FENWICK & WEST LLP

Corporate and Securities Law Update

FAQ: Form 8-K Disclosure Requirements and Practical Implications for Technology Companies

FENWICK & WEST LLP

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FAQ: Form 8-K Disclosure Requirements and Practical Implications for Technology Companies

Effective August 23, 2004, every public company must comply with new Form 8-K disclosure requirements that:

- expand the number of events that public companies must report on Form 8-K;
- expand the disclosure requirements for some existing Form 8-K items; and
- shorten the filing deadline for most events to four business days after the event.

The SEC adopted these changes to further its long-standing effort to improve the quality of reporting by public companies, and to implement the specific mandate of the Sarbanes-Oxley Act to improve "real time issuer disclosure." The new requirements are intended to provide investors with faster and better disclosure of more corporate events. The SEC believes that this will allow the market more rapidly to assimilate into the value of public companies' securities information that is "unquestionably or presumptively" material.

The SEC's adopting release setting forth and discussing the final rules is available at http://www.sec.gov/rules/final/33-8400.htm. A further release making technical corrections to errors in the regulatory text of the adopting release is also available at http://www.sec.gov/rules/final/33-8400a.htm.

To give you a sense of the breadth of disclosure requirements under revised Form 8-K and to illustrate the reorganization of Form 8-K undertaken in connection with the expansion of the required disclosures, we have reproduced the topically-organized disclosure items of Form 8-K below. For convenience, we have organized this FAQ into frequently-asked questions about general matters, followed by an item-by-item analysis of issues related to the new and significantly expanded requirements. Where Form 8-K disclosure requirements have been renumbered but not changed in a significant manner, we have not addressed them in the FAQ. For a detailed reference chart summarizing all Form 8-K requirements in effect as of August 23, 2004, please contact any member of your Fenwick & West team.

Corporate and Securities Law Update

GENERAL

What should my company do now to prepare for the new requirements?

Every public company should make sure that executive management, disclosure committee members, and legal, accounting and financial reporting personnel are aware of the new Form 8-K rules. Every public company should consider what new procedures, tailored to the company's own circumstances, are required to ensure that events triggering Form 8-K filing requirements are identified and brought to the attention of the appropriate company personnel, inside and outside legal counsel and the company's independent accountants in a timely manner. This will be a challenge, because most companies are accustomed to periodic assessment and reporting rather than continuous monitoring and spontaneous reporting. In essence, your company's disclosure controls and procedures must be updated to cover all of the items now subject to Form 8-K disclosures.

Here are some of the things you should be considering now:

- Review your disclosure controls and procedures.
  - Do you have in place procedures that provide for continuous monitoring for occurrence of disclosure triggers?
  - Do you have in place procedures for timely notifying the persons responsible for preparing and filing Forms 8-K that a disclosure trigger may have occurred, so that the necessary analysis may begin?
  - Have you discussed appropriate materiality thresholds and triggers?
  - Do you have in place procedures enabling your disclosure committee to respond on a timely basis to a disclosure trigger?
  - Do you have a plan for preparing and making the necessary filings within the required four business days, including obtaining necessary outside legal and accounting reviews?
  - Have you reevaluated your Form 10-Q and 10-K procedures to help identify any required Form 8-K filings that may have been missed?
  - Will your CEO and CFO be able to make their quarterly certifications that the company's disclosure controls and procedures are effective? What additional disclosures may be required?
- Identify the Form 8-K items that your company is most likely to encounter, and develop a company-specific plan for the necessary reporting.

- Designate, and train, the personnel within your company who will be responsible for understanding all of the Form 8-K disclosure requirements, and responding to them.
- Provide targeted education and training for specific personnel about specific Form 8-K triggers they are likely to face, as well as whom to notify and other responses.
  - Do Board Committees and designated officers understand when their "determinations" and "conclusions" can trigger a filing obligation?
  - Do persons who authorize or sign agreements that could be material understand when their approval or signature could trigger a filing obligation?
  - Are your accounting personnel sufficiently knowledgeable and involved about possible off-balance sheet arrangements, contingent financial obligations, impairment charges and other accounting and financial statement disclosure triggers?
  - Do persons who will first be aware of other triggering events understand the applicable triggering criteria and know whom to notify?
  - Are there guidelines in place that provide sufficient information to company personnel to gauge when a disclosure trigger may be an issue?
- Identify your material agreements, contingent financial obligations and off-balance sheet arrangements, and evaluate your internal processes for handling notices, amendments and terminations of these agreements and arrangements.
  - Have you identified existing agreements and arrangements?
  - Have you put in place procedures to monitor continuously the materiality of agreements and arrangements, including due to changes in relationships with third parties?
  - Have you put in place procedures to update continuously the list of agreements and arrangements that must be monitored?
  - Have you trained the personnel most likely to learn of developments about relevant triggering events and whom should be notified?
  - Are the company personnel who negotiate the agreements and arrangements sensitive to drafting of default and termination provisions in potentially material agreements and arrangements?
- Review your corporate approval process.

- Have you identified the persons who can execute material agreements?
- Have you considered notification procedures to disclosure committee or legal group?
- Have you considered additional controls on signing authorities?
- Have you considered clarifying what decisions that require disclosures should be made by Board committees and executive officers?

- Involve investor relations and press relations personnel with the Form 8-K filing process so that they are prepared for inquiries that may follow a filing.
- Review your insider trading policy for any changes that might be needed to address the impact of a Form 8-K filing.

When do we begin complying with the new Form 8-K rules?

Events occurring on or after August 23, 2004 must be reported under new Form 8-K. In addition, filings made on or after August 23 to amend reports filed earlier must use the new numbering system. For example, a Form 8-K/A filed to report financial statement information with respect to an acquisition previously reported under former Item 2 would be filed under new Item 9.01 rather than former Item 7.

What events will we now disclose on a Form 8-K that we were not previously required to disclose?

Eight new kinds of events now require Form 8-K disclosure:

- Entry into or amendment of a material definitive agreement;
- Termination of a material definitive agreement;
- Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement;
- Committing to exit or disposal activities with associated costs;
- Material impairments;
- 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.

In addition, two events that historically were reported in quarterly and annual reports will require Form 8-K disclosure:

- Unregistered sales of equity securities; and
- Material modifications to rights of security holders

Have any of the historic Form 8-K items been expanded in scope significantly?

