

SEC ADOPTS EXPANDED AND ACCELERATED 8-K REPORTING REQUIREMENTS

On March 16, 2004, the Securities and Exchange Commission (the “SEC”) issued final rules expanding the list of events required to be reported by registrants on Form 8-K and shortening the deadline for most filings to four business days following the event. These expanded and accelerated reporting requirements follow the Congressional mandate under Section 409 of the Sarbanes-Oxley Act of 2002 that the SEC adopt rules requiring reporting companies to disclose material information on a “rapid and current basis,” as well as previous SEC efforts that predate the Sarbanes-Oxley Act to expand such reporting requirements and move towards a “real time” reporting system. The amendments become effective on August 23, 2004.

Companies should review their disclosure controls and procedures to ensure that the appropriate mechanisms are in place to satisfy these new reporting requirements within the shortened time constraints under the new rules.

Expanded Coverage of Form 8-K

The SEC has expanded the coverage of Form 8-K by adding new categories of events to be reported, transferring items from the periodic reports into Form 8-K and expanding pre-existing items. Although in its adopting release the SEC eliminated much of the analysis of the events it had previously proposed, the SEC has cautioned that its general rules prohibiting material omissions that make the disclosure misleading continue to apply to these filings.

New Reportable Events

The amendments require reports on Form 8-K to disclose eight new events, reorganized with the existing events into topical categories under a new numbering system. For example, voluntary disclosure of “other events” previously reported under Item 5 has been redesignated as Item 8.01. See Annex I for an outline of these reorganized categories.

- ***Entry into a material definitive agreement (or material amendment) not made in the ordinary course of business (Item 1.01).*** The Form 8-K disclosing such an agreement must describe the date of the agreement, the parties to the agreement, any relationship between the company or its affiliates and the parties and the terms and conditions of the agreement. Although the proposed requirement to file the agreement as an exhibit to the Form 8-K has been eliminated in these final rules, the SEC encourages companies to do so when feasible.

Commentary:

- The SEC has defined a material definitive agreement as an agreement enforceable against or by the company. Thus, no disclosure is required for entry into letters of intent or other non-binding agreements, even if they contain non-material binding elements such as confidentiality or “no-shop” provisions. However, disclosure is required of an agreement that remains subject to customary closing conditions, such as delivery of legal opinions, completion of due diligence or regulatory approval.
- A material amendment to an agreement may need to be disclosed even if the underlying agreement did not. For example, if an agreement was entered into before the effective date of these new rules and the agreement was amended after the effective date, the amendment may need to be disclosed even though the underlying agreement did not. Similarly, the amendment itself may be material, even if the original agreement was not.
- Since this new item may be the first public announcement of a business combination under Rule 165 under the Securities Act and Rule 14d-2(b) or 14a-12 under the Securities Exchange Act, the SEC will permit a registrant to satisfy its obligations under those rules by including the required disclosure and appropriate EDGAR tag and checking the appropriate box added to the cover of the Form.
- Note that a company is required to report its entry into a material agreement to acquire or dispose of assets under this item and then later disclose the closing under the renumbered Item 2.01. However, the Item 2.01 requirement remains subject to a bright-line reporting threshold different from Item 1.01.
- ***Termination of a material definitive agreement not made in the ordinary course of business (Item 1.02).*** Under this new item, disclosure is required only following termination of the material agreement, other than upon expiration or completion, if such termination is material to the company. Thus, disclosure of negotiations or discussions regarding termination is not required. The Form 8-K disclosing such termination must include information similar to that required upon entry into a material agreement, as well as a description of the circumstances surrounding the termination and any material early termination penalties incurred.

Commentary:

- The SEC has clarified that no disclosure is required if the company believes in good faith that the agreement has not been terminated, unless it has received a notice of termination. However, if a company decides to voluntarily disclose the circumstances relating to this agreement despite such good faith belief that no

termination has occurred, it may be required to file an amended 8-K if its belief changes.

- ***Creation of a material direct financial obligation¹ or an off-balance sheet arrangement (Item 2.03).*** Disclosure is required once an enforceable agreement is entered into, or, if no such agreement exists, within four business days after the closing or settlement of the obligation. The disclosure must include the date, a description and the amount of the obligation or agreement, the terms of payment and other material terms, including whether the obligation can be accelerated or increased, and any provisions that enable the company to recover from third parties.

