

March 23, 2004

## SEC Adopts Additional Form 8-K Disclosure Items and Accelerated Filing Date

As we previously reported, on March 11, 2004, almost two years after proposing wide-ranging changes to Form 8-K under the Securities Exchange Act of 1934 (Exchange Act), the Securities and Exchange Commission (SEC) adopted most of the changes it had originally proposed. Although the proposal pre-dated enactment of the Sarbanes-Oxley Act of 2002 (SOX), the new rules, as the SEC pointed out in the adopting release, further the goals of Section 409 of SOX, which requires public companies to disclose “on a rapid and current basis” material information – so-called “real time” reporting.

The SEC adopted eight new disclosure items, from the 11 originally proposed. However, several of the items were substantially revised. In particular, the SEC eliminated proposed requirements to describe management’s analysis of the effects of events (although the SEC repeatedly emphasized that Form 8-K must include all material information necessary to make the disclosure not misleading). The SEC expanded two existing disclosure items and transferred two items from the periodic reports. Due to the increased number of items, the SEC reorganized the items into topics. The SEC also adopted a uniform filing deadline and a “safe harbor” from certain liabilities. The new rules will be effective August 23, 2004.

### Four Business Day Filing Deadline

The SEC had proposed a two business day filing deadline, with a two business day extension available. Instead, the rules as adopted generally provide for a four business day filing deadline, with no extension available. Filings made solely to report matters required by Regulation FD, or to report events not required to be reported, must be made by the deadline provided under Regulation FD, as applicable. The four business day deadline is also subject to certain other exceptions discussed below.

### New and Expanded Disclosure Requirements

As adopted, Form 8-K will require reporting of 20 items (plus events and exhibits), organized into topical sections. The following lists each of the sections and items, with the new designations, and discusses the new or expanded items.

#### *Section 1 – Registrant’s Business and Operations*

**Item 1.01 – Entry into a Material Definitive Agreement.** (New.) If the company enters into a “material definitive agreement,” not made in the ordinary course of business, or an amendment to a material definitive agreement and the amendment is material, the company must disclose the date the agreement was entered into or amended and the parties to the agreement, describe any relationship between the company or its affiliates and any of the other parties, other than in respect of the agreement or amendment, and the terms of the agreement or amendment that are material to the company. A “material definitive agreement” is 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 against other parties to the agreement (even if subject to conditions). An agreement required to be filed as an exhibit to the periodic

reports on Forms 10-K and 10-Q (identified in Item 601(b)(10) of Regulation S-K) would be considered to be “not in the ordinary course of business.”

In an important departure from the proposal, the new rule does not require disclosure of non-binding letters of intent. The SEC also narrowed Item 1.01 to require disclosure only of the material terms of the agreement; however, the SEC noted that provisions such as for duration and termination must be described to the extent material.

The SEC did not adopt a proposed requirement to file the definitive material agreement as an exhibit to the Form 8-K. The SEC noted comments that the short filing deadline would not permit sufficient time for submission of confidential treatment requests, or in some cases for conversion of documents into EDGAR format. Instead, the current regime, under which the agreement must be filed with the periodic report covering the period in which the agreement was entered into, will remain in place. The SEC did, however, encourage companies to file the agreements with the Form 8-K where possible.

Item 1.01 covers, among other things, business combination agreements. In some cases, the filing of the Form 8-K may be the first public disclosure of a business combination. To avoid duplicative filings, the SEC added three boxes to the cover of Form 8-K. By checking the appropriate boxes, the company can indicate that the Form 8-K filing also satisfies the company’s obligations under certain other rules regarding public announcements of business combination transactions, provided the filing includes the information required by those rules.

**Item 1.02 – Termination of a Material Definitive Agreement.** (New.) If a material definitive agreement, not made in the ordinary course of business, is terminated, and such termination is material, the company must disclose the date of termination and the parties to the agreement and describe any relationship between the company or its affiliates and any of the other parties, other than in respect of the agreement; the terms of the agreement that are material to the company; the material circumstances surrounding the termination; and any material termination penalties incurred by the company.

In response to comments, the SEC provided that a termination that results from expiration on a stated termination date or as a result of all parties completing their obligations under the agreement does not need to be reported. As proposed, disclosure is not required during negotiations regarding a potential termination until the agreement is actually terminated; the SEC also eliminated an instruction which indicated that disclosure would be required once the company decided to terminate, rather than when it actually did terminate, an agreement.

