



FENWICK & WEST LLP

CORPORATE & SECURITIES LAW UPDATE

SEC Proposes New Rules: New Form 8-K Disclosures and Accelerated Filing Deadlines

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On June 17, 2002, the SEC proposed further changes to the public company disclosure regime. The major elements of the proposed changes are:

- To specify new Form 8-K disclosure items for which companies would be required to file Form 8-K reports promptly; and
- To accelerate the Form 8-K filing deadlines -- to within two business days after the triggering event in most cases.

These proposals are in addition to various other recent SEC proposals to enhance the public disclosure system, which we have described in previous updates. The comment period on this proposal will be open until August 26, 2002, and we would be happy to assist you if you wish to comment on the proposals. To view the full text of the proposed rules, click here: <http://www.sec.gov/rules/proposed/33-8106.htm>.

New Form 8-K Disclosure Items

What will Form 8-K require if the proposals are adopted?

The SEC proposes to add a number of significant new disclosure items, modify others and move some from Form 10-Q or Form 10-K to Form 8-K. If the proposal is finalized in its present form, the list of disclosure items will be as follows:

1. Registrant's Business and Operations
 - Item 1.01 – Entry into a Material Agreement
 - Item 1.02 – Termination of a Material Agreement
 - Item 1.03 – Termination or Reduction of a Business Relationship with Customer
2. Financial Information
 - Item 2.01 – Completion of Acquisition or Disposition of Assets
 - Item 2.02 – Bankruptcy or Receivership
 - Item 2.03 – Creation of a Direct or Indirect Contingent Financial Obligation That Is Material to the Registrant
 - Item 2.04 – Events Triggering a Direct or Contingent Financial Obligation That Is Material to the Registrant
 - Item 2.05 – Exit Activities Including Material Write-Offs and Restructuring Charges
 - Item 2.06 – Material Impairments

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3. Securities and Trading Markets
 - Item 3.01 – Rating Agency Decisions
 - Item 3.02 – Notice of Delisting or Failure to Satisfy Listing Standards; Transfer of Listing
 - Item 3.03 – Unregistered Sales of Equity Securities
 - Item 3.04 – Material Modification to Rights of Security Holders
 4. Matters Related to Accountants
 - Item 4.01 – Changes in Registrant’s Certifying Accountant
 - Item 4.02 – Non-Reliance on Previously Issued Financial Statements or a Related Audit Report
 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 – Material Events Regarding the Registrant’s Employee Benefit, Retirement and Stock Ownership Plans
 6. Regulation FD
 - Item 6.01 – Regulation FD Disclosure
 7. Other Events
 - Item 7.01 – Other Events
 8. Financial Statements and Exhibits
 - Item 8.01 – Financial Statements and Exhibits

What are the new disclosure items that will be required?

The following items would be new Form 8-K disclosures:

- entry into a material agreement not made in the ordinary course of business;
- termination of a material agreement not made in the ordinary course of business;
- termination or reduction of a business relationship with a customer where the termination or reduction equals 10% or more of the company’s consolidated revenues during the company’s most recent fiscal year;
- creation of a direct or indirect contingent financial obligation that is material to the company;

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- events triggering a direct or contingent financial obligation that is material to the company, including any default or acceleration of an obligation;
 - exit activities including any material write-off or restructuring charges;
 - any material impairment;
 - a change in a rating agency decision, issuance of a credit watch or change in a company outlook;
 - movement of the company's securities from one exchange or quotation system of a registered national securities association 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;
 - conclusion or notice that security holders no longer should rely on the company's previously issued financial statements or a related audit report; and
 - any material limitation, restriction or prohibition, including the beginning and end of lock-out periods, regarding the company's employee benefit, retirement or stock ownership plans.

The following items that are currently required in Form 10-Q and Form 10-K would be moved to Form 8-K:

- unregistered sales of equity securities by the company; and
- material modifications to rights of holders of the company's securities.

