

Client Alert: SEC Proposes Additional Disclosure Requirements and Acceleration of Filing Date for Form 8-K

A. Introduction

On June 17, 2002, the SEC published for comment proposed rules that would require increased and accelerated disclosure on Form 8-K.¹ The proposed rules would (1) add 11 new items to the list of events that require a company to file a current report on Form 8-K, (2) make significant changes to existing Form 8-K items, (3) move two items currently requiring disclosure in a company's quarterly report on Form 10-Q to Form 8-K, and (4) accelerate the Form 8-K filing deadline to two business days after the event triggering the form's disclosure requirements.

B. Additional Form 8-K Disclosure Items

Under the proposal, the following additional disclosure items would be added to Form 8-K:

- ***Entry into a material agreement not made in the ordinary course of business.*** Public companies would be required to file a copy of these agreements (which would include letters of intent and other non-binding agreements) and disclose the following information related to the agreement: (1) the identity of the parties to the agreement and a description of any material relationship between any of the parties other than in respect of the agreement, (2) a brief description of the agreement, (3) the rights and obligations of each party to the agreement that are material to the company, (4) any material conditions to the agreement becoming binding or effective and (5) the duration of the agreement and any material termination provisions. Companies also would be required to disclose on Form 8-K any material amendments to these agreements.
- ***Termination of a material agreement not made in the ordinary course of business.*** In relation to such termination, public companies would be required to disclose (1) the identity of the parties to the agreement and a description of

¹ See Securities and Exchange Commission Release Nos. 33-8106; 34-46084; File No. S7-22-02. A copy of the Release is available on the SEC website at: <http://www.sec.gov/rules/proposed/33-8106.htm>

any material relationship between any of the parties other than in respect of the agreement, (2) a brief description of the agreement, (3) a description of the material circumstances surrounding the termination, (4) any material early termination penalty incurred by the company, and (5) a discussion of management's analysis of the effect of the termination on the company.

- ***Termination or reduction of a business relationship with a customer.*** Public companies would be required to disclose any such terminations or reductions that result in the loss of 10 percent or more of the company's consolidated revenues during the company's most recent fiscal year.
- ***Creation of a direct or contingent financial obligation that is material to the company.*** Public companies would be required to disclose a brief description of any transaction or agreement that creates any material direct or contingent financial obligation, including (1) an identification of the parties to the agreement, (2) the nature and amount of the company's material direct or contingent financial obligations, including a description of events that may cause the obligations to arise, increase or become accelerated, (3) if applicable, the name of any underwriters or placement or other agents for the transaction or any persons performing a similar function in the case of a private transaction, and the amount of any fee or other compensation paid to them, or the name of any lenders or other persons who are the beneficiaries of the obligations, and (4) a discussion of management's analysis of the effect of the direct or contingent financial obligations on the company.
- ***Events triggering a direct or contingent financial obligation that is material to the company, including any default or acceleration of an obligation.*** Upon any such triggering event, public companies would be required to (1) describe the agreement under which the triggering event occurred, (2) describe the triggering event, (3) disclose the nature and amount of the material direct or contingent financial obligation of the company that may arise, increase or become accelerated as a result of the triggering event, including obligations under cross-default, cross-acceleration or similar arrangements, and (4) discuss management's analysis of the effect on the company of the triggering event and of the obligation that has arisen, increased or been accelerated.
- ***Exit activities including material write-offs and restructuring charges.*** Under this proposed item, public companies would have to disclose when the company's board or authorized officers definitively commit the company to a course of action, including a plan to terminate or exit an activity, under which

the company will incur a material write-off or restructuring charge under GAAP. Upon such event, the company would have to disclose (1) the date on which such commitment was made, (2) a description of the course of action and reasons for the write-off or restructuring charge, (3) a description of the assets subject to write-off, (4) the estimated amount of the write-off or restructuring charge, (5) the estimated amount of the write-off or restructuring charge that will result in future cash expenditures, and (6) an analysis of the effect of the write-off or restructuring charge on the company, including the segment affected.

- ***Material impairments.*** This proposed new item would require disclosure when a public company's board or authorized officers conclude that the company is required to record a material charge for impairment to one or more of its assets, including an impairment of securities or goodwill, under GAAP. Specifically, the company would have to disclose (1) the date on which the conclusion was reached, (2) a description of the assets subject to impairment and the facts and circumstances leading to the impairment, (3) the estimated amount of the impairment charge, and (4) an analysis of the effect of the impairment charge on the company, including the segment affected.
- ***Rating agency decisions.*** Public companies would be required to file a Form 8-K when the company receives notice that a rating agency to whom the company provides information has decided to (1) change or withdraw the credit rating assigned to, or outlook on, the company or any class of debt or preferred security or other indebtedness of the company (including securities or obligations as to which the company is a guarantor), (2) refuse to assign a credit rating to the company, to any class of its securities, or to any of its indebtedness after the company has requested the rating agency to do so, (3) place the company or any class of its securities or indebtedness on "credit watch" or similar status, or (4) take any similar action. Under this proposed item, the company would have to disclose the date on which the company received the rating agency's notice, the name of the rating agency, the nature of the rating agency's decision and management's analysis of the effect of the decision on the company.
- ***Notice of de-listing on, or failure to satisfy listing standards of, a national securities exchange or national securities association, or transfer of listing.*** This item would require a public company to report any notice from the national securities exchange or national securities association that is the company's principal trading market that the company or a class of its

