

Client Advisory

July 2004

New Rules Require Public Companies to File Form 8-K Within Four Business Days of a Triggering Event

Following the surprising disclosures regarding Enron, WorldCom, etc. and the widespread criticism that the security laws disclosure requirements were “too little–too late,” Congress adopted Section 409 of the Sarbanes-Oxley Act of 2002 requiring public companies to disclose “on a rapid and current basis” material information regarding changes in a company’s financial condition or operation as required by the Rules of the Securities and Exchange Commission (SEC).

On March 16, 2004 the SEC issued Final Rules amending the Form 8-K. These amendments, effective August 23, 2004, significantly increase the disclosure items and shorten reporting time. As a consequence, beginning August 23, 2004, public companies must generally file an 8-K for expanded disclosure items within four business days of a triggering event.

We are issuing this Advisory to remind our clients of these impending changes and urge them to alert appropriate personnel and institute procedures so that new disclosure items will be timely identified and reported. Failure to comply with these enhanced “real time” disclosure requirements could adversely affect officer certifications required under Section 302 of the Sarbanes-Oxley Act and evaluations of disclosure procedures and internal controls required under Items 307 and 308(c) of Regulation S-K.

Summary

The amendments add or expand ten disclosure items and transfer two items to the current report from periodic reports.

The new disclosure items are:

- Item 1.01 - Entry into a material non-ordinary course agreement;
- Item 1.02 - Termination of a material non-ordinary course agreement;
- Item 2.03 - Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Item 2.04 - Triggering events that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Item 2.05 - Incurring material costs associated with exit or disposal activities;
- Item 2.06 - Concluding that an asset is materially impaired;
- Item 3.01 - Receipt of notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing; and
- Item 4.02 - Concluding or being notified of non-reliance on previously issued financial statements or a related audit report or completed interim review (restatements).

Expanded disclosure items are:

- Item 5.02 - Departure of directors or principal officers, election of directors, or appointment of principal officers; and
- Item 5.03 - Amendments to Articles of Incorporation or Bylaws or change in fiscal year.

Two disclosure items transferred, in part, from periodic reports are:

- Item 3.02 - Unregistered sales of equity securities; and
- Item 3.03 - Material modifications to rights of security holders.

The details of the new items are summarized in Appendix A to this Advisory.

Safe Harbor Exceptions

The new rules operate under a four business day reporting horizon. Acknowledging concerns that the failure to react quickly enough to the new requirements would inappropriately subject a registrant to increased liability, the SEC has adopted a limited safe harbor from claims under Exchange Act Section 10(b) and Rule 10b-5.

The safe harbor applies only to a failure to file a report. Any material misstatements or omissions in a Form 8-K that *is* filed *do not benefit* from the safe harbor and continue to be subject to Exchange Act Section 10(b) and Rule 10b-5 liability. This safe harbor applies only to a company's obligation to file a Form 8-K and not to any other disclosure obligations pertaining to the event in question. Finally, the new safe harbor extends only until the due date of the periodic report (*i.e.*, 10-K or 10-Q) for the period in which the 8-K should have been filed.

Short Form Registration Eligibility. The SEC acknowledged that the potential of losing eligibility to use short-form registration statements (Forms S-2 and S-3) for failure to meet the new Form 8-K reporting filing deadlines would be overly burdensome. Accordingly, the 10(b) and Rule 10b-5 safe harbor also applies to preserve Form S-2 and S-3 filing eligibility. However, a company must be current with all reporting requirements under Form 8-K prior to actually filing a registration statement. *Failing to file a timely Form 8-K for one of the items not covered by the safe harbor will result in the loss of short-form eligibility for 12 months.*

Items Covered by the Safe Harbor

Item	Topic
1.01	Material Definitive Agreement
1.02	Termination of a Material Definitive Agreement
2.03	Direct Financial Obligations and Off-Balance Sheet Arrangements
2.04	Triggering Event Accelerating or Increasing Obligations
2.05	Exit or Disposal Activities
2.06	Impairments
4.02	Non-Reliance - <i>note the safe harbor only applies to determinations made by registrants, not to notices received from auditors</i>

Compliance Suggestions

Determine materiality hurdles in advance. Most of the new disclosure items involve judgments about materiality, but the SEC neither defines the term nor suggests relevant factors for making the determination. In order to meet the compressed reporting horizon, companies may choose to establish materiality hurdles to quickly isolate potential disclosure events for further evaluation.