Yes. Two Form 8-K items have been significantly expanded from what was required before August 23, 2004:

- The existing Form 8-K requirement regarding departure of directors due to a disagreement has been expanded to cover departure of directors or principal officers, election of directors and appointment of principal officers; and
- The existing Form 8-K requirement regarding changes in the company's fiscal year has been expanded to cover amendments to articles of incorporation or bylaws as well as changes in fiscal year.

Are there any other changes to other existing Form 8-K disclosure requirements?

Yes. Some minor changes were made to a few of the existing Form 8-K items, including:

- Item 2.01 revises former Item 2 to require disclosure about the source of funds used for an acquisition *only* if there is a material relationship between the company, or any of its affiliates, directors, officers or persons associated with its directors or officers, and the person from whom the funding is obtained.
- Item 2.01 revises former Item 2 by removing the disclosure requirement related to the nature of the business in which the acquired assets were used and whether the company acquiring the assets intends to continue that use.
- Items 1.03 (former Item 3) and 5.01 (former Item 1) were edited to read more clearly.

What are the filing deadlines for Form 8-K?

Most reports on Form 8-K will be due within four business days after a triggering event. However, there are many exceptions to this general rule:

- Regulation FD disclosures (Item 7.01) must be filed in compliance with Regulation FD, which requires that, if a company chooses to use Form 8-K to make public disclosure of material non-public information that is being disclosed to a securities market professional or company security holder, the information must be filed with or furnished to the SEC simultaneously, in the case of intentional disclosure, or promptly, in the case of a non-intentional disclosure.

- Voluntary disclosures (Item 8.01) have no specific deadline, unless the filing is made to comply with Regulation FD, in which case the deadline discussed above applies. The SEC has advised companies that, when considering the timing of filings, they should have due regard for the accuracy, completeness and currency of the information in filed registration statements that incorporate by reference information in Exchange Act reports.
- Financial statements of an acquired business (Item 9.01(a)) must be filed not later than 71 calendar days after the date the initial Form 8-K reporting the acquisition was due.
- Some exhibits (Item 9.01) are due by amendment to a Form 8-K within two business days after receipt:
  - letters requested to be provided by former accountants under Item 4.01(a);
  - letters requested to be provided by independent accountants who advise or notify the company that previously issued financial statements should no longer be relied upon under Item 4.02(b); and
  - letters requested to be provided by former directors who resign, refuse to stand for re-election or are removed for cause under Item 5.02(a).
- Under some circumstances, disclosures of temporary suspension of trading under the company's employee benefit plans (Item 5.04), where the company does not receive a certain ERISA notice, must be filed on the same date that the company provides timely notice to an affected officer or director about the trading suspension.
- Under Item 2.03, where neither the company nor any affiliate is a party to the transaction or agreement creating the contingent obligation arising under a reportable off-balance sheet arrangement, the four business day period for reporting the event does not begin until the earlier of the fourth business day after the contingent obligation arises, and the day on which any executive officer becomes aware of the contingent obligation.

There are two other circumstances where companies may choose to take advantage of exceptions to the normal four-business day deadline:

- Item 5.02(c) disclosure of the appointment of a new principal officer may be delayed until the day the company otherwise makes a public announcement of the officer's appointment.
- Under Item 2.02, disclosure of material non-public information about the company's results of operations for a completed quarterly or annual fiscal period can be made by furnishing a Form 8-K prior to any related oral, telephonic, webcast, broadcast or similar presentation of the results, in which case the latter

disclosure need not be furnished (assuming the other requirements of Item 2.02 are satisfied).

Can we obtain an extension of the four business day filing requirement?

No. Rule 12b-25 was historically limited to periodic reports and not available for current reports on Form 8-K. The SEC originally proposed a two business day Form 8-K filing deadline, with provision for an automatic two business day extension upon a company's filing of Form 12b-25. However, the SEC ultimately decided to give companies four business days to comply with the filing requirement, without any ability to extend the filing deadline.

Since a number of the new triggers under Form 8-K require companies to determine if an event or agreement is "material," has the SEC provided any further guidance about when something is "material"?

No. Companies will need to rely on existing case law as well as statements of the views of the SEC and its staff regarding materiality (such as Staff Accounting Bulletin No. 99 issued in August 1999). Under existing case law, there is no bright line test of materiality. The Supreme Court has indicated that information is material if:

- there is a substantial likelihood that a reasonable stockholder would consider it important in making an investment decision about the company; or
- the information would have been viewed by the reasonable investor as having significantly altered the total mix of information that is available about the company.

Companies are generally accustomed to making materiality determinations in connection with their Form 10-Q and 10-K filings, but not accustomed to doing so in connection with Form 8-K filings, which historically had more objective triggers. The timing of Form 10-Q and 10-K filings allowed companies a substantial period of time to determine the materiality of an agreement, event or other information. The new Form 8-K requirements present a significant challenge for most companies, which will now be required to monitor their operations continuously, gather and assess information immediately and make materiality determinations about the collected information very quickly, so that they can file the required reports within four business days after the occurrence of any triggering event.

Will our company be subject to liability if we fail to file a Form 8-K on time?

There are liability concerns, but the SEC has established a limited safe harbor that ameliorates some of them. The safe harbor is limited because it protects companies only from public and private claims under the anti-fraud provisions of Exchange Act

Section 10(b) and Rule 10b-5. It is further limited to cover only failures to file on time a Form 8-K for seven of the new Form 8-K items, as follows:

- Entry into or amendment of a material definitive agreement (Item 1.01)
- Termination of a material definitive agreement (Item 1.02)
- Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement (Item 2.03)
- Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement (Item 2.04)
- Costs associated with exit or disposal activities (Item 2.05)
- Material impairments (Item 2.06)
- Non-reliance on previously issued financial statements or a related audit report or completed interim review, where the company makes the determination and does not receive a notice from its accountant (Item 4.02(a))

The SEC determined that the safe harbor was appropriate for these particular items because they often require management to assess the materiality of an event or to determine whether a disclosure item has been triggered, which is difficult in a short period of time. These issues are similar to those raised when the SEC adopted Regulation FD, which contains a similar limited safe harbor for failures to make public disclosures required solely by Regulation FD.

