SEC Adopts Additional 8-K Requirements

On March 11, 2004, the SEC adopted amendments to Form 8-K to require the reporting of a number of additional events and to expand the required disclosure relating to existing reportable events. These amendments respond to the "real time issuer disclosure" mandate in Section 409 of the Sarbanes-Oxley Act. The new rules reorganize and renumber the Form 8-K items into topical categories, add eight new items to the list of events that require a company to file a Form 8-K, transfer two items from other Exchange Act reports and expand disclosure relating to two existing Form 8-K items.

In addition, the new rules shorten the time for filing a Form 8-K to within four business days of the triggering event. The new rules will become effective on August 23, 2004.

We previously issued a Securities Alert on March 15, 2004, which can be found on our website at www.ropesgray.com under "News & Publications," that describes the SEC's initial press release on these amendments. The text of the final rules may be found on the SEC's website by clicking here.

New Disclosure Items

Entry into a Material Definitive Agreement (Item 1.01)

- The new rules require disclosure of material definitive agreements that are not made in the ordinary course of business and any material amendment to such an agreement.
- This new disclosure item parallels the definitions in Item 601(b)(10) about what constitutes a material agreement.
  - Item 601(b)(10) includes management compensation agreements that are deemed to be material agreements.
- In response to comments, the SEC eliminated the proposed requirement that companies disclose their entry into non-binding agreements, and it eliminated the proposed requirement to file the material agreement as a Form 8-K exhibit.[1]

Termination of a Material Definitive Agreement (Item 1.02)

- The termination of a material definitive agreement not made in the ordinary course of business, other than by expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under the agreement, triggers disclosure under the new rules, if the termination is material to the company.
- No disclosure is required during negotiations or discussions about terminating a material definitive agreement unless and until the agreement has been terminated.
  - Also, no disclosure is required if the company believes, in good faith, that the agreement has not been terminated, unless the company has received a notice of termination pursuant to the terms of the agreement.

[1] The filing of a material agreement as a Form 8-K exhibit is not required, but it is encouraged when feasible, particularly when no confidential treatment is requested.

- In response to comments, the SEC has generally eliminated the proposed requirement to disclose management's analysis of the effect of various triggering events, which some referred to as a "mini-MD&A" throughout the new 8-K requirements. The disclosure must still include all material information necessary to make the required disclosures not misleading.

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

- Disclosure is now required when a company becomes obligated on a material direct financial obligation.
  - Direct financial obligations include long-term debt, capital leases, operating leases, and short-term obligations incurred other than in the ordinary course of business.
  - No separate Form 8-K is required if the direct financial obligation is issued under a registration statement that includes the required disclosure.
- Similarly, disclosure is required if a company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement.
- This new disclosure item refers to Item 303(a)(4)(ii) of Regulation S-K for the definition of the term "off-balance sheet arrangement."

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

- An 8-K is required to be filed upon the occurrence of an event causing the increase or acceleration of a direct financial obligation of the company, if material to the company. Similarly, disclosure is required if an event occurs causing a company's obligation under an off-balance sheet arrangement to increase or be accelerated, or causing a contingent obligation of the company under an off-balance sheet arrangement to become a direct financial obligation of the company, if material to the company.
- No disclosure is required 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.

Costs Associated with Exit or Disposal Activities (Item 2.05)

- A Form 8-K must be filed when the board of directors, a board committee or an authorized officer commits the company to an exit or disposal plan, otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of SFAS No. 146 Accounting for Costs Associated with Exit or Disposal Activities, if material charges will be incurred under GAAP.
- 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 still file the Form 8-K describing the company's commitment to a course of action under which it will incur a material charge.
  - Within four days after the company actually formulates an estimate of the amount of the charges, it must file an amendment to the 8-K to include the estimate.

Material Impairments (Item 2.06)

- The new rules require disclosure when the board of directors, a board committee or an authorized officer concludes that a material charge for impairment to one or more of its assets, including, without limitation, an impairment of securities or goodwill, is required under GAAP.

- No disclosure will be required if the conclusion about the material charge is made in connection with year, or quarter, end financial statements (as is often the case) and disclosure is included in the company's Exchange Act report for that period.

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

- The new rules require a company to report its receipt of a notice from the principal listing organization for its common equity indicating that:
  - the company or the class of securities does not satisfy a rule or standard for continued listing;
  - the exchange has submitted an application under Exchange Act Rule 12d2-2 to 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.
    - Disclosure is required even if the company is entitled to a cure period.
- The new rules also require disclosure if the company has notified the national securities exchange or national securities association that the company is aware of any material noncompliance with a rule or standard for continued listing.
- The new rules also require disclosure of a public reprimand letter or similar communication from the exchange or association indicating that the company has violated a rule or standard.
- Finally, the new rules require disclosure if the company's board of directors, a board committee or an authorized officer has taken definitive action to cause the principal listing of its common equity to be withdrawn or terminated.
  - 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 company is not required to disclose any information where the delisting is a result of a redemption, a merger or similar event.
- Receipt of an early warning notice that merely informs the company that it is in danger of falling out of compliance with a rule or standard for continued listing on the exchange or association will not trigger an obligation to file a Form 8-K.
- In the typical involuntary delisting process, a company is likely to make two filings. An initial filing will be made when the company receives the first notice that it does not comply with a rule or standard for continued listing, or when it notifies the exchange or association that it no longer complies with a rule or standard for continued listing on the exchange or association. A second Form 8-K filing will be required upon the company's receipt of a notice regarding the actual delisting of a class of the company's securities.