Commentary:

- No Form 8-K is required under this item if the obligation is a security sold pursuant to an effective registration statement and the requisite information is provided in a timely filed prospectus.
 - Disclosure is required even if the company is not a party to the agreement or transaction that created the contingent liability. If this is the case, disclosure must be made within the four business day period following the earlier of (1) the fourth business day after the obligation arises, or (2) the day on which any executive officer of the company becomes aware of such obligation.
- ***Triggering events² that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement (Item 2.04).*** Disclosure is also required for a triggering event that causes a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation. Following such a triggering event under this item, the registrant must file a Form 8-K describing the event, the amount of the obligation, the terms of the payment or acceleration and any other material obligations of the company that could result from the triggering event, as well as the underlying agreement or transaction.

Commentary:

- Disclosure is required only following the occurrence of a triggering event according to the terms of the agreement or transaction. This includes the sending

¹ A "direct financial obligation" is defined as a long-term debt obligation, a capital lease obligation, an operating lease obligation or a short-term debt obligation arising other than in the ordinary course of business.

² A triggering event is defined as: "an event, including an event of default, event of acceleration or similar event, as a result of which a direct financial obligation of the registrant or an obligation of the registrant arising under an off-balance sheet arrangement is increased or becomes accelerated, or as a result of which a contingent obligation of the registrant arising out of an off-balance sheet arrangement becomes a direct financial obligation of the registrant."

of any notice required under the agreement and the satisfaction of any other conditions to the acceleration event, other than the passage of time.

- ***Material costs associated with exit or disposal activities (Item 2.05).*** This item requires disclosure of commitments to an exit or disposal plan or other disposal of a long-lived asset or termination of employees under a plan of termination under which material charges will be incurred by the company. The disclosure must include the date of commitment to the course of action, a description of the course of action, the expected completion date, an estimate of each major type of cost of the action and the total amounts to be incurred and an estimate of the amount of the charge that will result in future cash expenditures.

Commentary:

- This reporting obligation is triggered by the commitment of the company's board of directors or, if board action is not required, an authorized officer to the course of action.
 - If the company is unable to give a good faith estimate of the charges at the time of the filing, the Form 8-K may omit the estimate, provided that once an estimate is formulated, an amendment including the estimate must be filed within four business days.
- ***Material impairment charges (Item 2.06).*** Disclosure is required under this item when a company's board of directors or, if board action is not required, an authorized officer concludes that a material charge for impairment (including an impairment of securities or goodwill) is required under GAAP. The company must then disclose the date of the conclusion that the material charge is required, a description of the impaired asset(s), an explanation of the circumstances surrounding the impairment, an estimate of the amount of the charge and an estimate of the impairment that will result in future cash expenditures.

Commentary:

- No disclosure is required under this item if the conclusion regarding the need for the material 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 plan is disclosed in the relevant periodic report.
- ***Receipt of notice of delisting or failure to satisfy a rule or standard for continued listing; transfer of listing (Item 3.01).*** This new item requires a company to report a notice from the national securities exchange or association that maintains the principal listing of the company's common equity securities that the company or such securities do not satisfy a rule or standard for continued listing or the exchange or association has

taken steps to delist such securities. The Form 8-K must disclose the date of receipt of notice, the relevant rule or standard that was not met and any action that the company determined to take in response to the notice. Such disclosure is also required if the company (1) has notified the exchange of any such material noncompliance for continued listing, (2) receives a public reprimand letter regarding such a violation from the exchange, even if delisting is not contemplated, or (3) has taken action to delist such securities or transfer the listing to another exchange.