Appropriate numerical thresholds can serve as legitimate first steps in evaluating materiality. Factors relevant to calculating the threshold include not only the company's financial position and results, but also special areas of risk or weakness in its reporting structure. However, numerical thresholds should not be used in isolation. (*i.e.*, draw downs under credit facilities must be disclosed when they become material in the *aggregate*.) Once established, numerical thresholds should be periodically re-evaluated and adjusted to accommodate changing facts and circumstances.

Establish a disclosure sub-committee (or comparable body). A committee composed of mid-level managers most likely to have knowledge of reportable events in each key area may be in the best position to quickly identify and assemble the information necessary to create a draft disclosure. Potential committee members might include a financial analyst, treasury staff member, controller or assistant controller as well as managers with knowledge of material contracts. One person, however, must be responsible for gathering information and filing a Form 8-K on a timely basis.

Incorporate disclosure requirements into the transaction approval processes. By incorporating the disclosure requirements into the approval process for decisions, the company will accumulate the necessary information prior to the triggering event. Some companies may even incorporate drafting the disclosure into the approval process. These process changes will effectively push back the actual reporting trigger (the formal decision approval) until after the disclosure information has been gathered.

Incorporate additional notice requirements into contract provisions. Where practical, companies may wish to revise contracts to include provisions that amendments or terminations become effective only upon receipt of notice by designated officers (with a copy to in-house counsel).

Take specific steps to address immaterial but reportable events. Receipt of notifications from third parties for material agreement terminations, events of default, or non-compliance with stock exchange listing requirements are all disclosure events, even if there is a cure period or if the company disagrees with the notice. Ideally, the cleanest way to address these issues in a Form 8-K filing will be to resolve them within the four day reporting window. Alternatively, the Form 8-K filing would clearly state the status of the issue. In order to accomplish this, the company will likely need to dramatically shorten its notification response process and may consider putting negotiating strategies in place in advance.

Training and communication. Rather than attempting to train a large group of people on all of the new Form 8-K requirements, the company should tailor specific training for the people most likely to have knowledge of specific reporting triggers. For example, the company might designate a treasury manager for monitoring material direct financial obligations. A separate person might be responsible for monitoring debt covenant compliance. These people are not likely to be the proper person to report amendments to corporate bylaws. By coordinating training and responsibility with specific job accountabilities, companies increase the likelihood that reportable events will be surfaced and addressed in a timely manner.

Involve advisors. It will often be prudent to involve outside advisors, such as auditors, in evaluating a reportable event. This is especially applicable for events that the Company initiates. For example, when the disclosure involves a material charge for exit costs, asset impairment or accrual of a liability related to an off-balance sheet arrangement, the auditors should be consulted. Involving auditors during the disclosure process will minimize the risk that charge accruals will need to be materially revised in subsequent audited or reviewed financial statements.

Plan ahead. Decisions to provide for asset impairments do not trigger a Form 8-K reporting obligation *if* the impairment decision is made in connection with the preparation, review, or audit of financial statements required to be included in the next Form 10-Q or 10-K filing. This Form 8-K reporting exception does not apply to reporting changes in off-balance sheet obligations. Accordingly, when reviewing off-balance sheet obligations, Companies should understand that a decision to make an adjustment may trigger a Form 8-K reporting obligation and should plan accordingly.

