

ARE YOU READY FOR THE NEW FORM 8-K REQUIREMENTS?

The number of events that public companies must report on a Form 8-K will significantly expand from 9 specified events to 19 events when new SEC rules take effect on August 23, 2004. The increase in reportable events will require public companies to expend more time collecting and analyzing, and less time to report the information.

(<http://www.sec.gov/rules/final/33-8400.htm>)

- **Collection:** Public companies must ensure that potentially reportable information is detected and routed to persons responsible for analyzing such information.
- **Analysis:** Potentially reportable information must be analyzed in light of the new Form 8-K reporting requirements and, depending on the nature of such information, materiality standards.
- **Reporting:** With certain exceptions, information deemed reportable on Form 8-K must be filed within four business days. A limited safe harbor applies to certain information that was not reported in an 8-K filing, provided it is reported in the next Form 10-Q or Form 10-K.

Companies should determine if their current disclosure system can handle the increased reporting and shorter filing periods under the new rule. Non-compliance can result in, among other things, liability under the federal securities laws and a prohibition from using short-form registration statements.

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■ **CAN YOU SEE THE WARNING SIGNS? PROFILING THE TYPICAL CORPORATE FRAUDSTER**

Corporate officers and directors are being sued for fraud that occurs in their company, even if they were not previously aware of it and did not commit the fraud themselves. A recent Ernst & Young study found that an incredible 85% of the most financially costly frauds were committed by company employees. A survey by KPMG found that employee fraud is almost twice as prevalent as the number two type of fraud, consumer fraud. Examples of employee fraud include such things as expense account abuse, payroll fraud, check fraud, and pension theft.

The Ernst & Young study found that corporate fraudsters tend to have these characteristics:

- Male
- 36-45 years old
- Finance department employee of a public company for over 10 years
- Works excessive hours
- Refuses to delegate tasks

- Fails to use full holiday entitlement
- Appears to be living beyond means

High-risk areas in a company include small groups operating without direct oversight from senior officers and complex transactions that are considered too difficult to explain to a layman.

Companies that focus on proactive fraud detection could reduce costs and the risk of lawsuits against directors and officers.

■ HOW DEEP IS YOUR SAFE HARBOR?

The recent dismissals of two stockholder class action lawsuits highlight the importance to public companies of using the protection or “safe harbor” of a long-standing federal securities law when making forecasts and other forward-looking public statements.

Under the law, a company that makes public statements about the potential for future performance – such as “we expect to meet our earnings estimates” or “we believe that our business will continue to grow” – can avoid securities fraud claims even if the actual results differ materially from those statements by doing the following:

- identify the statements as “forward-looking”; and
- make “meaningful cautionary statements” that cite important factors which could cause actual results to differ from those in the statements.

In a federal class action lawsuit against Sketchers USA Inc., stockholders alleged that the company’s earnings releases during 2002 contained false estimates of future sales. The court dismissed several of the claims by noting that the estimates were “forward-looking” and accompanied by meaningful cautionary statements and “therefore entitled to protection” under the law. A class action lawsuit against Blockbuster alleging securities fraud in public statements was also dismissed because the stockholders did not meet the requirement

under the law for stating particular facts when challenging forward-looking statements.

To rely on this “safe harbor”, a company should ensure that its “meaningful cautionary statements” describe the principal contingencies that could cause actual results to depart from forecasts.

■ HIRE YOUR AUDITOR, LOSE YOUR ACCOUNTING FIRM

A public accounting firm recently had to stop auditing a public company because that company hired one of its former auditors as a CFO. Under Section 206 of the Sarbanes-Oxley Act, a public accounting firm cannot audit a public company if that company hires one of its auditors as a CEO, CFO, chief accounting officer, controller or similar officer, and that auditor worked on the company’s audit within the past year. In this instance, the auditor was not even employed by the accounting firm anymore. However, the auditor had resigned from the accounting firm just a few months beforehand and had actually worked on the most recent audit of the company.

This result underscores the need to consider whether the value of a new hire outweighs the cost of transitioning an accounting firm.

Kutak Rock LLP is a national law firm with 325 attorneys located in 16 offices throughout the United States. Our practice includes corporate, banking and federal securities law, mergers and acquisitions, bankruptcy and creditors’ rights, executive compensation, and complex commercial litigation.

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