

SEC Adopts Amendments to Form 8-K Increasing the Number of Events that Trigger the Requirement to File a Current Report

WIGGIN AND DANA

Counsellors at Law

The Securities and Exchange Commission (SEC) recently issued final rules intended to be responsive to the "real time issuer disclosure" mandate in Section 409 of the Sarbanes-Oxley Act, that requires public companies to disclose material information on a "rapid and current basis". The new rules expand the number of events that are reportable on Form 8-K by adding eight new items, requiring disclosure of two items on Form 8-K that are currently required in the company's periodic reports, and expanding the disclosures required under two existing Form 8-K items. Public companies should begin reviewing their disclosure controls and procedures and implement any changes necessary to ensure that all appropriate company personnel are informed of the new reporting requirements and accordingly assist the Company in meeting its new "real time" reporting obligations. *Companies must comply with the new Form 8-K requirements effective August 23, 2004.*

The eight new disclosure items are:

- Entry into a material agreement outside the ordinary course;
- Termination of a material agreement outside the ordinary course;
- Creation of a material direct financial obligation or obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement;

- Material costs associated with exit or disposal activities;
- Material impairments;
- Notice of delisting or failure to satisfy a continued listing rule or standard, or transfer of listing; and
- Non-reliance on previously issued financial statements or a related audit report or completed interim review (restatements).

The two disclosure items transferred from the periodic reports are:

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

Expanded disclosure will be required in connection with the following items:

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

The amendments shorten the Form 8-K filing deadline by replacing the current deadlines (5 business days for some items and 15 calendar days for other items) with a new 4 business day filing deadline for substantially all items. Recognizing that many of the new Form 8-K disclosure obligations require management to more quickly assess whether or not an event is material

for purposes of triggering the reporting obligations, the SEC adopted a new limited safe harbor from claims under Section 10(b) and Rule 10b-5 for failure to timely file a Form 8-K in connection with many of the new reporting obligations.¹

The full text of the SEC's release (Release Nos. 33-8400; 34-49424) is available on the Internet at <http://www.sec.gov/rules/final/33-8400.htm>, however, the most important provisions are described in more detail below.

Discussion

The following is a detailed discussion of disclosure requirements relating to items reportable on Form 8-K that are the subject of the new rules.

Item 1.01 Entry into a Material Definitive Agreement.

This new item requires the disclosure of material definitive agreements entered into by a company that are not made in the ordinary course of business. A company must also disclose any material amendment of such material definitive agreements under this item. A company should also disclose a material amendment on Form 8-K even if the underlying agreement was not previously disclosed by the company, if the agreement as amended, would be reportable under the new disclosure requirements. In connection with this item, a company must disclose the following information:²

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

Item 1.02 Termination of a Material Definitive Agreement.

This new item requires disclosure if a material definitive agreement of the company not made in the ordinary course of business is terminated, other than by expiration of the agreement or as a result of all parties completing their obligations under such agreement, and if the termination of such agreement is material to the company. In the event of such termination, the company must disclose the following:

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

No disclosure is required under this item

during negotiations or discussions regarding termination of a material definitive agreement - disclosure is only required if and when the agreement has been terminated.

Item 1.03 Bankruptcy or Receivership

This item retains the basic requirements currently included in Item 3 of Form 8-K regarding a company's entry into bankruptcy or receivership. The SEC, however, adopted minor changes to make the item more readable.

Item 2.01 Completion of Acquisition or Disposition of Assets

This item contains most of the requirements included in current Item 2 of Form 8-K. It requires disclosure if a company, or any of its majority-owned subsidiaries, has acquired or disposed of a significant amount of assets, other than in the ordinary course of business. The SEC has recognized that there will likely be a relationship between the disclosure provided under this item and the disclosure required by new Item 1.01, which the SEC resolved as follows: "a company will report its entry into a material definitive agreement ... under Item 1.01, and then later disclose the closing of the acquisition ... under Item 2.01."

Item 2.02 Results of Operations and Financial Condition³

New Item 2.02 is unchanged from the requirements of current Item 12 of Form 8-K regarding public announcements or

1. In addition, the company's failure to timely file a Form 8-K relating to any of the safe-harbor disclosures will not cause it to lose eligibility to use short-form registration on Forms S-2 or S-3, so long as the company is current in its Form 8-K filings at the actual time of a Form S-2 or S-3 filing. Similarly, a company's failure to timely file a Form 8-K report would not affect a security holder's ability to rely on Rule 144 to resell securities.