In addition, the SEC added an instruction that disclosure is not required if the company believes in good faith that the agreement has not been terminated, unless the company has received a notice of termination. If the company does make disclosure despite such a belief, the SEC stated that the company could disclose its belief and the reasons why it believes the agreement has not been terminated. However, if the company makes such a disclosure and its belief as to termination changes (*i.e.*, it reaches the conclusion that the agreement has in fact terminated), an amendment would (if the termination is material) be required within four business days from the date the company’s belief changes.

In response to comments, the SEC eliminated a proposed requirement that the company disclose management’s analysis of the effect of the termination.

**Item 1.03 – Bankruptcy or Receivership.** Item 1.03 is former Item 3 with minor changes.

## Section 2 – Financial Information

**Item 2.01 – Completion of Acquisition or Disposition of Assets.** Item 2.01 is substantially similar to former Item 2. Item 2.01, however, is revised to clearly relate only to *completed* transactions. In many cases, a company will first report entering into an acquisition or disposition agreement under Item 1.01, and then, if the acquisition or disposition meets the thresholds of Item 2.01 (which are unchanged from former Item 2), report the completion of the transaction under Item 2.01.

In response to comments, the SEC limited the requirements in former Item 2 for disclosure of information concerning the principle followed in determining the consideration paid or received and the source of funds. Such disclosures will now be required only if a relationship exists between the company and the other party to the transaction. As before, the identity of a bank providing a loan in the ordinary course of business need not be disclosed, but under the new rule the company must make a specific confidentiality request with the SEC.

**Item 2.02 – Results of Operations and Financial Condition.** Item 2.02 is former Item 12 (which was added to Form 8-K subsequent to the original proposals) with minor changes.

**Item 2.03 – Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.** (New.) If a company becomes obligated on a material “direct financial obligation,” it must disclose the date it became obligated on the obligation and describe the transaction or agreement creating the obligation; the amount of the obligation, including its payment terms; material provisions for acceleration or increase of the obligation and any provisions for recourse to third parties; and the other material terms of the agreement. A “direct financial obligation” is a long-term debt obligation, a capital lease, an operating lease or a short-term debt obligation that arises other than in the ordinary course of business.

The proposed rule also required disclosure of “contingent” financial obligations. Since the proposals were made, the SEC has adopted rules requiring disclosures concerning “off balance sheet arrangements.” As a result, instead of referring to “contingent” obligations, the rule requires disclosure, similar to that described above, if the company becomes liable, directly or contingently, for a material obligation arising out of an off-balance sheet arrangement.

Disclosure is required whether or not the company is party to the agreement creating the obligation. The SEC gave an example of Company A agreeing with Bank B that Company A will maintain the equity of Company C. At the time of that agreement, Company C has no indebtedness to Bank B. Accordingly, Company A would not be required to file a Form 8-K. Six months later, Company C borrows \$100 million from Bank B. Assuming that amount is material to Company A, Company A would then be obligated to file a Form 8-K, reporting its becoming contingently liable for that obligation.

Where neither the company nor an affiliate is a party to the transaction or agreement that creates the obligation (as in the above example), the four business day filing deadline would begin on the earlier of (1) the fourth business day after the obligation is created and (2) the day on which an executive officer of the company becomes aware of the obligation.

The SEC did not adopt a proposed requirement for disclosure of management’s analysis of the effect of the obligation.

**Item 2.04 – Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.** (New.) If a “triggering event” causes the increase or acceleration of a direct financial obligation, and the consequences of the event are material, the company must disclose the date of the event and describe the agreement or transaction under which the obligation was created, increased or accelerated; the triggering event; the amount of the obligation; its payment terms; and any other material obligation that may arise, increase, be accelerated or become a direct financial obligation as a result of the triggering event. Similar disclosure would be required with respect to off-balance sheet arrangements, including an off-balance sheet event becoming a direct financial obligation. A “triggering event” is an event, including an event of default, event of acceleration or similar event, as a result of which either a direct financial obligation is increased or accelerated or an off-balance sheet arrangement becomes a direct financial obligation. For purposes of Item 2.04, a direct financial obligation also includes an obligation under an off-balance sheet arrangement that is accrued under accounting standards as a probable loss contingency.

