

## Client Alert

### Reminder: New Form 8-K Requirements Take Effect August 23, 2004

On August 23, 2004, new SEC rules requiring increased and accelerated disclosure on Form 8-K will become effective. A copy of our March 2004 Client Alert containing an item-by-item outline and discussion of the new Form 8-K rules and a chart of the reorganized and renumbered Form 8-K items is attached. In anticipation of the August 2004 compliance date, we expect that issuers will be carefully reviewing the new requirements to ensure they have adequate internal procedures for monitoring and reporting the events that must be disclosed within four business days on Form 8-K.

The new rules represent a significant expansion of current Form 8-K reporting requirements and will likely raise interpretive questions as issuers begin to comply. Many of the new reporting items will require issuers to make determinations as to the materiality of certain events, an analysis not new to seasoned issuers, but one that will need to be made more frequently and more quickly than in the past.

Set forth below are some observations and suggestions for issuers to consider as they prepare to comply with the new Form 8-K requirements.

- Companies should review their disclosure controls and procedures (including the composition and operation of their disclosure committee) to ensure that information about potential Form 8-K triggering events is timely communicated to those charged with making decisions regarding disclosure. Note that under SEC rules issuers must disclose, and CEOs and CFOs must certify in annual and quarterly reports, conclusions about the effectiveness of the issuer's "disclosure controls and procedures", which include controls and procedures necessary to comply with Form 8-K requirements.
- Identify the individuals most likely to have knowledge of specific triggering events (this may include individuals not typically involved in the public disclosure process) and educate them about the types of events that will require Form 8-K disclosure.
- Consider establishing internal quantitative materiality guidelines, as well as procedures for rapidly assessing the materiality of events and whether a disclosure obligation has been triggered.
- Although the SEC eliminated its original proposal to require an analysis of the effect of certain triggering events (*i.e.*, a "mini-MD&A"), companies should be aware that any disclosure made in a report on Form 8-K must include any additional material information necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading.
- Modify disclosure procedures for periodic reports to ensure that any missed Form 8-K disclosures eligible for the Form 8-K "safe harbor" from liability under Section 10(b) and Rule 10b-5 are timely reported in the applicable Form 10-Q or Form 10-K, as the safe harbor extends only until the due date of the Form 10-K or Form 10-Q for the relevant period in which the Form 8-K was not timely filed.

- Review filing mechanics and responsibilities — identify the individuals responsible for filing Forms 8-K and determine whether filings will be made in-house, by outside counsel or by third-party vendors.
- Keep investor relations personnel informed of events requiring Form 8-K disclosure so as to ensure coordinated disclosure practices.
- Note that the filing deadline for Form 8-K will remain 5:30 p.m., Eastern Time, and has *not* been extended to accommodate filers in other time zones, as was the case for Section 16 reports (where insiders have until 10:00 p.m., Eastern Time, to file).

As to certain new items requiring disclosure on Form 8-K:

***Entry into or material amendment of a material definitive agreement not made in the ordinary course of business (Item 1.01).***

- The instructions to Form 8-K state that the standards applied in determining whether agreements or amendments should be disclosed under Item 1.01 are the same as those applied in determining whether agreements should be filed as exhibits under Item 601(b)(10) of Regulation S-K.
- Although a material agreement or amendment is not required to be filed as an exhibit to the Form 8-K disclosing it, the SEC encourages companies to do so when feasible, particularly when no confidential treatment is requested. Filing the agreement or amendment as an exhibit would serve to supplement the summary description provided in the Form 8-K. If the agreement or amendment is not filed with the Form 8-K, it will be required to be filed as an exhibit to the company's next registration statement or the periodic report for the period in which it was executed.
- Identify current material contracts and consider whether other contracts are likely to become material in the future so that any material amendments may be timely disclosed. Note that material amendments may cause previously immaterial agreements to become material and trigger a filing requirement.
- Establish procedures for notifying the disclosure committee or other appropriate decision maker in advance of executing a material agreement or amendment so as to allow time for the materiality analysis. Note that execution of a material agreement triggers the filing requirement even if the agreement is subject to later board approval or dated "as of" another date.
- Note that many compensatory agreements, including employment agreements and severance agreements, with a company's directors or "named executive officers" (the five or more officers included in the company's proxy statement compensation table) will be deemed material agreements and must be disclosed on Form 8-K.

***Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement (Item 2.03).***

- Companies will need to make a materiality determination, with input as appropriate from legal and finance personnel, when deciding whether a direct financial obligation or off-balance sheet arrangement must be disclosed.

- Direct financial obligations requiring disclosure include any long-term debt obligations, capital lease obligations and operating lease obligations, as well as any short-term debt obligations that arise other than in the ordinary course of business.
- Entering into a facility or program that may give rise to a material direct financial obligation must be disclosed on Form 8-K, even if the facility or program has not yet been drawn upon. As direct financial obligations are created under the facility or program, additional Form 8-K filings will be required if the obligations are material and, in the case of short-term debt obligations, are incurred other than in the ordinary course of business.
- In the case of a registered debt offering (*e.g.*, a shelf takedown), no Form 8-K is required if the information otherwise required by Item 2.03 is included in a Rule 424 prospectus filed with the SEC.

***Costs associated with exit or disposal activities (Item 2.05).***

- Note that a filing is required when a board, board committee or authorized officer *commits* an issuer to an exit or disposal plan.
- If a company is unable to make a good faith estimate of the amount of a material charge, the company should file an initial Form 8-K reporting the company's commitment to a course of action under which it will incur the charge and amend the filing within four days after the company determines the amount of the charge.

***Material impairments (Item 2.06).***

- No Form 8-K disclosure is required if the conclusion regarding an impairment charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or fiscal year and the Form 10-Q or Form 10-K for that fiscal period is timely filed and includes disclosure of the conclusion. We would expect that most material impairments otherwise requiring Form 8-K disclosure would fall within this exception.

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Also on the Form 8-K front, the NYSE has proposed eliminating the requirement that NYSE-listed companies file paper copies of Forms 8-K that are filed with the SEC through EDGAR. We expect that the SEC will approve this rule change shortly.

June 28, 2004

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, on our website at [www.chadbourne.com/publications/sub\\_Publications.html](http://www.chadbourne.com/publications/sub_Publications.html). Our client alerts are for general informational purposes and should not be regarded as legal advice. If you have any questions regarding the new Form 8-K requirements, please contact any of the following:

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## Client Alert

### SEC Amends Form 8-K and Accelerates Filing Date

On March 16, 2004, the SEC adopted final rules effective August 23, 2004 requiring increased and accelerated disclosure on Form 8-K.<sup>1</sup> The rules:

- add eight new events that a public company must report currently on Form 8-K;
- expand two existing Form 8-K items;
- move to Form 8-K two items previously required to be disclosed in a company's periodic reports; and
- accelerate the Form 8-K filing deadline for reportable events to four business days after occurrence of the event.

The final rules also renumbered and reorganized the Form 8-K items into topical categories. The new Form 8-K numbering system is attached as Exhibit A.

The Form 8-K amendments represent a major step by the SEC in implementing "real time disclosure" under the authority provided by Section 409 of the Sarbanes-Oxley Act of 2002. Senior management, in-house legal and finance departments and others within public companies should be aware of the types of events that will now require more current disclosure, in contrast to the periodic disclosure practices that have been followed for many years.

#### Additional Form 8-K Disclosure Items

The new rules require that the following additional events be disclosed on Form 8-K:

***1. Entry into or material amendment of a material definitive agreement not made in the ordinary course of business. A company must disclose the following:***

- the date the agreement was entered into or amended;
- the identity of the parties to the agreement;
- a brief description of any material relationship between the company or its affiliates and any of the other parties; and
- a brief description of the terms and conditions of the agreement or amendment that are material to the company.

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<sup>1</sup> Securities and Exchange Commission Release Nos. 33-8400; 34-49424; File No. S7-22-02. A copy of the Release is available on the SEC website at [www.sec.gov/rules/final/33-8400.htm](http://www.sec.gov/rules/final/33-8400.htm).

