



FENWICK & WEST LLP

# Corporate and Securities Law Update

## SEC Adopts Final Rules Requiring Additional Form 8-K Disclosures and Accelerating the Filing Deadline

March 23, 2004

On March 11, 2004, the SEC approved new rules that significantly expand the number of events that public companies must report on Form 8-K and that shorten the filing deadline for most events to four business days after the event.<sup>1</sup> These changes further implement the mandate of the Sarbanes-Oxley Act to improve “real time issuer disclosure.” They are intended to provide investors with better and faster disclosure of important corporate events. The SEC believes that this will allow the market to assimilate more rapidly into the value of a public company’s securities information that is “unquestionably or presumptively” material. These new requirements will become effective August 23, 2004.

### Expanded Disclosure Items

Eight new events will require disclosure on Form 8-K:

- Entrance into a material *definitive* agreement, or a material amendment to a definitive agreement, not made in the ordinary course of business (filing of the agreement as an exhibit *may* be delayed until the next Form 10-Q or Form 10-K);
- Termination of a material definitive agreement not made in the ordinary course of business (other than by expiration on a stated termination date or as the result of all parties completing their obligations) if the termination is material to the company;
- Becoming obligated on a material direct financial obligation or directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement;
- Occurrence of a triggering event that causes (i) a direct financial obligation to increase or accelerate, (ii) an obligation under an off-balance sheet arrangement to increase or accelerate, or (iii) a contingent obligation

under an off-balance sheet arrangement to become a direct financial obligation, in each case if the consequences of the event are material to the company;

- Commitment<sup>2</sup> to an exit or disposal plan of a long-lived asset (or disposing of it) or to terminate employees under a plan of termination, in either case where the company will incur material GAAP charges;
- Conclusion<sup>2</sup> that a material charge for impairment to one or more company assets, including securities or goodwill, is required under GAAP;
- Conclusion<sup>2</sup> that any of the company’s previously issued financial statements no longer should be relied upon because of an error, or advice or notification from the company’s auditors to similar effect; and
- Receipt of a notice from Nasdaq indicating that the company fails to satisfy a standard for continued listing or that Nasdaq has taken all necessary steps to delist the company’s securities, or notification by the company to Nasdaq that it is in material noncompliance with a Nasdaq standard for continued listing (and other similar events).

The new rules also advance the timing of disclosure for two additional events by moving the requirement for that disclosure from Forms 10-K and 10-Q to Form 8-K. Those events are:

- A sale of equity securities by the company in a transaction not registered under the Securities Act (*e.g.*, a private placement or limited offering); and
- A material modification to the rights of any of the holders of a company’s registered securities.

Finally, the new rules broaden the scope of disclosure required under two existing items of Form 8-K. Those revised disclosures are:

<sup>1</sup> The current deadlines are unaffected for disclosures under Regulation FD, for voluntary disclosures and for certain exhibits.

<sup>2</sup> By the Board, a Board committee or an authorized officer where Board action is not required.

- Departure of a director as a result of a disagreement previously triggered disclosure only if the director provided a letter to the company describing the disagreement and requested that the company disclose the matter. Now disclosure will be required if an executive officer of the company knows that a director has resigned or refuses to stand for reelection because of a disagreement with the company on any matter relating to the company's operations, policies or practices or that a director has been removed for cause. The revised item also requires disclosure when the company's principal executive officer, president, principal financial officer, principal accounting officer or principal operating officer retires, resigns or is terminated and when the company appoints a person to any one of those offices. In addition, the item now requires disclosure when a new director is elected to the Board other than by vote of securityholders at an annual or special meeting or when a director retires, resigns, is removed or refuses to stand for reelection; and
- An item that previously only required disclosure of a change in fiscal year has been expanded to require, in addition, disclosure of any amendment to the company's articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement or information statement.

#### **Failure to File or Timely File – Safe Harbor and Eligibility Consequences**

The new rules contain a limited safe harbor which provides that a failure to file a report on Form 8-K with regard to any of the first seven events listed in this summary shall not be deemed a violation of Section 10(b) and Rule 10b-5 under the Exchange Act. The safe harbor applies only to a failure to file; material omissions or misstatements in a Form 8-K will continue to be subject to liability. In addition, the SEC has indicated that (i) failure to file in a timely manner a Form 8-K required to report on any of those same seven events will not result in a loss of eligibility to use Form S-2 or S-3 if the

required Form 8-K has been filed by the time of the filing of the Form S-2 or Form S-3 and (ii) failure to file a Form 8-K in a timely manner will not affect the availability of Rule 144 for the resale of securities.

#### **Additional Information in the Adopting Release**

In this release, the SEC confirms its existing position that exhibits attached to a furnished (not filed) Form 8-K that relate to the furnished items will also be deemed to be furnished, even if the Form 8-K contains disclosures required to be filed under other items. The release also indicates that the SEC, after consultation with the Department of Justice, has concluded that Section 906 officer certifications, currently applicable to Forms 10-K and 10-Q, are not required for a Form 8-K.

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The foregoing is only a brief summary of a 95-page release. We will be publishing a more detailed update in the near future. Companies with questions prior to that time may refer to a full copy of the release and rules at <http://www.sec.gov/rules/final/33-8400.pdf>, contact any member of their Fenwick & West team or contact Laird H. Simons III ([lsimons@fenwick.com](mailto:lsimons@fenwick.com)) or Horace L. Nash ([hnash@fenwick.com](mailto:hnash@fenwick.com)), who were involved in preparing this client summary.

Although these rules will not be effective until August 23, 2004, we recommend that companies begin to establish procedures that will assure that events triggering the filing of a Form 8-K are brought to the attention of their inside and outside counsel in a timely manner. Like many other aspects of the Sarbanes-Oxley rules, this will require closer coordination and better communication within the company and between internal legal departments and outside counsel.

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