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

- A company must file a Form 8-K if its board of directors, a board committee or an authorized officer concludes that any of the company's previously issued financial statements covering one or more years or interim periods no longer should be relied upon because of an error in such financial statements as addressed in Accounting Principles Board (APB) Opinion No. 20.

- Similarly, the new rules require a company to file a Form 8-K if it 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.
  - If the company receives such advice or notice from its independent accountants, the company must provide the independent accountant with a copy of the 8-K disclosure it is making no later than the same day it files the report 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 file, within two business days of the company's receipt of the independent accountant's letter, an amended Form 8-K with a copy of this letter as an exhibit.
- In response to comments, the SEC eliminated the proposed requirement that a company disclose its plan to address the issue.

Amended and Moved Disclosure Items

The new rules also will require companies to report on Form 8-K two items that are currently reportable on Form 10-Q or 10-K. The SEC also amended the type of disclosures required for several existing Form 8-K items.

Unregistered Sales of Equity Securities (Item 3.02)

- This new Form 8-K item requires a company to disclose the sale of equity securities in a transaction that is not registered under the Securities Act. This includes shares issued upon conversion and similar transactions.
  - No Form 8-K need be filed if the equity securities sold in the aggregate since the company's last report filed under this new item or last periodic report, whichever is more recent, constitute less than 1% (5% in the case of a small business issuer) of the company's outstanding securities of that class.

Material Modifications to Rights of Security Holders (Item 3.03)

- Companies must disclose material modifications to the rights of the holder's of any class of the company's registered securities and briefly describe the general effect of the modifications on those rights.
- Once a company has reported a material modification to the rights of its security holders on Form 8-K, the company need not make any duplicative disclosure about the modification in any of its subsequently filed periodic reports.

Amended Disclosure Items

Departure of Directors or Principal Officers, Election of Directors, or Appointment of Principal Officers (Item (5.02)

- The new rules broaden the scope of former Item 6 of Form 8-K, which required disclosure only if a director departed as a result of a disagreement, provided a letter to the company describing the disagreement and then requested that the company publicly disclose the matter.
- The new rules require disclosure 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, known to an executive officer of 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, whether or not the departing director provides a letter of disagreement to the company.

  - If the director furnishes the company with any written correspondence about the circumstances surrounding his or her resignation, refusal or removal, then the company must file a copy of the correspondence as an exhibit to the report regardless of whether the director requests that the company take such action.

- The company must also:
  - 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;
  - 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 by the company and, if not, stating the respects in which he or she does not agree; and
  - file any letter received by the company from the director with the SEC as an exhibit by an amendment to the previously filed Form 8-K within two business days after receipt.
- The SEC's rules now require 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.
  - This item also requires disclosure when a director retires or resigns, is removed or declines to stand for re-election and the company is not required to provide disclosure described above in the case of a disagreement.
  - In response to comments, the SEC eliminated the proposed requirement that a company disclose thereasons for the departure of an officer.
- New Item 5.02(c) 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.
  - Disclosure is also required 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.
  - In response to comments, the SEC inserted instructions to Item 5.02(c) that:
    - permit a company to delay disclosure regarding the appointment of an officer until the day on which the company first makes public announcement of the appointment in order to allow for a smooth tran sition of authority; and
    - exclude a company that is a wholly-owned subsidiary of a reporting company from the reporting requirements of Item 5.02.

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

- The new rules require a company with a class of securities registered under Section 12 of the Exchange Act to disclose any amendment to its articles of incorporation or bylaws.
  - No disclosure is required if the company proposed the amendment in a previously filed proxy or information statement.
- A company must also file a Form 8-K if it determines to change its fiscal year from that used in its most recent fil-

ing 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.

Safe Harbor and Eligibility for Short-Form Registration

As part of these amendments, recognizing that the occurrence of some of the new disclosure events may not always be easy to determine, the SEC adopted a new limited safe harbor from claims under Exchange Act Section 10(b) and Rule 10b-5 for a failure to file timely a Form 8-K regarding the following items:

- Entry into 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 of a Registrant;
- Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement;
- Costs Associated with Exit or Disposal Activities;
- Material Impairments; and
- Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

The safe harbor for these items states that no failure to file a report on Form 8-K that is required solely pursuant to the provisions of Form 8-K shall be deemed to be a violation of Section 10(b) and Rule 10b-5 under the Exchange Act. The safe harbor only applies to a failure to file a report on Form 8-K. Thus, material misstatements or omissions in a Form 8-K will continue to be subject to Section 10(b) and Rule 10b-5 liability.

The SEC also revised the Form S-2 and Form S-3 eligibility requirements. Companies that fail to file timely reports required by the items listed above will not lose their eligibility to use Form S-2 and Form S-3 registration statements. In addition, the SEC amended Securities Act Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the 12 months preceding a sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition.

Other Matter Related to Form 8-K Filings

The SEC and the Department of Justice have jointly concluded that Section 906 of the Sarbanes-Oxley Act does not apply to Form 8-K.

Contact Information

If you have any questions or would like to learn more about these rules, please contact your usual legal advisor at Ropes & Gray.