

SEC ADOPTS FORM 8-K AMENDMENT**INTRODUCTION**

Final Rules Approved. As reported in our March 24th issue of **CORPORATE NOTES**, the SEC approved significant changes to the Form 8-K by:

- i. adding **eight new disclosure items** to the Form 8-K;
- ii. **transferring two disclosure items** from the Form 10-K and the Form 10-Q to the Form 8-K (thus speeding up their disclosure); and
- iii. **expanding** two existing Form 8-K disclosures.

(<http://www.sec.gov>)

Final Rules Changed from Initial Proposal. The final version of the revised Form 8-K differs from the original proposal in three key ways:

- The *deadline for filing* the Form 8-K will be four business days (from the proposed two business days). Currently, a Form 8-K must be filed anywhere between five business and 15 calendar days after a reportable event.
- Contrary to the original proposal, the adopting release does not require any disclosure regarding the termination or reduction of a business relationship with a customer.
- The Form 8-K amendments allow for a limited safe harbor for failing to timely file Form 8-Ks. However, the safe harbor is only applicable to certain items rather than all items as initially proposed.

OVERVIEW OF AMENDMENTS

The SEC shortened the filing deadline for a Form 8-K to four business days (not calendar days) for all disclosure items from the current deadline of either five business days or fifteen business days, depending upon the item being disclosed. The Form 8-K also has a new look because it has been reorganized into new topical categories with a new numbering system to accommodate all the changes.

New Disclosures. The eight new disclosure items include:

- Entry into a material non-ordinary course **definitive agreement**;
- **Termination** of a material non-ordinary course definitive agreement;
- Creation of a material direct financial obligation or a material 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 standards; transfer of listing; and
- Non-reliance on **previously issued financial statements or a related audit report** or completed interim review (i.e. restatements).

Quicker Disclosures. The two disclosure items that have previously been required in a Form 10-Q or a Form 10-K, and now must be disclosed more quickly in a Form 8-K, are:

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

Expansion of Existing Disclosures. Finally, the revised Form 8-K requires that more disclosure than currently required will need to be made with respect to the following items that are already required to be reported under the existing Form 8-K:

- Departure or election of **directors**;
- Departure or appointment of **principal officers**;
- **Amendments** to its articles of incorporation or by-laws, or change in fiscal year.

The rest of the disclosure items under Form 8-K will remain the same, including Regulation FD items and earnings releases.

SAFE HARBOR FOR LATE FILING

Companies that fail to file a required Form 8-K on a timely basis can file late under a “safe harbor” and still be considered to have a timely filing, but only for the following new disclosure items:

- Entry or termination of a material definitive agreement;
- Creation or triggering of a direct financial obligation
- Material costs associated with exit or disposal activities;
- Material impairments
- Non-reliance on previously issued financial statements (i.e. restatements).

A company that relies on this safe harbor will NOT be considered to have a late SEC filing and therefore can still qualify for Form S-2 and Form S-3 registration statement use, provided certain other conditions are met. . Also, this safe harbor will satisfy the “publicly available information” requirement that permits directors and officers to sell their stock under Rule 144.

However, the “safe harbor” does not excuse a company’s “anti-fraud” disclosure obligations under Rule 10b-5, which generally requires that the company disclose material information to investors promptly. Also, the “safe harbor” requires that the Form 8-K disclosure be included in the company’s Form 10-Q that covers the period in which the event occurred.

EFFECTIVE DATE OF NEW FORM 8-K

The new Form 8-K becomes effective on August 23, 2004.

NYSE AND NASDAQ EFFECT.

NYSE-listed companies that file a Form 8-K reporting the appointment or removal of a director will need to notify the NYSE of this event by submitting an “interim written affirmation” under the new NYSE corporate governance rules. For Nasdaq companies, even though there is no similar “interim written affirmation” requirement, upon becoming aware of any material non-compliance of the listing standards, listed companies must notify the association promptly. NYSE companies have a similar requirement.

We suggest that companies review their internal procedures to ensure that they are able to report Form 8-K events under the shortened filing deadline.