This limited safe harbor relates only to a failure to file a Form 8-K on time and applies only to Section 10(b) and Rule 10b-5. Companies may still be liable under other provisions of the securities laws, such as Exchange Act Sections 13(a) or 15(d), for failing to have in place disclosure controls and procedures adequate to ensure filing of all necessary reports. In addition, the safe harbor provides no relief for material misstatements or omissions in filed Forms 8-K. It provides no protection if a company is required to disclose information subject to the Form 8-K items for reasons apart from the Form 8-K requirements, such as to avoid misstatements or omission in connection with its purchases or sales of securities. In addition, the safe harbor applies only until the due date of the periodic report for the relevant period. If an event occurs that requires filing of a Form 8-K during a particular quarter, but the company fails to file the Form 8-K, the company must provide the disclosure in the next Form 10-Q (or Form 10-K, for the fourth quarter). Failure to do so thereafter eliminates the safe harbor.

Will our company be eligible to use Form S-2 or Form S-3 registration statements if we fail to file a Form 8-K on time?

Maybe not. Any company that fails to file a required Form 8-K on time for any of the items not covered by the limited safe harbor will lose eligibility to utilize Form S-2 and Form S-3 registration statements for the offer and sale of securities. The Company

will be disqualified to use these "short-form" registration statements for 12 months following the due date of the Form 8-K. Under the new rule, companies that fail to file on time a Form 8-K for the seven new items covered by the limited anti-fraud safe harbor, discussed above, will not lose their Form S-2 or Form S-3 eligibility.

However, in order to be eligible to use Form S-2 or S-3, at the actual time a Form S-2 or Form S-3 is filed (including deemed filings by virtue of various updates that are made to shelf registration statements), the Company must have filed the required information (in some cases by amending the relevant Form 10-Q or 10-K).

Will security holders be able to rely on Form 144 to resell securities if our company fails to file a Form 8-K on time?

Yes. The SEC has amended Rule 144 to clarify that the Rule 144 "current public information" condition does not require the company to have filed all required Form 8-K reports during the 12 months preceding a sale of securities under Rule 144. However, Rule 144(h) and Form 144 continue to require the security holder to represent that he or she does not have material adverse information when selling securities.

Will "mini-MD&A" disclosure be required in Form 8-K filings?

No. The SEC originally proposed that some new Form 8-K items would include a requirement that the company disclose management's analysis of the effect of the event triggering the Form 8-K filing. Ultimately, the SEC determined that this analysis is difficult to provide by the Form 8-K filing deadline. However, companies should be aware that, in addition to information specifically required by a Form 8-K item, a Form 8-K must include any other information that is necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading.

Does Form 8-K require CEO and CFO certification under Section 906 of the Sarbanes-Oxley Act?

No. The SEC and the Department of Justice have concluded that Section 906 does not apply to Form 8-K. The SEC earlier confirmed that no certification under Section 302 of the Sarbanes-Oxley Act is required to be filed with Forms 8-K.

Is all Form 8-K information considered "filed" with the SEC?

No. The SEC used the revised Form 8-K to clarify its existing position that information in a report furnished under Item 2.02 (Results of Operations and Financial Condition) or Item 7.01 (Regulation FD Disclosure), including exhibits filed with respect to those items, will not be considered to be "filed" with the SEC unless the company specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing.

What reporting is required if an event falls under more than one Form 8-K item?

General Instruction D to Form 8-K allows a company to file a single Form 8-K to satisfy one or more disclosure items, as long as the company identifies by item number and caption all items that are being satisfied and provides all of the substantive disclosure required by each item. For example, a company may need to report a single event under both new Item 1.01, Entry into a Material Definitive Agreement, and Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.

What companies are subject to the Form 8-K requirements?

All issuers required to file reports under Section 13(a) or 15(d) of the Exchange Act, other than foreign private issuers, must file Forms 8-K.

ITEM 1.01 – ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT

What agreements will we have to disclose under new Item 1.01?

Item 1.01 requires disclosures when a company enters into a material definitive agreement not made in the ordinary course of business. These agreements are generally the same type of agreements that have been required to be filed as material agreement exhibits to Forms 10-Q and 10-K. Under Form 8-K, an agreement will be deemed not made in the ordinary course, even if it is the type of agreement that ordinarily accompanies the business conducted by the company, if it involves the subject matter identified in Item 601(b)(10)(ii)(A)-(D) of Regulation S-K. This includes the following:

- Most contracts to which directors and officers, and some security holders are parties, including (with some limited exceptions) all management contracts and compensatory plans in which directors and "named executive officers" participate, other management contracts and compensatory plans in which other executive officers participate (unless immaterial in amount or significance) and equity compensation plans and arrangements adopted without shareholder approval in which company employees participate (unless immaterial in amount or significance);
- Contracts upon which the company's business is substantially dependent;
- Contracts calling for the acquisition or sale of any property, plant or equipment for consideration exceeding 15% of the fixed assets of the company on a consolidated basis; and
- Material leases.

In determining whether an Item 1.01 Form 8-K must be filed, companies will need to perform, on a real-time basis, an analysis similar to that which they use to decide whether to file a material agreement with a Form 10-K or Form 10-Q.

Will our company need to disclose material amendments to a material definitive agreement?

Yes, even if the company has not previously disclosed the underlying agreement.

What information must our company disclose about the material definitive agreements or amendments?

The company will need to disclose:

- the date of the agreement or amendment;
- the parties to the agreement or amendment;
- a brief description of the material terms and conditions of the agreement or amendment; and
- a brief description of any material relationship between the company or its affiliates and any of the parties.

In addition, the company would be required to disclose any other information that would be necessary to avoid a material misstatement or omission; for example, in many cases the duration and termination provisions of a contract will be material and should be disclosed.

Will a copy of the material definitive agreement need to be filed as an exhibit to the Form 8-K?

No. While the SEC encourages companies to file the agreement as an exhibit to the Form 8-K that announces the agreement or amendment, the company can wait and file the agreement as an exhibit to the periodic report covering the time period in which the agreement was entered into, consistent with current practice. Note, however, that if the company is attempting to have a Securities Act registration statement declared effective, it will need to file the agreement before that time.

If we are not required to disclose an agreement under Item 1.01, is there any other reason we might be required to announce or file the agreement?

Yes. The company may have an independent duty under other federal securities laws to disclose the signing of an agreement (even one that is non-binding) or negotiations related to an agreement. For example, a duty to disclose may be created where a company is involved in purchases or sales of its securities or where there is a duty to correct or update a prior statement made by the company.