2. The agreement itself need not be filed with the SEC until the company files its next periodic report or registration statement, but the SEC encourages companies to file the agreement as an exhibit to the Form 8-K in which it is discussed when feasible, particularly if no confidential treatment is requested. In addition, since the new Item 1.01 requires disclosures that relate to extraordinary corporate transactions, which may constitute the first "public announcement" for purposes of Rule 165 under the Securities Act and Rule 14d-2(b) or Rule 14a-12 under the Exchange Act, to avoid duplicative filings, the SEC has amended Form 8-K to enable a company to check one or more boxes on the cover page to indicate that it is simultaneously satisfying its filing obligations under those rules.

3. Note, the amendments state that if a report on Form 8-K contains disclosures under new Items 2.02 or 7.01 (Regulation FD Disclosure), whether or not the report contains disclosures regarding other items, all exhibits to that report relating to Item 2.02 or 7.01 will be deemed furnished, and not filed, unless the company specifies otherwise. This is merely a clarification of the SEC's position on this matter and does not change its existing position.

releases of material non-public information regarding a company. However, in the adopting release, the SEC announced that it, together with the Department of Justice and representatives from the Department serving on the President's Corporate Fraud Task Force, have confirmed that the certification requirement of Section 906 of the Sarbanes-Oxley Act does not apply to Form 8-K.

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

This new item requires a company to disclose the following information if it incurs a material direct financial obligation:⁴

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

In addition, 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, it must provide the following information:

- The date on which the company becomes directly or contingently liable on the obligation and a brief description of the transaction;

- A brief description of the nature and amount of the obligation of the company under the arrangement;
- The maximum potential amount of future payments (undiscounted) that the company may be required to make; and
- A brief description of the other terms and conditions of the obligation that are material to the company.

If the obligation required to be disclosed under Item 2.03 is a security, or a term of a security, that has been or will be sold pursuant to an effective registration statement, the company is not required to file a Form 8-K.

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

This new item requires a company to disclose a triggering event causing the increase or acceleration of a direct financial obligation of the company if the consequences of the event are material to the company. In such case, the company must provide the following information on Form 8-K:

- The date of the triggering event and a brief description of the transaction under which the direct financial obligation was created, is increased or accelerated;
- A brief description of the triggering event;
- The amount of the direct financial obligation and 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 financial obligation.

Also, if a triggering event occurs causing a company's obligation under an off-balance sheet arrangement to increase or be accelerated, or causing a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, and the consequences of such event are material to the company, it must disclose the following information:

- The date of the triggering event and 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, and 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 under the off-balance sheet arrangement or its becoming a direct financial obligation of the company.

Disclosure is required if a triggering event occurs in respect of the company's obligation under an off-balance sheet arrangement and the consequences are material to the company, whether or not the company is a party to the transaction or agreement under which the triggering event occurs.

4. The item defines a "direct financial obligation" as any of the following: (1) a long-term debt obligation, as defined in Item 303(a)(5)(ii)(A) of Regulation S-K (17 CFR 29.303(a)(5)(ii)(A)); (2) a capital lease obligation, as defined in Item 303(a)(5)(ii)(B) of Regulation S-K (17 CFR 29.303(a)(5)(ii)(B)); (3) an operating lease obligation, as defined in Item 303(a)(5)(ii)(C) of Regulation S-K (17 CFR 29.303(a)(5)(ii)(C)); (4) or a short-term debt obligation that arises other than in the ordinary course of business.

Item 2.05 Costs Associated with Exit or Disposal Activities

This new item requires disclosure when the company commits to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146

Accounting for Costs Associated with Exit or Disposal Activities (SFAS No. 146), under which material charges will be incurred under generally accepted accounting principles applicable to the company. Specifically the company must disclose:

- The date of the commitment to the course of action and a description of the course of action;
- For each major type of cost associated with the course of action, an estimate of the total amount or range of amounts expected to be incurred in connection with the action;
- The company's estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

If at the time of filing the company is unable to make a good faith estimate of the amount of the charges, it need not disclose an estimate at that time, but must nevertheless file the Form 8-K, and amend the filing within 4 business days after the company formulates its estimate.

