

# Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date

CLIENT ALERT | 04.27.2004

PRACTICE AREAS

Corporate/Securities Law

**MEMORANDUM To:** Our Clients and Friends **From:** Olshan Grundman Frome Rosenzweig & Wolosky LLP **Date:** April 27, 2004 **Re:** Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date

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## Introduction

On March 16, 2004, the Securities and Exchange Commission (the "SEC") adopted final rules in response to the "real time issuer disclosure" mandate contained in Section 409 of the Sarbanes-Oxley Act of 2002. These new rules apply to all companies filing periodic reports with the SEC except foreign private issuers. [1] Generally, the new rules:

- add eight new items to the list of events required to be disclosed on Form 8-K;
- move to Form 8-K two items currently required to be disclosed in quarterly or annual reports;
- revise several existing Form 8-K items to include additional disclosures;
- shorten the current filing deadlines for most Form 8-K filings to four business days; and
- provide a limited safe harbor from liability under Section 10(b) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), and Rule 10b-5 thereunder for failure to timely file select Form 8-K reports.

Although the SEC abandoned its proposal to require management's analysis of the effect of certain of the reported items on reporting companies, the new rules indicate that the general rule prohibiting material omissions that make the contents of a disclosure materially misleading continues to apply. Companies must comply with the new rules as of August 23, 2004.

## Reorganization of Form 8-K Items

The new rules organize into topical categories all items reportable on Form 8-K. Appendix A to this memorandum lists the new section headings and numbering system.

### **New and Revised Disclosure Items**

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

Disclosure is required under this item if a company enters into a material definitive agreement [2] not made in the ordinary course of business.[3] The item follows the framework of Item 601(b)(10) of Regulation S-K, with which reporting companies are already familiar. The required disclosures include the date of, the parties to and a brief description of the agreement. The company must report similar information regarding any material amendments to these agreements. The new rules do not change current requirements for filing material agreements as exhibits, although companies are encouraged to file the material agreement described with the Form 8-K.

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

Disclosure is required under this item if a company terminates a material definitive agreement not made in the ordinary course of business.[4] The required disclosures include similar disclosures to those required by Item 1.01, as well as a brief description of the material circumstances surrounding the termination and any material early termination penalties.

#### Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Disclosure is required under this item if a company becomes materially obligated under a direct financial obligation or if a company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement.[5] The required disclosures include: (1) the date the company becomes obligated or contingently liable, (2) a brief description of the transaction or agreement that creates the obligation or the off-balance sheet arrangement, (3) the amount of the obligation and (4) a brief description of the material terms under which the obligation or arrangement may be accelerated or increased or by which an off-balance sheet arrangement may become a direct obligation of the company. The new rules define both "direct financial obligation" and "off-balance sheet arrangement."

#### Item 2.04. Events Triggering a Material Direct or Contingent Financial Obligation.

Disclosure is required under this item if a "triggering event" occurs causing the increase or acceleration of a direct financial obligation or an obligation under an off-balance sheet arrangement, or a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company and, in each case, the consequences of the event are material to the company.[6] The required disclosures include: (1) the date and a brief description of the triggering event, (2) the amount of the obligation and terms of payment or acceleration that apply and (3) 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, the increase or acceleration of the direct financial obligation or obligation under the off-balance sheet arrangement or the arrangement becoming a direct financial obligation of the company.

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

Disclosure is required under this item if the board of directors, a board committee or an authorized officer 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 described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146 Accounting for Costs Associated with Exit or Disposal Activities, under which material charges will be incurred under generally accepted accounting principles ("GAAP"). The required disclosures include: (1) the date of commitment to and a description of the facts and circumstances leading to the expected action and the expected completion date, (2) an estimate of the total amount or range of amounts expected to be incurred in connection with the action, in the aggregate and broken out by major type of cost and (3) an estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

Item 2.06. Material Impairments.

Disclosure is required under this item if the board of directors, a board committee or an authorized officer concludes that a material charge for impairment to one or more of its assets, including an impairment of securities or goodwill, is required under GAAP.[7] The required disclosures include: (1) the date of the conclusion that a material charge is required, a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required, (2) an estimate of the amount or range of amounts of the impairment charge and (3) an estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures.