Will disclosure of letters of intent and other non-binding agreements be required?

No. Only agreements providing for obligations that are material to and enforceable against a company, or rights that are material to the company and enforceable by the company against one or more other parties, are required to be disclosed. An enforceable agreement must be disclosed under Item 1.01 even if customary closing conditions have not yet been satisfied.

If a company enters into a non-binding letter of intent or memorandum of understanding that also contains some binding, but non-material elements, such as a confidentiality agreement or a no-shop agreement, the letter or memorandum does not need to be filed because the binding provisions are not material. However, if the enforceable provisions are material to the company, disclosure would be required.

With respect to business combination agreements, will the filing of a Form 8-K satisfy the filing obligations under Securities Act Rules 165 and 425, and/or Exchange Act Rule 13e-4(c), 14d-2(b) and 14a-12?

Yes. To avoid duplicate filings, a company will be able to check one or more boxes on the Form 8-K cover page to indicate that it is simultaneously satisfying its filing obligations under Rule 425, Rule 13e-4(c), Rule 14a-12 and/or Rule 14d-2(b). These rules effectively provide that a communication about a planned business combination will not be treated as an illegal offer of securities, illegal tender offer, or illegal solicitation of proxies, if certain filing procedures are followed and certain disclosures are included in those communications. In order to comply with these business combination rules, the Form 8-K will have to include the substantive information and legends required by these rules, and the appropriate EDGAR tag.

Since Form 8-K already requires disclosures about material acquisitions and dispositions of assets, will a material acquisition or disposition agreement now be disclosable under more than one item of Form 8-K?

In some cases, yes. Form 8-K will now require a company to assess whether entering into a business combination or disposition agreement satisfies the materiality thresholds under Item 1.01 (material definitive agreements), and also whether the completion of the transaction meets the test for "significance" under Item 2.01 (acquisition and disposition transactions). Since Item 1.01 and Item 2.01 have different disclosure thresholds, not every business combination or disposition agreement that is disclosed under Item 1.01 will need to be disclosed under Item 2.01, since the threshold for "significant" acquisitions can be higher than those that are "material." However, a significant acquisition may require Item 1.01 disclosure when the acquisition agreement is entered into, Item 2.01 disclosure when the acquisition closes, and Item 9.01 disclosure when required financial statements are available.

What "management contracts and compensatory plans" does Item 1.01 cover?

Item 1.01 covers any kind of management contract or compensatory plan, contract or arrangement, including plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing, in which the designated insiders participate. In most cases, the adoption of a management contract or compensatory plan will trigger Item 1.01 disclosure.

Will Item 1.01 require disclosure of option grants made to executive officers and directors?

Not necessarily. The general rule is that management contracts and compensatory plans, contracts and arrangements must be disclosed if directors or "named executive officers" participate. They must also be disclosed if other executive officers participate, unless immaterial in amount or significance. However, exceptions set forth in S-K Item 601(b)(10) should be considered when analyzing the need to make Item 1.01 disclosure. In particular, the instructions to Item 601(b)(10) provide an exception to the individual agreement disclosure requirement for agreements under a compensatory plan if copies of the plan and the forms of agreement have been filed, as long as the individual agreements contain no other provisions that must be disclosed for an investor to understand the individual's compensation arrangement. Therefore, disclosure under Item 1.01 will not be required if the grant is to a person who is not a named executive officer and is "immaterial in amount or significance" or if it satisfies the exception for filing individual agreements (or some other exception). This analysis must be done on a grant-by-grant basis. Note that if the executive officer holds one of the positions covered by Item 5.02(c) (principal officer positions) and the grant is made in connection with his or her appointment to that position, disclosure will be required under Item 5.02(c).

ITEM 1.02 – TERMINATION OF A MATERIAL DEFINITIVE AGREEMENT

What types of terminations of what types of agreements need to be disclosed under new Item 1.02?

Item 1.02 generally requires disclosure of terminations of material definitive agreements, if material to the company. Disclosure is not required if the termination is due to expiration of the agreement on a stated termination date or as a result of all parties completing their obligations. Disclosure of a termination may be required even if the agreement was not previously disclosed, if the agreement and its termination meet the materiality threshold at the time of the termination.

What information about the termination must be disclosed?

The company must disclose the following information about the termination of a material definitive agreement:

- the date of termination;
- the parties to the agreement;
- a brief description of the material terms and conditions of the agreement;
- a brief description of any material relationship between the company or its affiliates and any of the parties to the agreement;
- a brief description of the material circumstances surrounding the termination; and
- any material early termination penalties incurred by the company.

Will our company need to disclose under Item 1.02 negotiations or discussions regarding termination?

No. The Form 8-K rules do not require disclosure (solely by reason of Item 1.02) of negotiations or discussions regarding termination, unless and until the agreement has been terminated.

What if our company does not believe an agreement has been terminated?

No disclosure is required (solely by reason of Item 1.02) if a company believes in good faith that the material definitive agreement has not been terminated, unless the company has received a notice of termination pursuant to the terms of the agreement. A company may choose to make a disclosure under Item 1.02 out of an abundance of caution, even if it believes in good faith that the agreement has not been terminated (because, for example, it does not believe that all of the conditions to termination have been satisfied), but the company would likely want to disclose in the filing its good faith belief that the agreement has not been terminated. If the company decides to make a disclosure about its good faith belief, an amendment to the Form 8-K may be required in the future if the company's conclusion as to the status of the agreement's termination later changes.

ITEM 2.03 – CREATION OF A DIRECT FINANCIAL OBLIGATION OR AN OBLIGATION UNDER AN OFF-BALANCE SHEET ARRANGEMENT OF A REGISTRANT

What is a "direct financial obligation" that must be disclosed under new Item 2.03?

Item 2.03(a) of Form 8-K defines a "direct financial obligation" as:

- a long-term debt obligation (S-K Item 303(a)(5)(ii)(A));
- a capital lease obligation (S-K Item 303(a)(5)(ii)(B));

- an operating lease obligation (S-K Item 303(a)(5)(ii)(C)); or
- a short-term debt obligation that arises other than in the ordinary course of business (defined in Form 8-K Item 2.03(e)).

The first three types of obligations are the same categories of obligations for which disclosures are required in the contractual obligations table of "management's discussion and analysis of financial condition and results of operations" in Forms 10-K and 10-Q.