APPENDIX A: NEW FORM 8-K DISCLOSURE ITEMS

1.01 Entry into a Material Definitive Agreement

1.02 Termination of a Material Definitive Agreement

Disclosure Triggers

- Entering into, or making a material modification to, a material definitive agreement not made in the ordinary course of business
- Entering into, or making a material modification to, an agreement made in the ordinary course of business, if it is reportable under Item 601(b)(10) of Regulation S-K
- Termination of a reportable agreement other than by expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under such agreement

Disclosure Requirements

- The date of the agreement, amendment or termination
- The identity of the parties and a description of any material relationship between the company, its affiliates and any of the parties other than in the context of the agreement
- A brief description of the terms and conditions of the agreement or amendment that are material to the company
- A brief description of the material circumstances surrounding the termination
- Any material early termination penalty incurred by the company

Comments

Non-binding agreements such as letters of intent are not required to be disclosed even if a non-material portion of such letter is binding. However, the signing of a material agreement subject to customary closing conditions triggers the filing and disclosure requirement.

Instructions

Copies of the actual agreements do not need to be filed as exhibits to the 8-K. However, the requirement that copies of the actual agreements be filed with the next periodic report (10-Q or 10-K) continues.

Filing a Form 8-K may constitute the first “public announcement” of a business combination or other extraordinary corporate transaction for purpose of Rule 165 under the Securities Act and Rule 14d2-(b) or Rule 14a-12 under the Exchange Act, triggering filing obligations under those rules. The SEC has amended Form 8-K to allow users to satisfy multiple reporting requirements with a single filing by checking one or more boxes on the cover page. To use this feature, the filing requirements of all the applicable rules must be met by the information included in the 8-K.

1.03 Bankruptcy or Receivership

(The substantive requirements formerly included in Item 3 of Form 8-K)

Disclosure Triggers

- Appointment of a receiver, fiscal agent, or similar officer in a federal or state proceeding for a registrant or its parent

- A court or other governmental authority has assumed jurisdiction over substantially all of the assets or business of the registrant or its parent

Disclosure Requirements

- The identity of the court or governmental authority, type of proceeding, and date that jurisdiction was assumed
- The identity and date of appointment of the receiver, fiscal agent, or similar officer
- A description of the date and material features of any order confirming a plan of reorganization, including a copy of the plan, the number of shares issued and reserved for future issuance, and information as to the assets and liabilities of the registrant or its parent

2.01 Completion of Acquisition or Disposition of Assets

(The substantive requirements formerly included in Item 2 of Form 8-K)

Disclosure Triggers

- Completing the acquisition or disposition of assets when the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets exceeds 10% of the total assets of the registrant and its consolidated subsidiaries *and* the transaction is not made in the ordinary course of business

Disclosure Requirements

- The date of the transaction, a description of the assets
- The identity of the parties and a description of any material relationship between the company, its affiliates and any of the parties other than in the context of the transaction
- The nature and amount of the consideration given or received for the assets, including the source of funds of the transaction is a related party acquisition

Comments

In contrast to the materiality standard in Item 1.01, this item retains the bright-line “significant” assets test in old Item 2 of Form 8-K. The SEC’s adopting release implies that an acquisition or disposition agreement may be “material” (and thus reportable under Item 1.01) but not meet the “significant” assets test of Item 2.01.

2.02 Results of Operations and Financial Condition

(The substantive requirements formerly included in Item 12 of Form 8-K)

Disclosure Triggers

- A public announcement or release by a registrant, or any person acting on its behalf, disclosing material non-public information regarding the registrant’s results of operations or financial condition for a completed quarterly or annual fiscal period

Disclosure Requirements

- The date of the announcement or release
- Identify the announcement or release and include the text as an exhibit

Instructions

Form 8-K is not required for disclosures made orally, by telephone, webcast, broadcast, or similar means if the disclosure occurs within 48 hours after a related, written announcement or release that was furnished on Form 8-K.