securities no longer satisfies applicable listing requirements or standards, or that a class of the company's securities has been de-listed by the exchange or association. Specifically, the company would have to file a copy of the notice, if in writing, and disclose (1) the date that it received the notice, (2) the listing requirement or standard that the company failed to satisfy or the reason for the de-listing as indicated by the exchange or association, and (3) a discussion of the company's planned response to the notice and management's analysis of the effect of the de-listing or failure to satisfy a listing standard on the company. Public companies also would be required to file a Form 8-K when the company has taken definitive action to terminate the listing of a class of equity securities, including by reason of a transfer of the listing or quotation to another securities exchange or quotation system.

- ***Conclusion by a company or notice from independent accountants that security holders should no longer rely on the company's previously issued financial statements or a related audit report.*** Upon such event, public companies would have to disclose (1) the date on which the conclusion was reached or the company received the notice, (2) a description of the events giving rise to the conclusion or notice related to the reliability of the financial statements, (3) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, discussed with the independent accountant the subject matter giving rise to the conclusion or notice, and (4) a description of management's plans to alleviate the reliance issue.
- ***Any event that would materially limit, restrict or prohibit participants in a company's employee benefit, retirement or stock ownership plan from acquiring, disposing or converting their holdings.*** This proposed item would require public companies to disclose the period or expected period of the limitation, the nature of the limitation and the reasons for the limitation. This item would not require disclosure of a temporary trading "black-out" upon persons in possession of material non-public information.

C. Modifications to Existing Form 8-K Disclosure Items

In addition, the proposed rules expand the current Form 8-K item that requires disclosure about certain resignations of a director to also require disclosure regarding (1) any departure of a director, whether or not due to a disagreement or removal for cause, (2) the appointment or departure of the company's principal executive officer, president, principal financial officer, principal accounting officer or similar officers, and (3) the election of any new directors, except by a vote of the stockholders at an

annual meeting. The proposed rules also combine the current Form 8-K item regarding a change in a public company's fiscal year with a new requirement to disclose any amendment to a company's articles of incorporation or by-laws not disclosed in a proxy statement or information statement filed by the company.

D. Relocation of Certain Disclosure Items

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

- ***Unregistered Sales of Equity Securities.*** This proposed item would require a company to disclose in a 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 is currently required to be disclosed in annual reports on Form 10-K and quarterly reports on Form 10-Q.
- ***Material Modifications to Rights of Security Holders.*** This proposed item would require a company to disclose on a Form 8-K material modifications to the rights of holders of any class of the company's registered securities, and to briefly describe the general effect of such modifications on the company's stockholders.

E. Shortened Filing Deadline for Form 8-K

The proposed amendments would require domestic issuers that are subject to the reporting requirements of Section 13(a) and Section 15(d) of the Exchange Act to file required current reports on Form 8-K within two business days of a triggering event. These amendments would not affect the filing deadline for disclosures under Regulation FD, voluntary disclosures or the proposed deadlines under recently proposed Item 10 of Form 8-K (which requires disclosure of, among other things, transactions by directors and executive officers in the company's equity securities and any loans to a director or executive officer made or guaranteed by the company).

F. Safe Harbor

The proposed rules contain safe harbor provisions which provide that a company would not be liable under Sections 13 and 15(d) of the Exchange Act for a failure to timely file a Form 8-K if:

- on the Form 8-K due date, the company maintained sufficient procedures to provide reasonable assurances that the company is able to collect, process and disclose, within the specified time period, the information required to be disclosed by Form 8-K; and

- no officer, employee or agent of the company knew, or was reckless in not knowing, that a report on Form 8-K was required to be filed, and once an executive officer of the company became aware of its failure to file a required Form 8-K, the company promptly (and not later than two business days after becoming aware of its failure to file) filed a Form 8-K with the SEC containing the required information and stating the date, or approximate date, on which the report should have been filed.

Although compliance with the safe harbor would shield the company from liability under Sections 13 and 15(d) for a late filing, the late Form 8-K filing would not be considered timely filed. Accordingly, a company that fails to timely file a Form 8-K would not be eligible to use short form registration statements or Forms S-8 and its stockholders could not rely on Rule 144 unless the company is current in its Exchange Act filings, including Forms 8-K.

Comments Sought

The staff of the SEC invites interested persons to submit written comments on the proposed amendments and any other matters that might have an impact on the proposed amendments. Comments should be received on or before August 25, 2002. Comments may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-22-02; this file number should be included in the subject line if e-mail is used.

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