What disclosures about the creation of direct financial obligations are required?

If the company becomes obligated on a direct financial obligation that is material to it, Item 2.03(a) requires the company to disclose:

- the date on which the company became obligated;
- a brief description of the transaction or agreement creating the obligation;
- the amount of the obligation, including the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties; and
- a brief description of the other material terms and conditions of the transaction.

When is information about off-balance sheet arrangements required to be disclosed?

If the company becomes directly or contingently liable for an obligation that is material to the company arising out of an off-balance sheet arrangement (defined in Regulation S-K Item 303(a)(4)(ii)), Form 8-K Item 2.03(b) requires disclosure.

What disclosures about the creation of direct or contingent liability under off-balance sheet arrangements are required?

If the company becomes directly or contingently liable for an obligation that is material it arising out of an off-balance sheet arrangement, Item 2.03(b) requires the company to disclose:

- the date on which the company became directly or contingently liable on the obligation;
- a brief description of the transaction creating the arrangement or obligation;
- a brief description of the nature and amount of the obligation, including the material terms whereby it may become a direct obligation, if applicable, or may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties;

- the maximum potential amount of future payments (undiscounted) that the company may be required to make (not reduced for amounts recoverable under recourse or collateralization provisions in guarantees); and
- a brief description of the other material terms and conditions of the transaction.

At what point does the creation of a direct financial obligation trigger disclosure under this item?

A company need not disclose information until it enters into an agreement enforceable against it, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. If there is no such agreement, the company must provide the disclosure within four business days after the closing or settlement of the transaction or arrangement under which the direct financial obligation arises or is created.

Must our company provide disclosure regarding off-balance sheet arrangements if we are not a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement?

Yes. Where neither the company nor any affiliate of the company is a party to the transaction or agreement, the company is given additional time to provide the required disclosure about the creation of the obligation, as the four business day response period does not begin to run until the earlier of:

- the fourth business day after the contingent obligation is created or arises; and
- the day on which an executive officer of the company becomes aware of the contingent obligation.

What if our company enters into a facility, program or similar arrangement that creates or may give rise to direct financial obligations in connection with multiple transactions?

When the company enters into a facility, program or similar arrangement, it must disclose that the facility has been entered into, if material to the company. Disclosure is required under both Items 1.01 and 2.03. Thereafter, it must make additional disclosures to the extent it incurs additional obligations under the facility or program, including when a series of previously undisclosed individually immaterial obligations become material in the aggregate.

What if the direct financial obligation is a security that is being sold?

If the obligation required to be disclosed under Item 2.03 is a security, or term of a security, disclosure would be required unless:

- the sale is being made under an effective registration statement;
- the prospectus relating to the sale contains the information required by Item 2.03; and
- the prospectus is filed within the required time period under Securities Act Rule 424.

When reporting an obligation related to an unregistered offering, a company will want to be careful to include only the information allowed to be disclosed under Securities Act Rule 135c, if the offering has not been completed.

ITEM 2.04 – TRIGGERING EVENTS THAT ACCELERATE OR INCREASE A DIRECT FINANCIAL OBLIGATION OR AN OBLIGATION UNDER AN OFF-BALANCE SHEET ARRANGEMENT

What "triggering events" with respect to a direct financial obligation will require disclosure to be made under new Item 2.04?

Two kinds of triggering events lead to disclosure – those related to direct financial obligations and those with respect to obligations under off-balance sheet arrangements.

Item 2.04(a) requires disclosure when a "triggering event" occurs, causing an increase or acceleration of a direct financial obligation of a company and the consequences of the triggering event are material to the company.

Item 2.04(b) requires disclosure when a "triggering event" occurs, causing either an increase or acceleration of an obligation of the company under an off-balance sheet arrangement or a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, and the consequences of the triggering event are material to the registrant.

What is a "triggering event"?

A triggering event under this item is an event, such as an event of default, event of acceleration, or similar event, as a result of which a direct financial obligation or an obligation arising under an off-balance sheet arrangement is increased or becomes accelerated or as a result of which a contingent obligation arising out of an off-balance sheet arrangement becomes a direct financial obligation.

What information must be disclosed under this item?

For triggering events causing the increase or acceleration of a direct financial obligation, the company must disclose:

- the date of the triggering event;

- a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;
- a brief description of the triggering event;
- the amount of the direct financial obligation, as increased if applicable;
- the terms of the payment or acceleration that apply; and
- 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 or the increase or acceleration.

For triggering events causing an obligation under an off-balance sheet arrangement to increase or be accelerated, or causing a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation, the company must disclose:

- the date of the triggering event;
- a brief description of the off-balance sheet arrangement;
- a brief description of the triggering event;
- the nature and amount of the obligation, as increased if applicable;
- the terms of payment or acceleration that apply; and
- 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 or the increase or acceleration of the obligation or its becoming a direct financial obligation of the company.

Must our company provide disclosure regarding a triggering event in respect of a material obligation under an off-balance sheet arrangement even if the company is not a party to the transaction or agreement under which the triggering event occurs?

Yes.

When is a triggering event deemed to occur under this item?

No disclosure is required until a triggering event has occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including:

- if required, notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement; and
- the satisfaction of all conditions to the occurrence of the triggering event, *except* the passage of time.

This suggests that, if there has been an event of default, but there is a cure period, the company would still need to file a Form 8-K. If the event default is later cured, the company would presumably want to make some sort of public notification of that fact.

What if the company does not believe a triggering event has occurred?

No disclosure is required (solely by reason of Item 2.04) if the company believes in good faith that no triggering event has occurred, *unless* the company has received a notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement. A company may choose to make a disclosure under Item 2.04 out of an abundance of caution, even if it believes in good faith that a triggering event has not occurred (because, for example, it does not believe that all of the conditions for a triggering event have occurred), but the company would probably want to disclose in the filing its good faith belief that a triggering event has not occurred. If the company decides to make a disclosure about its good faith belief, an amendment to the Form 8-K may be required in the future if the company's conclusion as to the status of the occurrence of a triggering event has changed.

How does SFAS No. 5 affect disclosure obligations under new Item 2.04?