2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant

Disclosure Triggers

- Becoming obligated on a material direct financial obligation
- Entering into a facility, program or similar arrangement that creates or may give rise to direct financial obligations
- Becoming directly or contingently liable for an obligation that is material to the registrant arising out of an off-balance sheet arrangement

Disclosure Requirements

- The date on which the registrant became directly or contingently liable on the obligation and a brief description of the transaction or agreement creating the arrangement or obligation
- The nature and amount of the obligation including the terms of its payment and any material terms whereby it may become direct (if contingent) or may be accelerated or increased and the nature of any recourse provisions
- A brief description of other terms and conditions of the obligation or arrangement that are material to the registrant
- For obligations arising out of off-balance sheet arrangements, the maximum potential amount of future payments (undiscounted) that the registrant may be required to make

Instructions

Direct Financial Obligations: A direct financial obligation is defined as any of the following (as further defined in Item 303(a)(5)(ii)(A)-(C) of Regulation S-K):

- A long term debt obligation; or
- A capital lease obligation; or
- An operating lease obligation; or
- A short-term obligation arising other than in the ordinary course of business.

The obligation to disclose information arises when the registrant either enters into an agreement enforceable against it or closes or settles the transaction under which the direct financial obligation arises or is created.

When an agreement comprises a facility, program or similar arrangement that creates or may give rise to direct financial obligations in connection with multiple transactions, the disclosure requirement applies both when the registrant enters into the agreement and when a series of previously undisclosed individually immaterial obligations become material in the aggregate. Commercial paper programs or credit facilities can create multiple reporting triggers under this disclosure requirement.

Off-Balance Sheet Obligations: An off-balance sheet arrangement is defined in Item 303(a)(4)(ii) of Regulation S-K as any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has:

- Any obligation under a guarantee; or
- A retained or contingent interest in assets transferred to an unconsolidated entity; or
- An obligation or contingent obligation indexed to the registrant's own stock, classified in the stockholder's equity section and exempt from FASB 133 "*Accounting for Derivative Instruments and Hedging Activities*;" or
- An obligation or contingent obligation arising out of a variable interest accounted for under FASB Interpretation 46 "*Consolidation of Variable Interest Entities*"

Reporting requirements for off-balance sheet arrangements are triggered whether or not a company is also a party to the underlying transaction or agreement. In connection with arrangements for contingent obligations when neither the company nor any of its affiliates is a party to the underlying transaction or agreement, the four business day period is triggered on the earlier of the fourth business day after the contingent obligation is created or arises, or the day on which an executive officer of the registrant becomes aware of the contingent obligation.

2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement

Disclosure Triggers

- Occurrence of a triggering event causing the increase or acceleration of a direct financial obligation of the registrant with material consequences
- Occurrence of a triggering event causing an obligation under an off-balance sheet obligation to increase, be accelerated, or become a direct financial obligation with material consequences
- Receipt of a notice of a triggering event

Disclosure Requirements

- The date of the triggering event and a brief description of the agreement under which the obligation was created that is increased, accelerated, or becoming a direct financial obligation
- The nature and amount of the obligation, as increased if applicable, and the terms of payment or acceleration
- Any other material obligations that may arise, increase, or be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration or the off-balance sheet arrangement becoming a direct financial obligation

Instructions

An off-balance sheet obligation becomes a direct financial obligation when it is accrued under FASB 5 "*Accounting for Contingencies*," which triggers a disclosure obligation.

2.05 Costs Associated with Exit or Disposal Activities

Disclosure Triggers

- Making a commitment to an exit or disposal plan or employee termination plan under which material charges will be incurred and accounted for under FASB 146 *“Accounting for Costs Associated with Exit or Disposal Activities”*

Disclosure Requirements

- The date of the commitment
- A brief description of the course of action, related facts and circumstances and expected completion date
- A breakdown of the amount (or range of amounts) of each major cost, total costs, and future cash expenditures associated with the exit or disposal

Instructions

Even if an exit or disposal decision is too recent for the registrant to be able to quantify the charges, disclosure of the decision is still required within four days of the commitment, with an amended Form 8-K to follow once the amounts are quantifiable.

2.06 Material Impairments

Disclosure Triggers

- Reaching a conclusion that a material charge for impairment to an asset is required

Disclosure Requirements

- The date of the conclusion, a description of the impaired asset and the facts and circumstances leading to the conclusion that a charge for impairment is required
- An estimate of the amount or range of amounts of the impairment charge, including the amount that will result in future cash expenditures

Instructions

Even if an impairment decision is too recent for the registrant to be able to quantify the charges, disclosure of the decision is still required within four days of the decision, with an amended Form 8-K to follow once the amounts are quantifiable.