As in Item 2.03, disclosure would be required regardless of whether the company is a party to the agreement under which the triggering event occurs. As with termination of a material definitive agreement under Item 1.02, disclosure is not required if the company believes in good faith that no triggering event has occurred, unless the company has

received a notice of its occurrence (and, also as in Item 1.02, if the company does make disclosure despite such a belief, and that belief changes, an amendment would be required within four business days from the date the company's belief changes).

The SEC did not adopt a proposed requirement for disclosure of management's analysis of the effect of the event.

**Item 2.05 – Costs Associated with Exit or Disposal Activities.** (New.) If the company's board of directors, a committee of the board or authorized officers commits the company to an exit or disposal plan, disposes of a long-lived asset or terminates employees under a plan of termination, and will incur material charges as a result, the company must disclose the date it committed to the course of action; describe the course of action, including the circumstances that led to it and its expected completion date; and provide estimates of each major type of associated cost, the total amounts expected to be incurred and the total amount of expected cash expenditures. If the company is unable to make such estimates at the initial filing, it may provide the estimates by amendment within four business days of making a determination of its estimates.

The SEC did not adopt a proposed requirement for disclosure of management's analysis of the effect of the course of action.

**Item 2.06 – Material Impairments.** (New.) If the company's board of directors, a committee of the board or authorized officers concludes that a material charge for impairment to one or more of the company's assets is required, the company must disclose the date the conclusion is reached; describe the assets subject to impairment and the circumstances leading to the conclusion that the impairment charge is required; and provide estimates of the amount of the charge and the amount that will result in future cash expenditures. As in Item 2.05, if the company is unable to make such estimates at the initial filing, it may provide the estimates by amendment within four business days after making a determination of its estimates. No disclosure is required if the conclusion is reached in connection with the preparation, review or audit of financial statements to be included in a periodic report, that report is timely filed and the conclusion is disclosed in that report.

The SEC did not adopt a proposed requirement for disclosure of management's analysis of the effect of the charge.

### **Section 3 – Securities and Trading Market**

**Item 3.01 – Notice of Delisting or Failure to Satisfy Listing Standards and Transfer of Listings.** (New.) If the company receives notice from the principal market for its common equity of failure to meet continued listing standards, or of certain delisting actions, the company must disclose the date it received the notice, the standard it has failed to satisfy and any action the company plans to take in response. Disclosure is required even if the company has available a grace period to cure the failure. Because the company will typically receive notice of failure to meet the standard, followed by notice of the delisting action, two filings will generally be required. (The company may, but generally would not be required to, make additional filings to report further communications or events concerning the compliance failure.) However, an "early warning notice," informing the company that it is in danger of falling out of compliance with a listing standard, would not trigger a disclosure requirement.

Disclosure also would be required if the company notifies such a market that the company is aware of a material noncompliance with continued listing standards; if the market issues a public reprimand letter concerning a violation by the company of a standard of the market; or if the company takes action to delist the company's equity securities from a market, including to transfer to another market.

Item 3.01 does not apply to companies whose securities are quoted only on automated inter-dealer quotation systems, such as the over-the-counter bulletin board (OTCBB) or The Electronic Pink Sheets, since those markets do not maintain listing standards.

The SEC limited the proposed requirement for disclosure of the company's proposed response to require disclosure only to the extent the company has determined on a response. In addition, the SEC did not adopt a proposed requirement to file the notice from the market.

**Item 3.02 – Unregistered Sales of Equity Securities. (Relocated.)** Item 3.02 requires the disclosure concerning unregistered sales of securities that was previously required in periodic reports. This includes sales resulting from conversions and similar transactions. The four business day filing deadline commences when the company enters into an enforceable agreement for the sale or, if there is no such agreement, on the closing or settlement of the sale.

As proposed, all such sales would have been reported on Form 8-K. The rules as adopted, however, do not require disclosure on Form 8-K if the number of shares sold since the last report of sales is less than one percent (five percent for small business issuers) of the outstanding shares. Sales not reported on Form 8-K due to this exclusion would continue to be reported in the periodic reports.