Although the agreement or amendment is not required to be filed as an exhibit to the Form 8-K, the SEC encourages companies to do so when feasible, particularly when no confidential treatment is requested. Moreover, if not filed with the Form 8-K, the agreement or amendment will be required to be filed as an exhibit to the company's next periodic report, or with its next registration statement filed prior to its next periodic report.

**2. *Termination of a material definitive agreement not made in the ordinary course of business.***

For terminations that are material to a company, the company must disclose:

- the date of termination;
- the identity of the parties to the agreement;
- a brief description of any material relationship between the company or its affiliates and any of the other parties;
- a brief description of the terms and conditions of the agreement that are material to the company;
- a brief description of the material circumstances surrounding the termination; and
- any material early termination penalty incurred by the company.

No disclosure is required (a) for terminations resulting from expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under the agreement or (b) 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.

**3. *Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement.*** If a company becomes obligated under a direct financial obligation that is material to the company, it must disclose:

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

If a 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 disclose:

- the date the company becomes directly or contingently liable on the obligation;
- a brief description of the transaction or agreement creating the arrangement and obligation;

- a brief description of the nature and amount of the company's obligation, including the material terms under which it may become a direct obligation, if applicable, or may be accelerated or increased;
- a brief description of the nature of any recourse provisions that would enable the company to recover from third parties;
- the maximum potential amount of future payments (undiscounted) that the company may be required to make, if different; and
- a brief description of the other terms and conditions of the obligation or arrangement that are material to the company.

**4. *Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement or cause a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation.*** Upon any such triggering event that is material to a company, the company must disclose:

- the date of the triggering event;
- a brief description of (a) the agreement or transaction under which the direct financial obligation was created and is increased or accelerated or (b) 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 (a) the direct financial obligation or (b) the obligation under the off-balance sheet arrangement or its becoming a direct financial obligation of the company.

**5. *Costs associated with exit or disposal activities.*** If a company's board, board committee or authorized officer commits the company to an exit or disposal plan, or otherwise disposes of a long-lived asset or terminates employees under a plan of termination, under which the company will incur a material charge under GAAP, the company must disclose:

- the date of the commitment to the course of action;
- a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;
- the estimated total amount or range of amounts expected to be incurred for each major type of cost associated with the course of action;
- the estimated total amount or range of amounts expected to be incurred in connection with the course of action; and
- the estimated amount or range of amounts of the charge that will result in future cash expenditures.

**6. *Material impairments.*** If a company's board, board committee or authorized officer concludes that the company is required under GAAP to record a material charge for impairment to one or more of its assets, including an impairment of securities or goodwill, the company must disclose:

- the date the conclusion was reached;
- a description of the assets subject to impairment;
- a brief description of the facts and circumstances leading to the conclusion that the impairment charge is required;
- the estimated amount or range of amounts of the impairment charge; and
- the estimated amount or range of amounts of the impairment charge that will result in future cash expenditures.

However, no Form 8-K disclosure is required if the conclusion regarding the impairment charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or year and the Form 10-Q or Form 10-K for that fiscal period is timely filed and includes disclosure of the conclusion.

**7. *Notice of delisting or failure to satisfy continued listing standards of a national securities exchange or national securities association; notice of reprimand letter or transfer of listing.*** A company must report any notice (a) from the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity indicating that the company or that class of common equity no longer satisfies a rule or standard for continued listing on the exchange or association or that the exchange or association has taken certain actions to delist the company's securities or (b) from the company to the exchange or association that the company is aware of its material non-compliance with a rule or standard for continued listing. Specifically, the company must disclose:

- the date it received or provided the notice;
- the rule or standard for continued listing that the company failed to satisfy; and
- any action or response that, at the time of filing, the company has determined to take.

A company must disclose on Form 8-K (a) receipt of a public reprimand letter in lieu of delisting, including a summary of the letter and its date, or (b) definitive action by the company to terminate the listing of a class of its common equity, including by reason of a transfer of the listing or quotation to another exchange or quotation system. This disclosure is required even if the company has the benefit of a grace period or similar cure period.