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

Disclosure is required under this item if:

- a company receives notice from a national securities exchange or national securities association that maintains the principal listing for the company's common stock that the company does not satisfy a continued listing requirement or that the exchange or association has submitted an application or taken all necessary steps to delist the company's common stock;
- a company has notified the exchange or association that the company is aware of any material noncompliance with a continued listing requirement;
- the exchange or association issues a public reprimand letter indicating that the company has violated a continued listing requirement; or
- the board of directors, a board committee or an authorized officer or officers takes definitive action to cause the listing of the company's common stock to be withdrawn or terminated.

In the case of a notice to or from a national stock exchange or securities association, the required disclosures include the date the notice was sent or received by the company, the continued listing standard that the company has failed to satisfy and any action that the company has decided to take in response to the notice or relating to its noncompliance. In the case of a public reprimand letter, the company must disclose a summary of the contents of the letter. In the case of withdrawing or terminating the listing of common stock, the company must describe the actions taken.

Item 3.02. Unregistered Sales of Equity Securities.

Subject to a one percent *de minimis* exception, disclosure is required under this item if the company sells equity securities in a transaction that is not registered under the Securities Act of 1933, as amended (the '1933 Act').<sup>[8]</sup> Filing requirements are triggered when 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 no such agreement exists, the company must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement pursuant to which the equity securities are sold.

Item 3.03. Material Modification to Rights of Security Holders.

Disclosure is required under this item if a company materially modifies the rights of the holders of any class of the company's registered securities. Upon the effective date of the new rules, this disclosure, currently required by Items 2 (a) and (b) of Form 10-Q, will no longer be a Form 10-Q disclosure item.

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

Disclosure is required under this item if the board of directors, a board committee or an authorized officer concludes that any previously issued financial statements covering one or more years or interim periods should no longer be relied on because of an error in those financial statements as addressed in Accounting Principles Board Opinion No. 20.

Disclosure is also required under this item 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. The company must provide the independent accountant with a copy of the disclosures no later than the same day it files the Form 8-K. The independent accountant must then provide the company with 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 he or she does not agree. The company must then amend its Form 8-K by filing the independent accountant's letter as an exhibit within two business days after receipt of this letter.

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

The new rules expand required disclosures relating to the departure of a director and extend disclosure obligations to the appointment of directors and the departure and appointment of principal officers.

Disclosure is required under this item if a director has resigned or refuses to stand for reelection 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.<sup>[9]</sup> The required disclosures include a brief description of the circumstances of the disagreement that the company believes caused the director's departure.<sup>[10]</sup> The company must provide the director with a copy of the disclosures no later than the same day the company files the Form 8-K. The company must also provide the director with an opportunity to provide a letter to the company stating whether he or she agrees with the company's disclosures and, if not, the nature of his or her disagreement. The director's response, if any, must be filed as an exhibit to an amended Form 8-K within two business days after receipt by the company.

Disclosure is also required under this item if 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 his or her position. Disclosure is also required under this item if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions. Lastly, disclosure is required under this item if a new director is added to the board, other than by a vote of shareholders at an annual meeting or special meeting convened for such purpose.

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

The final rules combine the existing item relating to a change in a company's fiscal year with a new requirement to disclose amendments to a company's articles of incorporation or bylaws.

Disclosure is required under this item if a company with a class of equity securities registered under Section 12 of the 1934 Act amends its articles of incorporation or bylaws. The company must file the text of the amendment as an exhibit to the Form 8-K. The restated articles of incorporation or bylaws, need only be filed as an exhibit to the company's next periodic report or registration statement.

Disclosure is also required under this item if the company changes its fiscal year from the one used in its most recent SEC filing other than by submission to a vote of security holders or by an amendment to its articles of incorporation or bylaws.

### **Limited Safe Harbor in Certain Cases**

The final rules provide a limited safe harbor from all claims under Section 10(b) of the 1934 Act and Rule 10b-5 thereunder. Failure to timely file a Form 8-K relating to those new disclosure requirements identified below will not be deemed to be a violation of Section 10(b) and Rule 10b-5. This safe harbor only applies to the failure to file certain reports, not to material misstatements or omissions. The safe harbor's protection only extends until the due date of the company's next periodic report for the period in which the Form 8-K was not timely filed. The safe harbor applies 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 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; and
- 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 an Item 4.02(b) notice from its accountant).