If a triggering event occurs under an off-balance sheet arrangement and, as a result, an accrual for a probable loss is required under SFAS No. 5, then the obligation arising out of the off-balance sheet arrangement becomes a direct financial obligation. If the consequences are material to the company, disclosure is required under Item 2.04 (although this type of obligation would not be a direct financial obligation under Item 2.03).

ITEM 2.05 – COSTS ASSOCIATED WITH EXIT OR DISPOSAL ACTIVITIES

When is an exit or disposal plan required to be disclosed under new Item 2.05?

Item 2.05 of Form 8-K requires disclosure when:

- the board, a committee of the board or an authorized officer, if board action is not required, commits a 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 SFAS No. 146; and
- material charges will be incurred under GAAP pursuant to those exit or disposal plans or activities.

What must be disclosed when an exit or disposal plan triggers a filing under this item?

When an exit or disposal plan triggers disclosure under Item 2.05, the company must disclose:

- the date of the commitment to the course of action;
- a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;
- for each major type of cost associated with the course of action (for example, one time termination benefits, contract termination costs and other associated costs), an estimate of the total amount or range of amounts expected to be incurred;
- an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and
- an estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

What if we cannot estimate the future expense amounts required to be disclosed under this item by the time the Form 8-K is due?

If at the time of filing the Form 8-K the company cannot in good faith determine the estimated costs required to be disclosed, the company may omit this information from the original filing, but must file an amended Form 8-K within four business days after it makes a determination of these amounts.

ITEM 2.06 – MATERIAL IMPAIRMENTS

When must the company disclose that it is taking a material charge for impairments?

Item 2.06 requires disclosure when the board, 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 the company's assets (including impairments of securities or goodwill) is required under GAAP.

What information about material impairments must be disclosed under this item?

Item 2.06 requires the company to disclose:

- the date of the conclusion that a material charge is required;
- a description of the impaired asset and the facts and circumstances leading to the conclusion that the charge for impairment is required;
- an estimate of the amount or range of amounts of the impairment charge; and

- an estimate of the amount or range of the impairment charge that will result in future cash expenditures.

What if we cannot estimate the impairment charge required to be disclosed under this item at the time the Form 8-K is due?

If at the time of filing the Form 8-K the company cannot in good faith determine the estimated range of impairment charge required to be disclosed, the company may omit this information from the original filing, but must file an amended Form 8-K within four business days after it makes a determination of these amounts.

What happens if a conclusion about a material charge for impairment is made in connection with the preparation, review or audit of financial statements required for the company's next periodic report?

No filing under Item 2.06 is required if the conclusion about a material charge for impairment is made in connection with the preparation, review or audit of the company's financial statements that are required to be included in the next periodic report that is due to be filed under the Exchange Act if:

- the periodic report is timely filed; and
- the conclusion is disclosed in the report.

Since impairment decisions are often made in connection with the preparation, review or audit of the company's financial statements, this exception to Item 2.06 should significantly limit the number of Form 8-K filings under this item. However, GAAP does require assessments for impairment charges of certain assets to be made at other times, so other events can trigger the need to take an impairment charge and to make a filing under Item 2.06.

ITEM 3.01 – NOTICE OF DELISTING OR FAILURE TO SATISFY A CONTINUED LISTING RULE OR STANDARD; TRANSFER OF LISTING

What types of delisting or listing compliance notices from securities exchanges or associations must be disclosed under new Item 3.01? What information must be disclosed?

Item 3.01(a) generally requires a company to provide disclosure if it receives notice from the national securities exchange or association that maintains the principal listing for any class of its common equity indicating that:

- the company or the class of equity securities does not satisfy a rule or standard for continued listing;

- the exchange has submitted an application under the Exchange Act Rule 12d2-2 of the SEC to delist the class of securities; or
- the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system.

The disclosure must include:

- the date the company received the notice;
- the rule or standard for continued listing that the company fails to satisfy; and
- any action or response that, at the time of filing, the company has determined to take in response.

Is there a materiality threshold for disclosure of a delisting notice received by a company?

No.

When is our company required to disclose that it ha provided notice to an exchange regarding its compliance with listing standards? What must be disclosed?

Item 3.01(b) requires disclosure when a company (or, if required by exchange or association rules, a designated officer) has notified the national securities exchange or association that maintains the principal listing for any class of its common equity that the company (or the applicable officer) is aware of any material noncompliance with a rule or standard for continued listing on the exchange or association. The disclosure must include:

- the date the company (or designated officer) provided the notice;
- the rule or continued listing standard that the company fails to satisfy; and
- any action or response that, at the time of filing, the company has determined to take.

Are there any other types of letters or communications from a national securities exchange or association that would require disclosure under Item 3.01? What must be disclosed?

Yes. Item 3.01(c) of Form 8-K requires disclosure when a national securities exchange or association that maintains the principal listing for any class of the company's common equity, in lieu of suspending trading in or delisting the class of securities, issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard for continued listing. The disclosure must include the date of the letter and a summary of the contents of the letter or communication. There is no materiality threshold for this disclosure.

Is disclosure required when our company withdraws or terminates the listing of a class of its securities? What must be disclosed?

Yes. Item 3.01(d) requires disclosure if a company's board, a committee of the board or, where board action is not required, an authorized officer, has taken definitive action to withdraw or terminate the principal listing of a class of the company's common equity from a national securities exchange or association, including by reason of a transfer of a listing or quotation to another securities exchange or quotation system. The disclosure must include the action taken and the date of the action.

Are there exceptions to this filing requirement?

Yes. A company is not required to disclose any information when the delisting is a result of one of the following:

- the entire class of the security has been called for redemption, maturity or retirement and certain procedures have been followed;
- the entire class of the security has been redeemed or paid at maturity or retirement;
- the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities and represent no other right, except
  - if true, the right to receive an immediate cash payment, or
  - dissenters rights; or
- all rights pertaining to the entire class of the security have been extinguished.

If a company has a grace period to cure a listing deficiency, does it still need to file a Form 8-K upon receiving or giving notice of the deficiency?

Yes.

Does the company need to file notices from or to the exchange or association as an exhibit to Form 8-K?

No.

Are additional Form 8-K filings required for delisting notices that repeat the contents of earlier notices for which a Form 8-K has been filed?

Notices or other communications that follow an initial notice sent to, or by, a company under Item 3.01(a), (b) or (c) that continue to indicate that the company does not comply with the same rule or standard for continued listing that was the subject of the

initial notice are not required to be filed – but the company may voluntarily file them. However, a separate Form 8-K would be required to be filed under Item 3.01 if the company receives, or sends, other notices that relate to noncompliance with a different listing standard or rule.