Item 2.06 Material Impairments

This new item requires disclosure when a company concludes that a material charge for impairment to one or more of its assets (including impairment of securities or goodwill) is required under the generally accepted accounting principles applicable to the company. Specifically, the company must disclose:

- The date of the conclusion that a material charge is required and a description of the impaired asset or assets and the

facts and circumstances leading to the conclusion the charge is required; and

- The company's estimate of the amount or range of amounts of the impairment charge; and
- Any estimate of the amount of the impairment charge that will result in future cash expenditures.

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

New Item 3.01(a) requires a company to report its receipt of a notice from the national securities exchange or national securities association that maintains the principal listing for the company's common equity securities indicating that: the company or a class of its securities does not satisfy a rule or standard for continued listing on the exchange or association; or that the exchange has submitted an application under Exchange Act Rule 12d2-2 to the SEC to delist such class of the company's securities; or the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system. In connection with this item, the company must disclose the following information:

- The date that it received the notice;
- The rule or standard for continued listing that the company fails, or has failed, to satisfy; and
- Any action or response the company has determined to take in response to the notice.

In addition, if the company has notified the exchange or association that maintains its principal listing that the company is in material noncompliance with a rule or standard for continued listing, the company must disclose:

- The date that the company provided such notice to the exchange or association;

- The rule or standard for continued listing that the registrant fails, or has failed, to satisfy; and
- Any action or response that the company has determined to take regarding its noncompliance.

Furthermore, if the national securities exchange or association, in lieu of suspending trading in or delisting the company's securities, issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard, the company must state the date and summarize the contents of the communication.

Finally, Item 3.01(d) requires that, if the company has taken definitive action to cause the listing of a class of its common equity securities to be withdrawn from the exchange, or terminated from the automated inter-dealer quotation system, the company must describe the action taken and state the date of the action. This requirement includes disclosure of action taken by a company to transfer such a listing or quotation of its securities to another securities exchange or quotation system. The definitive action taken by the company may also include the adoption of a resolution by the board of directors, or committee of the board, to delist the class of securities.

Item 3.02 Unregistered Sales of Equity Securities

This new item requires a company to disclose the information specified in paragraphs (a), (c), (d) and (e) of Item 701 of Regulation S-K regarding the company's sale of equity securities in a transaction that is not registered under the Securities Act. This disclosure is currently required in Item 2(c) of Forms 10-Q and 10-QSB and Item 5(a) of Forms 10-K and 10-KSB.

Item 3.03 Material Modifications to Rights of Security Holders

This new item requires a company to disclose material modifications to the rights of the holders of any class of the company's registered securities and to briefly describe the general effect of such modifications on such rights. The substance of the disclosure is currently required by Items 2(a) and (b) of Forms 10-Q and 10-QSB.

Item 4.01 Changes in Registrant's Certifying Accountant

This item is substantively the same as current Item 4 of Form 8-K, requiring disclosure of the resignation, dismissal or engagement of an independent accountant. The only revision made to the substantive requirements of current Item 4 is to delete the phrase "and the related instructions to Item 304" as a company routinely needs to consider and comply with the instructions to all disclosure items containing instructions.

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

This new item requires a company to file a Form 8-K if and when it concludes that any of the company's previously issued financial statements covering one or more years or interim periods should no longer be relied upon because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20 (APB Opinion No. 20). This item requires the company to disclose the following information:

- The date of the conclusion regarding the non-reliance and an 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; and

- A statement of whether the audit committee, or the board of directors, or an authorized officer or officers, discussed with the company's independent accountant the subject matter giving rise to the conclusion.

Similarly, if the company is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, it must disclose the following information:

- The date on which the company was so notified;
- Identification of the financial statements that should no longer be relied upon;
- A brief description of the information provided by the accountant; and
- A statement of whether the audit committee, or the board of directors, or an authorized officer or officers, discussed with the independent accountant the subject matter giving rise to the notice.

The company must provide the independent accountant with a copy of the disclosures it is making under Item 4.02(b) no later than the same day it files these disclosures with the SEC. The company must also request the independent accountant to furnish to the company as promptly as possible a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company and, if not, stating the respects in which it does not agree. The company must then amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit within 2 business days of the company's receipt of the letter.

