disposal activities. The filing requirement is triggered when the board of directors, a committee of the board or an authorized officer (if board action is not required) commits the company to the plan;
- material impairments. The filing requirement is triggered when the board of directors, a committee of the board or an authorized officer (if board action is not required) concludes that a material charge for impairment to one or more of its assets is required under GAAP;
- receipt of a notice of delisting or failure to satisfy a continued listing rule or standard;
- transfer of listing; and
- non-reliance on previously issued financial statements or a related audit report or completed interim review (restatements).

The two events previously reported on other forms that now need to be reported on Form 8-K are:

- unregistered sales of equity securities; and
- material modifications to rights of security holders.

The amendments expand the disclosure required with respect to the following events that are currently required to be reported on Form 8-K:

- departure of directors or principal officers, election of directors or appointment of principal officers; and
- amendments to articles of incorporation or bylaws and change in fiscal year.

SAFE HARBOR

The SEC has adopted a limited safe harbor under Exchange Act Section 10(b) and Rule 10b-5 covering seven of the additional Form 8-K items that require management to quickly assess whether an event triggers the filing obligation of Form 8-K. The safe harbor protects the company from liability under these sections if it makes a determination that one of the required events is not material (and thus does not require a filing) and it is later determined that the event was material and a Form 8-K should have been filed. In such a circumstance, the failure to make the filing will not be a violation of Section 10(b) and Rule 10b-5 so long as the company discloses such event in its next periodic report for the relevant period in which the triggering event occurred.

The SEC noted that material misstatements or omissions in a Form 8-K will continue to be subject to Rule 10b-5 liability and are not protected by the safe harbor.

Use of the safe harbor does not affect eligibility to file on the short forms Form S-2 and Form S-3. The SEC also carved out timely Form 8-K filings from the Rule 144 current public information condition.

CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who normally represents you, or:

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