Does a company need to disclose on Form 8-K that it has received an "early warning" notice informing the company that it is in danger of falling out of compliance with a rule or standard for continued listing?

No. However, a Form 8-K is required if the early warning notice states that the company is currently out of compliance but will not be delisted if it cures the problem within a specified time.

My company's securities are quoted exclusively on an automated inter-dealer quotation system. Will we be subject to Item 3.01 of Form 8-K?

No. If a company's securities are not otherwise listed on an exchange or association, then a Form 8-K will not have to be filed even if the securities are removed from quotation on an automated inter-dealer quotation system.

ITEM 3.02 – UNREGISTERED SALES OF EQUITY SECURITIES

What sales of equity securities need to be reported under new Item 3.02?

Item 3.02 of Form 8-K requires disclosure of sales of "equity securities" if:

- the sale is made in a transaction that is not registered under the Securities Act; and
- the aggregate sales of the equity securities since the company's last Item 3.02 filing or, if more recent, its last periodic report, equal or exceed 1% of the company's outstanding securities of the class sold (5% for small business issuers).

Item 3.02 would require a filing to report securities issuances through conversion of other securities, as well as issuances for cash or other consideration. "Equity securities" is broadly defined in Exchange Act Rule 3a11-1 and includes many types of securities, such as those that are convertible into equity securities.

Forms 10-Q and 10-K have been amended to eliminate the need to repeat disclosures of sales of unregistered securities that have already been reported on Form 8-K. However, if a company sells equity securities in unregistered transactions that do not meet the disclosure threshold for Form 8-K and are not, therefore, reported prior to the filing of the Form 10-Q or 10-K, disclosure of those sales will be reportable in the periodic report for the applicable period. In addition, if not voluntarily provided in the Form 8-K

filing, Forms 10-Q and 10-K will require disclosure of the following with respect to any transaction previously reported on Form 8-K:

- the names of the principal underwriters, if any; and
- the names of the persons, or class of persons, to whom securities that were not publicly offered were sold.

Are convertible securities included in the calculation of the 1% threshold?

No. Only the actual number of shares of equity securities outstanding of the affected class of securities are included in the calculation – securities of the same class issuable upon conversion or exchange of other securities are not considered.

When precisely does an unregistered sale trigger the filing requirement?

A company need not disclose information under Item 3.02 about a transaction involving unregistered sales of equity securities until:

- the company enters into an agreement enforceable against it, whether or not subject to conditions, under which the equity securities are to be sold; or
- if there is no agreement, the transaction closes or settles.

What information about an unregistered sale of securities must be disclosed?

A company must furnish the following information regarding a reportable sale of equity securities under Item 3.02:

- the date of sale;
- the title and amount of securities sold;
- for cash sales:
  - the aggregate offering price, and
  - the aggregate underwriting discounts or commissions;
- for non-cash sales:
  - the nature of the transaction; and
  - the nature and aggregate amount of consideration received by the company;
- the section of the Securities Act or SEC rule under which the exemption from registration was claimed;
- a brief statement of facts relied upon to make the securities law exemption available; and
- for securities convertible or exchangeable into equity securities, or warrants or options representing equity securities, the terms of conversion or exercise.

ITEM 3.03 – MATERIAL MODIFICATIONS TO RIGHTS OF SECURITY HOLDERS

What types of events regarding material modifications, limitations or qualifications to the rights of security holders must be reported under Item 3.03?

Under Item 3.03, a company must report any:

- material modification to the constituent instruments defining the rights of the holders of any class of registered securities; or
- material limitation or qualification to the rights of the holders of any class of registered securities due to the issuance or modification of any other class of securities.

This disclosure is currently required in Forms 10-Q, but the new Form 8-K disclosures will replace these requirements. Please note that working capital restrictions and other limitations upon the payment of dividends must be reported under Item 3.03.

What information must be disclosed under this item?

Item 3.03 requires disclosure of:

- the date of modification of constituent instruments, or issuance or modification of other securities;
- the title of class of securities involved, if due to modification of constituent instruments defining rights of holders; and
- description of general effect of modification of constituent instruments, or issuance or modification of other securities, upon rights of holders of the registered securities.

ITEM 4.02 – NON-RELIANCE ON PREVIOUSLY ISSUED FINANCIAL STATEMENTS OR A RELATED AUDIT REPORT OR COMPLETED INTERIM REVIEW

If we determine that our company's financial statements should not be relied upon, what disclosure would be required?

Item 4.02(a) requires disclosure when a company's board, committee of the board or, if board action is not required, an authorized officer, concludes that any of the company's previously issued financial statements covering one or more years or interim periods for which the company is required to provide financial statements under Regulation S-X no longer should be relied upon because of an error in those financial statements as addressed in APB Opinion No. 20.

Item 4.02(a) requires disclosure of:

- the date of the conclusion;

- identification of the financial statements and years or periods covered that should no longer be relied upon;
- a brief description of the facts underlying the conclusion to the extent known at the time of filing; and
- whether the audit committee, or the board in the absence of an audit committee, or authorized officers, discussed with the company's independent accountants the matters disclosed in the Form 8-K.

What if our company determines that our financial statements need to be restated or revised?

Under Item 4.02(a), a Form 8-K is only required when there is an error in the financial statements that leads the company to believe that the financial statements should not be relied upon. Restatement of financial statements that are not related to errors, such as a subsequent stock split or a plan to discontinue operations under SFAS No. 144 that is decided after the end of a fiscal year end, would not normally lead to a Form 8-K filing under Item 4.02(a).

If our accountants advise us that our company's financial statements should not be relied upon, what disclosure is required?

Item 4.02(b) requires disclosure when 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.

Item 4.02(b) requires disclosure of:

- the date the company was advised or notified;
- identification of the financial statements that should no longer be relied upon;
- a brief description of the information provided by the accountant;
- whether the audit committee, or the board in the absence of an audit committee, or authorized officers, discussed with the accountants the matters disclosed in the Form 8-K; and
- as an exhibit, any letter received from the accountant regarding the disclosures being made.