No filing is required if the impairment decision is made in connection with the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, provided that the periodic report is filed on a timely basis and the impairment is disclosed in the report.

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

Disclosure Triggers

- Receipt of a notice, public reprimand letter, or similar communication from the national securities exchange or national securities association that maintains the principal listing for any class of the registrant's common equity that:
 - The registrant or their securities does not satisfy a rule or standard for continued listing on the exchange or association; or
 - The exchange has submitted an application to the SEC to delist a class of the registrant's securities; or
 - The association has taken all necessary steps under its rules to delist the security
- The registrant notifies the national securities exchange or national securities association that maintains the principal listing for any class of the registrant's common equity that the registrant is aware of any material noncompliance with a rule or standard for continued listing
- The registrant taking definitive action to withdraw from its principal national securities exchange, or automated inter-dealer quotation system, including by reason of a transfer of the listing or quotation to another securities exchange or quotation system

Disclosure Requirements

- The date that the registrant received (or provided) the notice, the listing rule or standard that the registrant fails, and any action or response that has been taken or is being planned
- A summary of any public reprimand letter or similar communication
- A description of any decisions to withdraw or transfer listings or quotations and the date of the action

Instructions

Registrants whose securities are quoted exclusively (*i.e.*, the securities are not otherwise listed on an exchange or association) on automated inter-dealer quotation systems are not subject to these disclosure requirements. Such registrants are not required to file a Form 8-K if the securities are no longer quoted on such quotation system. If a security is listed on an exchange or association and is also quoted on an automated inter-dealer quotation system, the registrant is subject to the disclosure obligations if any of the triggering events occur.

If a registrant receives a notice which triggers a disclosure duty, the disclosure is due within four business days of receipt of the notice even if the registrant has the benefit of a grace period or similar extension period during which it may cure the deficiency.

The registrant is not required to make a disclosure when the delisting is the result of an entire class of security being called for redemption, maturity, or retirement when appropriate notice has been given and necessary funds have been deposited with an agency.

The registrant is not required to make a disclosure when the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution therefore and represent no other right, except the right to receive an immediate cash payments (or the right of dissenters to receive the appraised or fair value of their holdings).

The registrant is not required to make a disclosure when all rights pertaining to the entire class of the security have been extinguished; provided, however, that where such event occurs as the result of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired, and no appeals shall be pending.

3.02 Unregistered Sales of Equity Securities

(Previously reportable under Form 10-Q Item 2 or Form 10-K Item 5)

Disclosure Triggers

- Selling or Entering into an enforceable agreement to sell equity securities in a transaction that will not be registered under the Securities Act, when that the securities to be sold constitute 1% or more of the number of shares outstanding of that class of equity securities (5% or more for Small Business Issuers).

Disclosure Requirements

- The information set forth in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K or Regulation S-B, as applicable

Instructions

For purposes of this item, “the number of shares outstanding” refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.

3.03 Material Modification to Rights of Security Holders

(Previously reportable under Form 10-Q Item 2 or Form 10-K Item 5)

Disclosure Triggers

- Making a material modification to the rights of the holders of any class of registered securities
- Making a material limitation or qualification of the rights of one class of registered securities by issuing or modifying the rights of any other class of securities

Disclosure Requirements

- The date of the modification, the title of the class of securities and a brief description of the general effect of such modification upon the rights of holders of such securities
- The date of issuance of the new securities or the modification of rights of securities and the general effect of the issuance or modification upon the rights of the holders of the registered securities

Instructions

Working capital restrictions and other limitations upon the payment of dividends must be reported under this item.

