

Client Alert

A report
for clients
and friends
of the firm **March 2004**

SEC Adopts Significant Changes To Form 8-K

On March 16, 2003, the SEC (in Release Nos. 33-8400 and 34-49424) mandated significant changes to Forms 8-K filed on and after August 23, 2004. Specifically, (1) eight new items were added to the list of events that require a company to file a current report on Form 8-K, (2) two items were moved from other Exchange Act reports to Form 8-K, (3) changes were made to two existing Form 8-K items, (4) the filing deadline for Form 8-K was shortened to four business days after an event triggering the form's disclosure requirements, (5) a limited safe harbor for certain violations of the Form 8-K filing requirements was created and (6) the eligibility rules for the use of short form registration statements (Forms S-2 and S-3) and sales under Rule 144 were amended. Since foreign private issuers are not required to file Forms 8-K but instead file Forms 6-K, these changes have no application to foreign private issuers. The SEC has not amended the Form 6-K requirements.

New Disclosure Items added to Form 8-K

- Entry into (including by assumption or assignment), or amendment of, a "material definitive agreement" not made in the ordinary course of business (Item 1.01);
- Termination of a "material definitive agreement" not made in the ordinary course of business (Item 1.02);
- Creation of a direct financial obligation or a direct or contingent obligation arising out of an off-balance sheet arrangement, in either case, that is material to the company, including, for example, the entry by an affiliate into a loan agreement that is subject to a pre-existing guaranty by the company, whether or not the company is party to the loan agreement; disclosure would be required when the agreement creating the obligation is entered into, even if the agreement is subject to customary closing conditions (Item 2.03);
- Triggering events that accelerate or increase a "direct financial obligation" or an obligation under an off-balance sheet arrangement, contingent or otherwise, that is material to the company, including any default or acceleration of a material obligation (Item 2.04);
- Costs associated with exit or disposal activities, including material write-offs and restructuring charges; disclosure would be required when the board of directors or authorized company officers definitively commit the company to undertake a course of action that will result in a material write-off or restructuring charge (Item 2.05);
- Any material impairment charge; disclosure would be required when the company's board of directors or authorized officers conclude that the company is required to record a material impairment charge (Item 2.06);
- Movement of the company's securities from one exchange or quotation system to another, delisting of the company's securities from an exchange or quotation system, or a notice that a company does not comply with a listing standard (Item 3.01); and
- Conclusion by the company or the receipt of notice from its auditors that security holders no longer should rely on the company's previously issued financial statements or a related audit report (Item 4.02).

Items Moved From other Exchange Act Reports to Form 8-K

- Unregistered sales of equity securities by the company in excess of one percent of the company's outstanding securities (five percent in the case of small business issuers)(Item 3.02); and
- Material modifications to rights of holders of the company's securities (Item 3.03).

Expansions of Current Form 8-K Items

- Expanded disclosure now required about the resignation or refusal to stand for election of a director as a result of a disagreement with the company, whether or not the director provides a letter to the company describing the disagreement; disclosure also required for the removal of a director for cause, the appointment or departure of a principal executive officer and the election of new director (other than by stockholder vote) (Item 5.02); and
- Combination of the current Form 8-K item regarding a change in a company's fiscal year with a new requirement to disclose any material amendment to a company's articles of incorporation or bylaws (Item 5.03).

Other Changes to Form 8-K Items

Relatively minor changes have been made in the following Form 8-K items:

- Bankruptcy or receivership (Item 1.03); and
- Completion of acquisition or disposition of assets (Item 2.01).

Shortened Filing Deadline For Form 8-K

The amendments require domestic issuers that are subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act to file required current reports on Form 8-K within four business days after a triggering event. This would shorten the deadlines of five business days or 15 calendar days, depending on the nature of the event

currently requiring a Form 8-K filing. These amendments would not affect the filing deadline for disclosures under Regulation FD (Item 7.01), voluntary disclosures (Item 8.01) or certain exhibits (Item 9.01).

Limited Safe Harbor

The SEC has created a limited safe harbor for a company that fails to file a required Form 8-K in a timely manner for some, but not all, of the disclosure items.¹ Under the safe harbor, a company would not be liable under Section 10(b) and Rule 10b-5 under the Exchange Act solely by reason of such a failure to file. This safe harbor, however, would not provide protection for violations of other provisions of the securities laws or material misstatements or omissions in a Form 8-K. For example, if a company sells its securities while in possession of material non-public information that is required to be disclosed in a Form 8-K in an item that is covered by the safe harbor, the safe harbor will not protect the company from Section 10(b) and Rule 10b-5 liability for the separate disclosure obligation arising in connection with the offering of securities. Furthermore, the safe harbor extends only until the due date of the company's next periodic report. Thus, for example, if an event occurs that required the filing of a Form 8-K during a particular quarter, but the company fails to make the required timely disclosure on Form 8-K, the company must provide the disclosure prescribed by the relevant Form 8-K item in its Form 10-Q or 10-QSB filed for the quarter during which that event occurred.

Eligibility Requirements for Forms S-2 and S-3 and Sales under Rule 144

The SEC has also revised the eligibility requirements for Forms S-2 and S-3 to provide that companies that fail to file timely Forms 8-K reporting items covered by the safe harbor will nonetheless retain their eligibility to use these short form registration statements; provided, however, that a company must be current in its Form 8-K filings with respect to all items at the actual time of a Form S-2 or S-3 filing.

The SEC has also amended the eligibility requirements for security holders to sell shares in reliance on Rule 144 to permit such sales even though the company has not filed all required Forms 8-K during the 12 months preceding the date of the sale of securities. A security holder nonetheless will continue to be required to represent that he or she does not have inside information.

¹ The new limited safe harbor from public and private claims under Exchange Act Section 10(b) and Rule 10b-5 for a failure to timely file a Form 8-K relates to 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); 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); and Item 4.02(a) (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review).

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Client Alert

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