**8. *Conclusion by a company or notice from its independent accountant that security holders should no longer rely on the company's previously issued financial statements, a related audit report or completed interim review because of an error in such financial statements.*** Upon such event, a company must disclose:

- the date the conclusion was reached or the company received the notice from its independent accountant;

- the financial statements and year or periods covered that should no longer be relied upon;
- a brief description of the facts underlying the conclusion, to the extent known at the time of filing, or the information provided by the accountant; and
- a statement of whether the audit committee, the board of directors in the absence of an audit committee, or authorized officers discussed with the independent accountant the subject matter giving rise to the conclusion or notice.
- If the disclosure is in response to a notice from the company's independent accountant, the company must provide the independent accountant with a copy of its Form 8-K disclosure not later than the day the Form 8-K is filed and request that a letter addressed to the SEC be furnished to the company stating whether the accountant agrees with the disclosure (and, if not, the respects in which it does not agree). The company must amend its previously filed Form 8-K to file the accountant's letter as an exhibit within two business days after receipt of the letter.

### Modifications to Existing Form 8-K Disclosure Items

The final rules also expand a number of current Form 8-K disclosure items:

**1. *Departure of directors or principal officers; election of directors; appointment of principal officers.*** The final rules require disclosure regarding:

- any departure of a director, whether or not due to a disagreement or removal for cause;
- the appointment or departure of the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or persons performing similar functions; and
- the election of any new directors, except by a vote of the stockholders at an annual meeting.

If a 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 and 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 with the officer.

If a company intends to make a public announcement of an officer appointment other than by means of a Form 8-K, it may delay filing the required Form 8-K until the date it otherwise makes the public announcement.

If the terms of an employment agreement with a new officer are not determined or are unavailable at the time of the required Form 8-K filing, the company must include a statement to that effect in the filing and amend the Form 8-K to provide the information within four business days after the

information is determined or becomes available. Note that the employment agreement may also constitute a material definitive agreement requiring separate disclosure as described above.

If a director resigns or refuses to stand for reelection due to a disagreement on any matter relating to the company's operations, policies or practices, or is removed for cause, the company must disclose:

- the date of the director's resignation, refusal to stand for reelection or removal;
- any board committee memberships of the director; and
- a brief description of the disagreement that management believed caused the director's resignation, refusal or removal.

Moreover, if the director furnishes the company with written correspondence regarding the director's resignation, refusal or removal due to a disagreement, a copy must be filed as an exhibit to the Form 8-K regardless of whether the director requests its public disclosure. The company must also provide a copy of its Form 8-K disclosure to the director not later than the day the Form 8-K is filed and must provide the director an opportunity to furnish a letter addressed to the company stating whether the director agrees or disagrees with the disclosure. The company must then amend its previously filed Form 8-K to file the director's letter as an exhibit within two business days after receipt of the letter.

2. ***Change of fiscal year; amendment of certificate of incorporation or by-laws.*** The new rules also combine the current Form 8-K item regarding a change in a company's fiscal year with a new requirement to disclose any amendment to a company's certificate of incorporation or by-laws not disclosed in a proxy statement or information statement filed by the company. The text of the amendment must be filed as an exhibit to the Form 8-K. This requirement applies only to public companies with a class of equity securities registered under Section 12 of the Exchange Act.

## Relocation of Certain Disclosure Items

The new rules move the following items of disclosure from other Exchange Act periodic reports to Form 8-K:

1. ***Unregistered sales of equity securities.*** A company must disclose on Form 8-K information regarding the company's sale of equity securities in a transaction that is not registered under the Securities Act. This information was previously required to be disclosed on Forms 10-K and 10-Q. Form 8-K disclosure is not required if the aggregate amount of equity securities sold since the company's last report disclosing such sales constitutes less than 1% of the company's outstanding securities of that class. However, unregistered sales not reported on Form 8-K will continue to be required to be reported in periodic reports.
2. ***Material modifications to rights of security holders.*** A company must disclose on Form 8-K material modifications to the rights of holders of any class of the company's registered securities and briefly describe the general effect of those modifications. This information was previously required to be disclosed on Form 10-Q.