**Eligibility to Use Forms S-2 and S-3 and to Rely on Rule 144**

Currently, to be eligible to use Form S-2 or Form S-3, a company must have timely filed all reports required to be filed under Section 13(a) or 15(d) of the 1934 Act during the 12 months prior to filing the registration statement. The new rules amend Form S-2 and Form S-3 to provide that failure to timely file reports on Form 8-K relating to the same items to which the Rule 10b-5 safe harbor applies will not result in a loss of eligibility to use these forms. A company must, however, be current in its Form 8-K filings (including the items to which the safe harbor applies) at the time it files a Form S-2 or Form S-3.[11] The new rules also amended Rule 144 under the 1933 Act 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 condition relating to current public information.

**"Filed" vs. "Furnished" Status of Exhibits**

The SEC clarified its position that all exhibits to a Form 8-K containing disclosures under Item 2.02, Results of Operations and Financial Condition, or Item 7.01, Regulation FD Disclosure, whether or not they contain disclosures regarding other items, will be deemed "furnished," and not "filed," unless the company specifies under Item 9.01, Financial Statements and Exhibits, the exhibits or portions of exhibits intended to be deemed filed rather than furnished. Exhibits or portions of exhibits that are deemed furnished rather than filed are not automatically incorporated by reference into the company's 1933 Act registration statements, thereby avoiding potential liability under Section 11 of the 1933 Act and Section 18 of the 1934 Act.

**Section 906 Certifications Not Required**

In the new rules, the SEC has also clarified that the certification requirement of Section 906 of the Sarbanes-Oxley Act of 2002 does not apply to Form 8-K filings.

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These are only brief descriptions of the SEC's new rules. This memorandum provides general information only and does not constitute legal advice that may be applied to any particular situation. Please contact the Partners in our Corporate Department for further advice and assistance.

**Appendix A**

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 6 - [Reserved]

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[1] See SEC Release No. 33-8400: *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date* at <http://www.sec.gov/rules/final/33-8400.htm>.

[2] 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 by the company against one or more other parties to the agreement, in each case whether or not subject to conditions.

[3] A material definitive agreement subject to customary closing conditions must be disclosed. The company is not required to disclose information relating to letters of intent or other non-binding agreements.

[4] Disclosure is not required if the agreement expires or terminates as a result of all of the parties completing their obligations.

[5] If a company enters into a facility or similar agreement that creates or may create a direct material financial obligation in connection with multiple transactions, the company must disclose this as well as any obligations as they arise under the facility or arrangement.

[6] Disclosure is not required until a triggering event has occurred in accordance with the terms of the transaction, including the company's receipt of a notice of the occurrence of a triggering event and the satisfaction of all conditions to such occurrence, except the passage of time. Disclosure is also not required if the company believes, that no triggering event has occurred, unless the company has received notice of the occurrence of a triggering event.

[7] A filing is not required if the conclusion regarding the material charge is made in connection with the preparation, review or audit of financial statements required to be included in the next 1934 Act periodic report, the report is filed on a timely basis and the conclusion is disclosed in the report.

[8] This new item requires disclosure of information specified in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K currently required in a company's periodic reports. Under the new rules, the Form 10-Q disclosure requirement will be limited to issuances that have not been reported on Form 8-K and the Form 10-K disclosure requirement will be limited to issuances that have not been reported on Form 8-K or Form 10-Q. In the case of a small business issuer, if the securities sold in the aggregate since its last report filed under this item or last periodic report, whichever is more recent, constitute less than 5% of its outstanding securities of that class, the information need not be disclosed on Form 8-K.

[9] If a director retires, resigns, is removed or declines to stand for re-election in circumstances other than those noted above, the event and the date of occurrence must be disclosed.

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

[11] The company can become current by including the appropriate disclosure in its periodic report for the period in which the Form 8-K disclosure was not timely made or, if such disclosure was not included in the periodic report, by amending the annual or quarterly report to include the disclosure.