

Securities and Exchange Commission Adopts Additional 8-K Requirements and Accelerates 8-K Filing Deadlines

At an open meeting held March 11, the Securities and Exchange Commission adopted new disclosure requirements, adding eight new items to the Current Report on Form 8-K. The Commission also moved two disclosure items currently required on Form 10-K and Form 10-Q to Form 8-K and expanded two of the items currently required by Form 8-K. The Commission intends the new disclosure requirements to provide investors with accelerated access to a greater range of reliable information, consistent with Section 409 of the Sarbanes-Oxley Act of 2002. It also stated that more prompt disclosure by companies of significant events should reduce the opportunities for deception and manipulation that stem from delayed disclosure.

The full text of the new rule is not yet available, so the description provided in this Client Alert is based on the statements made by the Commissioners and SEC staff at the open meeting. We will prepare a comprehensive client alert when the adopted rules and regulations are made publicly available.

Changes from Proposed Rules

The Commission adopted the disclosure regulations and rules substantially as proposed, but the following significant differences were discussed at the meeting.

No “Mini-MD&A”

The Commission did not adopt the provision included in several of the proposed new items that would have required management’s analysis of a reported event (the so-called “Mini-MD&A”). The Commission stated that companies should nevertheless take care to disclose all material information and avoid omissions that make disclosure materially misleading.

Four Business Day Filing Deadline

Companies will have four business days to file Form 8-Ks, with no extensions available. The proposed regulations would have required Companies to file Form 8-Ks within two business days of a reportable event, with the opportunity to file a Rule 12b-25 notice to receive a two business day extension.

Section 10(b) and Rule 10b-5 Safe Harbor

The Commission adopted a limited safe harbor, applicable to seven of the events that will trigger a Form 8-K filing, by which companies will not be liable under Section 10(b) or Rule 10b-5 of the Exchange Act for failure to file a Form 8-K reporting one of those events. The safe harbor is effective only until the company’s next periodic report is due and is not applicable to material misstatements or omissions in an already filed Form 8-K. This safe harbor replaces the safe harbor included in the proposed rules under Exchange Act Sections 13(d) and 15(d).

No Letter of Intent Requirement

The adopted regulations will not require disclosure of letters of intent or other non-binding agreements. The definition of “agreement” under the final rules will not include agreements that are not definitive. The proposed changes would have required disclosure of letters of intent and other non-binding agreements.

No Disclosure Requirement for Termination or Reduction of a Business Relationship with a Customer

Disclosure of a termination or reduction of a business relationship with a customer, which would have been required under the proposed rules, will not be included as a requirement in the final rules.

Exclusion from S-2/S-3 Eligibility and Rule 144 Current Public Information Requirement

The adopted regulations will carve out from the eligibility requirements for Forms S-2 and S-3 and the Rule 144 current public information requirement any failure to timely file a Form 8-K with respect to the same seven reportable events to which the Section 10(b) and Rule 10b-5 safe harbor applies.

Additional Disclosure Requirements

Based on the previously published proposal and the discussion at the open meeting, we believe the following eight events will be required as additional items to be disclosed on Form 8-Ks.

- Entry into a material agreement not made in the ordinary course of business;
- Termination of a material agreement not made in the ordinary course of business;
- Creation of a direct or contingent financial obligation that is material to the registrant;
- Events triggering a direct or contingent financial obligation that is material to the company, including any default or acceleration of an obligation;
- Exit activities, including material write-offs and restructuring charges;
- Any material impairment;
- Movement of the company's securities from one exchange or quotation system to another, delisting of the company's securities from an exchange or quotation system, or a notice that a company does not comply with a listing standard; and
- Conclusions or notice that security holders no longer should rely on the company's previously issued financial statements or a related audit report.

We will provide a more detailed summary of these new items when the Commission's adopting release is made available.

Items Moved from Periodic Reports to Form 8-K

As part of the new Form 8-K requirements, the Commission also moved the following two items from other Exchange Act reports to Form 8-K:

- Unregistered sales of equity securities by the company; and
- Material modifications to the rights of holders of the company's securities.

Other Changes

The Commission also adopted additional disclosure requirements surrounding the resignation of a director, requiring disclosure regarding a director's departure for reasons other than a disagreement or removal for cause, the appointment or departure of a principal officer and the election of new directors. In addition, the Commission also combined the current Form 8-K item regarding a change in a company's fiscal year with a new requirement to disclose any material amendment to a company's article of incorporation or bylaws.

Who must comply with the rules?

The new disclosure requirements are applicable to all domestic issuers, including small business issuers.

When are the new disclosure regulations effective?

Companies must comply with the new disclosure requirement beginning August 23, 2004.

Additional Sources

SEC Proposed Rules: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Securities Act Rel. No. 33-8106, <http://www.sec.gov/rules/proposed/33-8106.htm>

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