**Item 3.03 – Material Modifications to the Rights of Security Holders. (Relocated.)** Item 3.03 requires disclosures concerning material modifications of the rights of security holders, and is substantially the same as previously required in periodic reports. The SEC did not adopt a proposal that a Form 8-K would not be required if the modification was described in the company's proxy statement.

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

**Item 4.01 – Changes in Registrant's Certifying Accountant.** Item 4.01 is former Item 4 with minor changes.

**Item 4.02 – Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review. (New.)** If the company's board of directors, a committee of the board or authorized officers concludes that a previously issued financial statement should no longer be relied upon because of an error, the company must disclose the date it reached that conclusion; identify the statements that should no longer be relied on; describe the facts underlying the conclusion, to the extent known; and state whether the audit committee, or the board in the absence of an audit committee, or authorized officers discussed the issue with the company's independent accountant. Similar disclosure is required if the independent accountants notify the company that action should be taken to prevent future reliance on a previously issued audit report or interim review. In that event, the company must provide the disclosure to the independent accountant no later than the day of filing with the SEC; request a letter from the accountant stating whether the accountant agrees with the disclosure and, if not, the respects in which it disagrees; and file the accountant's letter as an exhibit within two business day of receipt.

The SEC did not adopt a 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.** Item 5.01 is substantially the same as former Item 1, with some revisions to clarify the language.

**Item 5.02 – Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers. (Expanded.)** Item 5.02 substantially expands former Item 6, which required disclosure only of the resignation of a director and only if the director provides a letter describing a disagreement which is the reason for the resignation and requests that the company disclose the matter.

New Item 5.02 requires disclosure if a director resigns or refuses to stand for re-election because of any disagreement with the company, known to an executive officer, concerning the company's operations, policies or practices, or if a director is removed for cause. The company must disclose the date of such resignation, refusal to stand for re-election or removal; any committee positions held by the director; and the circumstances of the disagreement. If the director furnished any written correspondence to the company concerning the circumstances, the company must file the

correspondence. The company also must provide the director with a copy of the company's disclosure, no later than the date of filing with the SEC; provide the director an opportunity to furnish the company with a letter stating whether or not the director agrees with the disclosure; and file any letter received as an exhibit within two business days of receipt.

If a director is elected other than at a meeting of security holders, the company must disclose the new director's name and the date of election; describe any arrangement or understanding pursuant to which he or she was selected as a director; identify any committees to which the new director has been or is expected to be named; and provide information concerning the director's background and transactions with the company.

In addition, the company must disclose if a principal executive officer, president, principal financial officer, principal accounting officer or principal operating officer (or person performing similar function) retires, resigns, is removed or refuses to stand for re-election, or if a new such officer is appointed. In the case of an appointment, the company must disclose the date of the appointment; the officer's name and position; the officer's background and information concerning transactions between the company and the officer; and the material terms of any employment agreement with the officer. If the company intends to make a public announcement of the appointment other than by means of a Form 8-K, the company may delay filing the Form 8-K until the date it otherwise makes such a public announcement.

If information concerning a new director's committee positions or background, or with respect to the employment agreement of a new officer, is not available, the company may say so in the filing and provide the information by an amendment to the Form 8-K within four business days of the information becoming available.

The SEC did not adopt a proposed requirement to disclose the reasons for departure of an officer.

**Item 5.03 – Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.** (*Expanded.*) As in former Item 8, the company must disclose a determination to change its fiscal year. Disclosure is not required under the new rule, however, if the determination was made by a vote of security holders through solicitation of proxies.

Item 5.03 has been expanded to require disclosure of any amendments to the company's articles of incorporation or bylaws, unless previously disclosed in a proxy or information statement. This applies only to a company with a class of equity securities registered under Section 12 of the Exchange Act; other companies are typically debt issuers, which generally will be required to file amendments to the debt instruments under Item 3.03. The company must file the text of the amendment with the Form 8-K. The complete articles or bylaws must be filed with the periodic report for the period in which the amendment is adopted, if the complete text is not filed with the Form 8-K.

**Item 5.04 – Temporary Suspension of Trading Under Registrant's Employee Benefit Plans.** Item 5.04 is former Item 11. The disclosure has been revised to clarify that the filing must be made within four business days after the company receives or gives certain notices with respect to the suspension of the ability for employees to make trades of company securities under an employee benefit plan. Item 5.04 also now requires filing of updates to such notices from the company.