4.01 Changes in Registrant's Certifying Accountant

(The substantive requirements formerly included in Item 4 of Form 8-K)

Disclosure Triggers

- Resignation, dismissal or indication of intention to decline to stand for re-appointment of an independent accountant previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary
- Appointment of a new independent accountant as either the principal accountant or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary

Disclosure Requirements

- For resignations, dismissals, or indications of intention to decline to stand for re-appointment, the information required by Item 304(a)(1) of Regulation S-K or Regulation S-B, as applicable, including compliance with Item 304(a)(3) of Regulation S-K or Regulation S-B, respectively
- For appointments, the information required by Item 304(a)(2) of Regulation S-K or Regulation S-B as applicable

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

Disclosure Triggers

- Concluding that any previously issued financial statements, required under Regulation S-X or Regulation S-B should no longer be relied upon because of an error in such financial statements
- Receiving notice or advice from its independent accountant that disclosure should be made or action taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements

Disclosure Timing

- Disclosure must be made within four business days of an internal decision that the financial statements should no longer be relied upon. An amended filing including a letter from the registrant's independent accountant must be filed within two business days of receipt of such letter.

Disclosure Requirements

- The date of the conclusion, notification or advice regarding non-reliance, an identification of the financial statements that should no longer be relied upon
- A brief description of the facts underlying the conclusion or the information provided by the accountant
- A statement of whether the audit committee, or the board of directors, or officers, discussed the matters disclosed in the filing with the registrant's independent accountant
- A letter from the registrant's independent accountant addressed to the Commission stating whether the independent accountant agrees with the statements made by the registrant in the filing and if not, stating the respects in which it does not agree

Instructions

The registrant is required to provide the independent accountant with its proposed disclosures and request that a letter as described above be furnished as promptly as possible. Even if the registrant has not received a letter from its independent accountant, disclosure of the conclusion, notice or advice is still required within four business days. The letter is to be filed with an amended Form 8-K due within two business days of receipt of the letter.

5.01 Changes in Control of Registrant

(The substantive requirements formerly included in Item 1 of Form 8-K)

Disclosure Triggers

- A change in control of the registrant

Disclosure Requirements

- The identity of the person acquiring control, the date of control change and a description of the transaction, including the amount of consideration and the source of funds
- The basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control
- The person from whom control was assumed and any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters
- The information required by Item 403(c) Regulation S-K or Regulation S-B

Instructions

If the funding for the change of control transaction was obtained from a bank loan made in the ordinary course of business, the identity of the bank may be omitted at the request of the person obtaining control, provided certain conditions are met.

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

(An expansion of the substantive requirements formerly included in Item 6 of Form 8-K)

Disclosure Triggers

- Any resignation, termination, removal from office or refusal to stand for re-election of a director, principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions
- Appointment of a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions
- Election of a new director, other than by a vote of security holders at an annual or special meeting

Disclosure Requirements

- Identify the director or officer and note the date of the event.

- For Directors:
 - Disclose any position held by the director on any committee of the Board of Directors at the time of the event
 - If the director has resigned, been removed for cause, or refuses to stand for re-election: include a brief description of *the circumstances of any disagreement* that the registrant believed caused, in whole or in part, the director’s resignation or refusal to stand for re-election; and
 - Include a copy of any written correspondence received from the director concerning the circumstances surrounding his or her departure
 - Provide the director with a copy of the filing and an opportunity to furnish the registrant with a letter stating whether he or she agrees with the statements made in the disclosure and if not, stating the respects in which he or she does not agree. Any such letter to be filed as an exhibit to the previously filed 8-K within two business days of receipt
 - For newly elected directors (other than by a vote of security holders at an annual or special meeting): A brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director; and
 - The committees of the Board of Directors to which the new director has been, or is expected to be, named; and
 - The information required by Item 404(a) of Regulation S-K or Item 404(a) of Regulation S-B, as applicable
- For Officers:
 - For appointments: the information required by Items 401(b), (d), (e) and Item 404(a) of Regulation S-K or Items 401(a)(4), (a)(5), (c) and Items 404(a) and (b) of Regulation S-B; and
 - A brief description of the material terms of any employment agreement between the registrant and the officer

Comments

The SEC has neither defined “disagreement” nor provided any materiality guidance regarding directors’ disagreements. Often board level decisions are not unanimous. The extent of the disclosure obligation is not clear when a “normal course” disagreement is followed by a director’s decision not to stand for re-election.