Existing Form 8-K disclosures would be expanded to include:

- disclosure regarding the departure of a director for reasons other than a disagreement or removal for cause;
- the appointment or departure of a principal officer;
- the election of new directors; and
- disclosure regarding any material amendment to a company's certificate of incorporation or bylaws.

Some existing Form 8-K items would be modified:

- completion of acquisition or disposition of assets;
- bankruptcy or receivership;
- changes in the company's certifying accountant; and
- changes in control of the company.

Only the following Form 8-K items would remain unchanged:

- Regulation FD disclosure; and
- voluntary disclosure of other material events.

What material agreements would be required to be disclosed?

Any agreement that is material to the company and is not made in the ordinary course of the company's business would be reported. The SEC does not provide any additional guidance on the determination of materiality. However, the proposal specifically would require disclosure of letters of intent and other non-binding agreements. Filing of the agreement as an exhibit would also be required. Some ordinary course agreements will be reported on Form 8-K – for example, contracts on which the company is substantially dependent, or a material lease.

Will I have to file exhibits to the Form 8-K?

Yes. In the past, some Form 8-K items required exhibits to be filed as part of the Form 8-K. Consistent with that approach, some of the new or revised Form 8-K items also require exhibits to be filed at the time the Form 8-K is filed – i.e., within two business days. The most burdensome will be the requirement to file a material agreement (or material amendment to a material agreement). This will be especially difficult when confidential treatment for a portion of the agreement is being sought.

What is the status of the SEC's proposal to require companies to report insider transactions on Form 8-K?

On April 12, 2002, the SEC proposed that companies be required to disclose promptly on Form 8-K transactions by its officers and directors in the company's securities, as well as loans. That proposal is still under consideration, and if the information is required to be reported by the company, it might be on Form 8-K or on a separate form.

Accelerated Form 8-K Filing Deadlines

What will the new reporting deadlines be?

The SEC is proposing that almost all Form 8-K filings be due within two business days of the event that triggers the filing requirement. Forms 8-K related to Regulation FD disclosure, voluntary disclosure and the recently proposed disclosure of transactions by company officers and directors in the company's securities will not have the two business day deadline. The SEC is also proposing that it would be possible for a company to receive a short (two business day) extension of the filing deadline in certain circumstances upon filing a Form 12b-25.

What if a company is late in filing a Form 8-K?

The SEC proposes no change to existing rules, under which a company that fails to file a Form 8-K on a timely basis loses its eligibility to use Form S-3 and other “short form” registration statements for a year. In addition, during any period of time when a company is not current in all of its Exchange Act filings, including its Forms 8-K, it cannot use Form S-8 to issue stock upon exercise of options and its security holders cannot rely on Rule 144 to resell shares. The SEC expects that proposed amendments to Rule 12b-25 would afford some relief with regard to the timeliness of filings and short form eligibility.

Next Steps

When will these new rules take effect?

The proposed rules described above are open for public comment until August 26. It is expected that the SEC will issue final rules on this topic shortly thereafter. The effective date would probably be 60 days after adoption of the final rule.

Why is the SEC proposing these changes?

The SEC believes that the items it has identified are of such importance to investors that prompt disclosure is necessary for the markets to perform properly and efficiently. It also believes that the two-day filing requirement is the appropriate balance between investors’ needs for timely access to information and the time required by companies to prepare accurate and complete information.

While this proposal may be controversial, the substance of it has been identified as a presidential priority, and the leadership of the SEC has stated its intention to take action in this area. The rules that are finally adopted may be significantly modified from those that have been proposed. We will provide further information on the final rules when they are announced.

How can I find out more about these proposals?

If you have any questions about this latest release, please contact Horace Nash, who is the head of our Securities Group, or Rob Freedman or Jeff Vetter, who helped prepare this summary. You may also contact any member of your Fenwick & West team, or fwcsu@fenwick.com.