The company must provide the accountant with a copy of the disclosure it is making in the Form 8-K no later than the day the disclosure is filed with the SEC, and the company must ask the accountant to furnish the company as promptly as possible a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company in the Form 8-K and, if not, stating the respects in which it does not

agree. If the company does not include the accountant's letter in time to be included in the initial filing, it must amend its Form 8-K by filing the accountant's letter as an exhibit no later than two business days after receipt of the letter.

ITEM 5.02 – DEPARTURE OF DIRECTORS OR PRINCIPAL OFFICERS; ELECTION OF DIRECTORS; APPOINTMENT OF PRINCIPAL OFFICERS

When does our company need to file a Form 8-K to disclose that a director has left the company due to a disagreement?

Form 8-K has historically provided for disclosure of the departure of a director due to a disagreement with the company, if certain conditions were satisfied that were under the control of the director. As revised, Item 5.02(a) will require disclosure when a director:

- resigns or refuses to stand for re-election since the last annual shareholder meeting due to a disagreement with the company relating to the company's operations, policies or practices, which is known to an executive officer; or
- is removed for cause.

Under these circumstances, the company would be required to disclose:

- the date of resignation, refusal to stand for re-election or removal;
- any position held by the director on any board committee at that time;
- a brief description of the circumstances representing the disagreement that the company believes caused, in whole or part, the resignation, refusal or removal;
- as an exhibit, any written correspondence furnished to the company by the director regarding the circumstances surrounding the resignation, refusal or removal; and
- as an exhibit, any letter received from the director regarding the disclosures being made by the company in the Form 8-K.

The company must provide the director a copy of the disclosure it is making in the Form 8-K no later than the day it is filed with the SEC, and the company must provide the director with the opportunity to furnish the company as promptly as possible with a letter addressed to the company stating whether he or she agrees with the statements made in the Form 8-K and, if not, stating the respects in which he or she disagrees. If a director letter is received too late to be included in the initial filing, the company must amend its Form 8-K to file the letter as an exhibit, no later than two business days after receipt.

Are we now required to disclose other departures of directors when there is no disagreement?

Yes. Under Item 5.02(b), if a director retires, resigns, is removed, or refuses to stand for re-election (other than in the circumstances described in the immediately preceding FAQ), the company must file a Form 8-K disclosing:

- the fact that the event occurred; and
- the date of the event.

There is no specific requirement to disclose the reason for the departure. However, under some circumstances this disclosure may be warranted.

When do we need to file a Form 8-K disclosing the election of a new director?

When a company elects a new director, except by a vote of security holders at an annual meeting or a special meeting convened for that purpose, the company must disclose under Item 5.02(d):

- the name of the director;
- the date of election;
- a brief description of any arrangement or understanding between the new director and any other persons (including their names) under which the director was selected as a director;
- any committees on which the director will be named to serve; and
- the information required by Regulation S-K Item 404(a) regarding related party transactions between the director, or a member of his immediate family, and the company.

If the information about the committees on which the director will serve or related party transactions is not determined or is unavailable at the time of the filing, the company must indicate that at the time of the original filing and then file an amendment containing the omitted information within four business days of it being determined or becoming available.

When do we need to file a Form 8-K to disclose the departure of an officer?

Item 5.02(b) requires disclosure when any of the following persons retires, resigns or is terminated from that position:

- principal executive officer;
- president;

- principal financial officer;
- principal accounting officer;
- principal operating officer; or
- person performing similar functions.

The Form 8-K must disclose the fact that the event occurred and the date of the event. There is no specific requirement to disclose the reason for the departure. However, under some circumstances, this disclosure may be warranted.

When do we need to file a Form 8-K to disclose the appointment of an officer?

When a company appoints an officer into one of the positions identified in the immediately preceding FAQ, the company must file a Form 8-K under Item 5.02(c) disclosing

- the name and position of the newly appointed officer;
- the date of appointment;
- the information required by Regulation S-K Items 401(b),(d) and (e) related to the officer's age, background, experience, family relationships with other officers or directors and arrangements for selection as an officer;
- the information required by Regulation S-K Item 404(a) regarding related party transactions between the officer, or any member of his immediate family, and the company; and
- a brief description of the material terms of any employment agreement.

If the company intends to make a public announcement of the appointment of the officer other than by means of a report on Form 8-K, the company may delay filing the Form 8-K until the day the company otherwise makes the public announcement.

If the information regarding an employment contract of a newly-appointed officer is not determined or is unavailable at the time the Form 8-K is required to be filed, the company must include a statement to that effect and file an amendment to the Form 8-K with the required information within four business days after the information is determined or becomes available.

ITEM 5.03 – AMENDMENTS TO ARTICLES OF INCORPORATION OR BYLAWS; CHANGE IN FISCAL YEAR

When is a Form 8-K filing required to disclose amendments to our articles of incorporation or bylaws?

Item 5.03(a) requires disclosure if a company amends its articles of incorporation or bylaws and a proposal for the amendment was not disclosed in a proxy statement or information statement filed by the company.

The disclosure must include:

- the effective date of the amendment;
- a description of the provision adopted or changed by amendment;
- if applicable, the previous provision of the articles or bylaws; and
- as an exhibit, the text of the amendment.

If the company only files the text of the amendment rather than a complete copy of the articles of incorporation or bylaws, it must file a complete copy of the articles or bylaws as an exhibit to its next periodic report.

Do we have to file a Form 8-K if our company changes its fiscal year?

Form 8-K has historically provided for disclosure if a company determines to change its fiscal year. Under revised Item 5.03(b), this disclosure requirement has been modified to require disclosure if a company decides to change its fiscal year from that used in its most recent filing with the SEC by any means other than:

- a submission to a vote of security holders (through the solicitation of proxies or otherwise); or
- an amendment to its articles of incorporation or bylaws.

Under Item 5.03(b), the company must disclose the date of its determination; the date of the new fiscal year end; and the form on which the report covering the transition period will be filed.

What if I have more questions?

The discussion above simply summarizes the new rules, which are detailed and can be complex. Should you have any questions about these new requirements or if you would like to obtain a detailed reference chart summarizing all Form 8-K requirements in effect as of August 23, 2004, please feel free to contact any member of your Fenwick & West team. You may also contact Horace Nash (hnash@fenwick.com), Rob Freedman (rfreedman@fenwick.com), Eileen Duffy Robinett (erobinett@fenwick.com) or Dan Winnike (dwinnike@fenwick.com), all of whom contributed to this update.

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