**Item 5.05 – Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.** Item 5.05 is former Item 10, with one change: Under former Item 10, a Form 8-K was not required if the company disclosed the information on its Web site within five business days of the event and met certain other requirements. Under Item 5.05, the information must be posted within four business days to avoid the need to file Form 8-K.

## **Section 6 – [Reserved]**

## **Section 7 – Regulation FD**

**Item 7.01 – Regulation FD Disclosure.** Item 7.01 is former Item 9.

## Section 8 – Other Events

**Item 8.01 – Other Events.** Item 8.01 is former Item 5 with minor changes.

## Section 9 – Financial Statements and Exhibits

**Item 9.01 – Financial Statements and Exhibits.** Item 9.01 is former Item 7. Under former Item 7, certain financial statements could be filed by amendment within 60 days of the date the initial report was required, *i.e.*, 75 days after the event. Item 9.01 requires that the financial statements be filed within 71 days of the date the initial report was required, preserving the 75 day period from the date of the event.

## Proposed Items Not Adopted

The SEC did not adopt a proposed requirement to disclose the termination or reduction of a business relationship with certain customers, after considering and agreeing with comments that it would be difficult to determine when such disclosure would be required. In addition, the SEC did not adopt proposed disclosure requirements relating to rating agency decisions; the SEC has issued a study and a concept release concerning such matters. Proposed requirements concerning suspension of trading under employee benefit plans were superseded by the adoption of former Item 11 (now Item 5.04).

## Safe Harbor

The SEC did not adopt a proposed safe harbor under which a company would not have been liable for violating its reporting obligations under Sections 13 and 15(d) of the Exchange Act if the company failed to file a Form 8-K on a timely basis and met certain other conditions. Instead, the SEC adopted a limited safe harbor from claims under Section 10(b) of the Exchange Act and Rule 10b-5. Under this provision, a failure to file a report on Form 8-K that is required *solely* pursuant to certain specific items of Form 8-K will not be deemed a violation of Section 10(b) or Rule 10b-5. The items specified, which the SEC believes are items where it may be more difficult for management to quickly assess the materiality of the event or whether a disclosure obligation is triggered, are Items 1.01 (Entry into a Material Definitive Agreement), 1.02 (Termination of a Material Definitive Agreement), 2.03 (Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant), 2.04 (Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement), 2.05 (Costs Associated with Exit or Disposal Activities) and 2.06 (Material Impairments), and paragraph (a) of Item 4.02 (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review) (relating to a company's conclusion that previously issued financial statements should not be relied on).

The safe harbor only applies to the failure to file. Material misstatements or omissions in a filed report continue to be subject to liability under Section 10(b) and Rule 10b-5. In addition, the safe harbor does not provide protection from failure to satisfy other disclosure obligations. For example, if the company sells securities while in possession of non-public information that is required to be disclosed in a Form 8-K but is covered by the safe harbor, the safe harbor will not protect the company from liability to the purchasers. In addition, the safe harbor only extends until the due date of the periodic report for the period in which the event triggering the Form 8-K filing obligation occurred.

Also, under the new rules, a failure to make a timely filing of a Form 8-K required solely for the same items specified above will not prevent the company from being eligible to use Forms S-2 and S-3. The company must have filed the required disclosures at the time of the filing of a Form S-2 or S-3, however.

The SEC also provided that failures to file Form 8-K (for any items) will not affect security holders' ability to sell under Rule 144.

## Other Matters

The SEC clarified Instruction 2 to Form 8-K to provide specifically that exhibits relating only to Items 2.02 (Results of Operations and Financial Condition) and 7.01 (Regulation FD Disclosure) will be deemed furnished, and not filed, unless the company specifies otherwise. The SEC has also made various conforming amendments to Forms 10-K, 10-KSB, 10-Q, and 10-QSB.

The SEC also stated, as had previously been announced informally, that it and the Department of Justice had concluded that the certifications required by Section 906 of SOX do not apply to Form 8-K.

## For Further Information

If you have any questions regarding these proposals, including how they may affect your company, or if you are interested in submitting comments to the SEC, please contact one of the members of the Securities Practice Group or the lawyer in the firm with whom you are regularly in contact.

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