### Accelerated Filing Deadline for Form 8-K

Under the new rules, domestic issuers must file required current reports on Form 8-K within four business days after a triggering event. The rules do not affect the filing deadline for disclosures under Regulation FD, voluntary disclosures and certain exhibits.

### Safe Harbor and Eligibility to Use Forms S-2 and S-3 and to Rely on Rule 144

The new rules include a limited “safe harbor” under which a company will not be liable under Section 10(b) or Rule 10b-5 of the Exchange Act for failure to file timely a Form 8-K for the following disclosure items:

- entry into or amendment of a material definitive agreement (Item 1.01);
- termination of a material definitive agreement (Item 1.02);
- creation of a direct financial obligation or an obligation under an off-balance sheet arrangement (Item 2.03);
- triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement (Item 2.04);
- costs associated with exit or disposal activities (Item 2.05);
- material impairments (Item 2.06); and
- non-reliance on previously issued financial statements or a related audit report or completed interim review (where a company makes the determination and does not receive a notice from its accountant) (Item 4.02(a)).

The safe harbor extends only until the due date of the Form 10-K or 10-Q of the company for the relevant period in which the Form 8-K was not filed timely and applies only to a failure to file a report on Form 8-K; it does not provide protection from liability that may arise from failure to satisfy separate disclosure obligations, including the obligation to include all of the material information, if any, that is necessary to make the required disclosure in the Form 8-K, in light of the circumstances under which it is made, not misleading.

A company that fails to file timely a Form 8-K with regard to the disclosure items subject to the safe harbor will also remain eligible to use Forms S-2 and S-3 registration statements; however, the company must be current with its Form 8-K filings for these disclosure items at the time it files the Form S-2 or S-3. The safe harbor does not provide protection for a failure to file timely a Form 8-K for other required disclosure items, which would result in a loss of Form S-2 or S-3 eligibility for 12 months.

In addition, stockholders may continue to rely on Securities Act Rule 144 even if a company is delinquent in its Form 8-K filings for any disclosure items, not just those subject to the safe harbor.

### Section 906 Certification

The SEC also confirmed that, after consultation with the Department of Justice, the Department of Justice and the SEC jointly concluded that the certification required by Section 906 of the Sarbanes-

Oxley Act of 2002 does not apply to Form 8-K (or to filings on Form 6-K or Form 11-K).

\* \* \* \* \*

March 25, 2004

**Amended SEC Form 8-K Disclosure Items**

**(Effective 8/23/04)**

**Section 1 – Registrant’s Business and Operations**

- Item 1.01 Entry into a Material Definitive Agreement
- Item 1.02 Termination of a Material Definitive Agreement
- Item 1.03 Bankruptcy or Receivership

**Section 2 – Financial Information**

- Item 2.01 Completion of Acquisition or Disposition of Assets
- Item 2.02 Results of Operations and Financial Condition
- Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant
- Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement
- Item 2.05 Costs Associated with Exit or Disposal Activities
- Item 2.06 Material Impairments

**Section 3 – Securities and Trading Markets**

- Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing
- Item 3.02 Unregistered Sales of Equity Securities
- Item 3.03 Material Modifications to Rights of Security Holders

**Section 4 – Matters Related to Accountants and Financial Statements**

- Item 4.01 Changes in Registrant’s Certifying Accountant
- Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

**Section 5 – Corporate Governance and Management**

- Item 5.01 Changes in Control of Registrant
- Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers
- Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year
- Item 5.04 Temporary Suspension of Trading Under Registrant’s Employee Benefit Plans
- Item 5.05 Amendments to the Registrant’s Code of Ethics, or Waiver of a Provision of the Code of Ethics

**Section 6 – [Reserved]**

**Section 7 – Regulation FD**

- Item 7.01 Regulation FD Disclosure

**Section 8 – Other Events**

- Item 8.01 Other Events

**Section 9 – Financial Statements and Exhibits**

- Item 9.01 Financial Statements and Exhibits