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

(An expansion of the substantive requirements formerly included in Item 8 of Form 8-K)

Disclosure Triggers

- For registrants with a class of equity securities registered under Section 12 of the Exchange Act only:
 - Amending the articles of incorporation or bylaws without the proposal for the amendment being first disclosed in a proxy statement or information statement filed by the registrant

- A change in fiscal year other than by means of a submission to a vote of security holders or an amendment to the articles of incorporation or bylaws

Disclosure Requirements

- For amendments: The effective date of the amendment and a description of the provision adopted or changed by the amendment along with the previous provision
- For fiscal year changes: The date of the decision, the date of the new fiscal year, and the form on which the report covering the transition period will be filed

5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans

(The substantive requirements formerly included in Item 11 of Form 8-K)

Disclosure Triggers

- Receipt of the notice required by section 101(1)(2)(E) of the Employment Retirement Income Security Act of 1974
- Transmission of a timely notice to an affected officer or director

Disclosure Requirements

- The information specified in Rule 104(b) of Regulation BTR and the date of the notice, if applicable

5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics

(The substantive requirements formerly included in Item 10 of Form 8-K)

Disclosure Triggers

- Making any substantive (non-technical, non-administrative) amendment to, waiver, or implicit waiver of, a registrant's code of ethics applying to the principal executive officer, principal financial officer, principal accounting officer, controller or persons performing similar functions when such amendment, waiver or implicit waiver relates to any element of the code of ethics definition enumerated in Item 406(b) of Regulation S-K or Regulation S-B

Disclosure Timing

- The registrant may meet the disclosure requirement by posting the required information on its Internet website within five business days following the date of the amendment or waiver if the registrant has disclosed its Internet address and intention to provide disclosure in this manner in its most recently filed annual report

Disclosure Requirements

- Briefly describe the date and nature of any amendment or waiver
- Identify the person to whom any waiver was granted

Instructions

For purpose of this disclosure, “waiver” means the approval by the registrant of a material departure from a provision of the code of ethics. The term “implicit waiver” means the registrant’s failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer of the registrant.

7.01 Regulation FD Disclosure

(The substantive requirements formerly included in Item 9 of Form 8-K)

Disclosure Triggers

- Disclosure by a registrant, or any person acting on its behalf, of any material nonpublic information to a broker, dealer, investment advisor, investment manager, or investment company or affiliated person of any of foregoing
- Disclosure by a registrant, or any person acting on its behalf, of any material nonpublic information to a holder of the registrants securities under circumstances in which it is reasonably foreseeable that the person will purchase or sell the registrant’s securities on the basis of the information

Disclosure Timing

- Simultaneously, in the case of an intentional disclosure, and promptly, in the case of a non-intentional disclosure

Disclosure Requirements

- The material information included in the disclosure that triggered the reporting obligation

Instructions

“Intentional” means a selective disclosure of material nonpublic information when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic. “Promptly” means as soon as reasonably practical, but in no event after the later of 24 hours or the commencement of the next day’s trading, after the registrant learns that there has been a non-intentional disclosure.

8.01 Other Events

(The substantive requirements formerly included in Item 5 of Form 8-K)

Disclosure Triggers

- Optional, any events not otherwise triggering disclosure, that the registrant deems of importance to security holders

9.01 Financial Statements and Exhibits

(The substantive requirements formerly included in Item 7 of Form 8-K)

Disclosure Triggers

- Financial statements and pro forma financial exhibits for transactions reported under Item 2.01

Disclosure Timing

- Financial information may be filed with the initial Form 8-K (in response to Item 2.01) or by amendment not later than 71 calendar days following the filing of the initial Form 8-K

Disclosure Requirements

- Financial statements and pro forma financial exhibits prepared in accordance with Regulation S-X

We Can Help

Katten Muchin Zavis Rosenman is available to discuss the Form 8-K Rules and their potential implications for your company. Please direct questions to one of the co-chairs of Katten Muchin Zavis Rosenman's Securities Practice:

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