Item 5.01 Changes in Control of Registrant

New Item 5.01 retains the basic substantive requirements currently included in Item 1 of Form 8-K regarding a change in control of a registrant, however the new Item 5.01 streamlines the language for purposes of clarity.

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

A director resigns or refuses to stand for re-election due to a disagreement or is removed for cause

Paragraph (a) of Item 5.02 broadens the scope of current Item 6 of Form 8-K which requires disclosure only if a director departed as a result of a disagreement, provided a letter to the company describing the disagreement and requested that the company publicly disclose the matter. Under the revised item, if a director has resigned or refuses to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the company, on any matter relating to the company's operations, policies or practices, or if a director has been removed for cause from the board of directors, the company must disclose:

- The date of the director's resignation, refusal to stand for re-election or removal;
- Any positions held by the director on any committee of the board of directors at the time of the director's resignation, refusal to stand for re-election or removal; and
- A brief description of the circumstances representing the disagreement that caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal.

If the director furnishes the company with any correspondence relating to his or her departure, the company must file a copy of the correspondence as an exhibit to the report on Form 8-K. The company must provide the director with a copy of the disclosures it is making in response to this item no later than the day that the company files the disclosures with the SEC.

The company must also provide the director with the opportunity to furnish a letter addressed to the company as promptly as possible stating whether he or she agrees with the company's disclosures in response to this item and, if not, the respects in which he or she does not agree. Finally, the company must file any letter it receives from the director with the SEC as an exhibit to an amendment of the previously filed Form 8-K within two business days after receipt by the company.

Certain officers retire, resign or are terminated; a director retires, resigns, is removed or refuses to stand for re-election for any reason other than as a result of a disagreement or for cause

Paragraph (b) of Item 5.02 requires disclosure when the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns, or is terminated from that position. The item also requires disclosure when a director retires, resigns, is removed or declines to stand for re-election in the case where the company is not required to provide disclosure under Item 5.02(a).

The registrant appoints certain new officers or a new director is elected

Paragraph (c) of Item 5.02 requires disclosure if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions. The company must disclose the officer's name, position, the date of the appointment, information regarding the background of the officer and certain related transactions with the company, and a brief description of the material terms of any employment agreement between the company and the officer.

In addition, if a new director is elected to the board, except by a vote of security holders at an annual meeting or a special meeting convened for such purpose, paragraph (d) of Item 5.02 requires disclosure of the new director's name, the election date, a brief description of any arrangement or understanding pursuant to which the new director was selected as a director, any committees to which the new director has been, or at the time of the disclosure is expected to be, named, and information regarding certain related transactions between the new director and the company.

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

This item requires a company to disclose any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously

filed proxy statement or information statement. The item requires the company to disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and, if applicable, the previous provision. If the company determines to change its fiscal year from that used in its most recent filing with the SEC by means other than a submission to a vote of security holders through the solicitation of proxies or otherwise, or by an amendment to its articles of incorporation or bylaws, the company must state the date of that determination, the date of the new fiscal year-end and the form on which the report covering the transition period will be filed.

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This document is intended as an informational notice and does not constitute legal advice. If you have any questions or would like to discuss a particular situation, you should contact your usual Wiggin and Dana attorney or one of the following attorneys:

Michael Grundeis — 203.363.7630
mgrundeis@wiggin.com

Norman J. Fleming — 203.498.4328
nfleming@wiggin.com

Mark Kaduboski — 203.363.7629
mkaduboski@wiggin.com

For more information about the firm and our Securities and Venture Capital Group, visit our website at www.wiggin.com.

One Century Tower
P.O. Box 1832
New Haven CT
06508-1832
Telephone 203.498.4400
Telefax 203.782.2889

400 Atlantic Street
P.O. Box 110325
Stamford CT
06911-0325
Telephone 203.363.7600
Telefax 203.363.7676

450 Lexington Avenue
Suite 3800
New York NY
10017-3913
Telephone 212.490.1700
Telefax 212.490.0536

One CityPlace
185 Asylum Street
Hartford CT
06103-3402
Telephone 860.297.3700
Telefax 860.525.9380

Quaker Park
1001 Hector Street, Ste. 240
Conshohocken PA
19428-2395
Telephone 610.834.2400
Telefax 610.834.3055