Commentary:

- An early warning notice indicating that the company is in danger of noncompliance does not trigger the reporting requirements under this item. However, if the notice indicates that the company is not in compliance, but will not be delisted if it cures the problem within a grace period, disclosure is required.
 - Disclosure is only required of the company's anticipated action as of the filing date. Disclosure of any changes to such anticipated action is not mandated, but is encouraged.
 - Thus, two filings would likely be required in connection with an involuntary delisting: (1) an initial filing when the company receives notice from the exchange, or it notifies the exchange, that it does not comply with a listing requirement; and (2) upon receipt of an actual notice of delisting.
 - Disclosure is not required for a delisting of the securities when the class has been called for redemption or otherwise has been paid at maturity.
- ***Non-reliance on previously issued financial statements or related audit report or interim review (Item 4.02).*** The company must file a Form 8-K if its board of directors or, if board action is not required, an authorized officer concludes that the company's previously issued financial statements should not be relied upon because of an error in such statements. The disclosure must include the date of the conclusion of non-reliance, identify the financial statements and years or interim periods that should no longer be relied upon, describe the facts underlying the conclusion to the extent known to the company at the time of the filing and state whether the audit committee or company's officers discussed the matter with the company's independent accountants.

Similar disclosure is required if the independent accountants have notified the company that a previously issued audit report or interim review should not be relied upon. In such event, the company must provide the independent accountants with a copy of the disclosure under this item on or before the day it files the related Form 8-K and request a letter from the accountants indicating whether or not they agree with the disclosure. The accountants' letter must then be filed as an exhibit to an amendment of the Form 8-K.

New 8-K Items Previously Required in Periodic Reports

Under the new rules, the following items, which previously were required to be disclosed only in a company's periodic reports, will be required to be reported on a Form 8-K:

- ***Unregistered sales of equity securities (Item 3.02).*** This new item requires early disclosure on Form 8-K of unregistered sales of equity securities unless the equity securities sold in the aggregate since the company's last report filed under this item or last periodic report, whichever is most recent, constitute less than 1% of the company's outstanding securities of that class. Issuances not reported on a Form 8-K must continue to be reported in periodic reports.

Commentary:

- The reporting obligation is triggered once an enforceable agreement is entered into, whether or not subject to conditions, regarding the sale of such securities. If no such agreement exists, disclosure must be provided within four business days after the closing of the sale.
 - In computing the percentage of outstanding securities of the class, securities convertible into or exchangeable for such securities should not be included.
- ***Material modifications to rights of security holders (Item 3.03).*** Any material modifications to the rights of holders of a class of the company's registered securities must be described on a Form 8-K. Disclosure is still required if the company previously described the proposed modification in a proxy statement, but once it is reported on a Form 8-K, no duplicative disclosure about the modification needs to be made in future periodic reports.

Expansion of Existing Reportable Events

The new rules also expand upon two existing Form 8-K items:

- ***Departure of directors or principal officers; election of directors; appointment of principal officers (Item 5.02).***
- ***Disclosure is required if a director resigns or refuses to stand for re-election because of a disagreement known to an executive officer of the company relating to the company's operations, policies or practices or if the director has been removed for cause.*** Under this amended item, disclosure is now required regardless of whether the director requested such disclosure. The company must then disclose the date of such removal, refusal or resignation and any positions held by the director on any board committee and describe the circumstances surrounding the disagreement.

The company must file a copy of any correspondence from the director regarding the circumstances of such removal, refusal or resignation as an exhibit to the Form 8-K. The company must also furnish the director with a copy of its disclosure no later than the day of filing and provide the director with the opportunity to furnish a letter stating whether he or she agrees with the company's disclosures. Any letter received by the company from the director must be filed as an exhibit by amendment to the previously filed Form 8-K within two business days after receipt.

- ***Disclosure is required when a principal officer retires, resigns or is terminated and when a director retires, resigns, is removed or refuses to stand for re-election other than as a result of a disagreement or for cause.*** No further disclosure regarding the reasons for such departure is required under this item. Principal officers include the company's chief executive officer, president, chief financial officer, principal accounting officer and chief operating officer.
- ***Disclosure is also required following the appointment of a principal officer or the election of a new director.*** The new officer's name, position, date of appointment and background must be disclosed, as well as any related transactions with the company and the material terms of any employment agreement between the company and the officer. Similar information is required if a new director is elected to the board, unless the director was elected at an annual or special meeting of stockholders.

Commentary:

- The disclosure requirements under this Item 5.02 do not apply to a registrant that is a wholly owned subsidiary of another issuer with registered securities.
 - If a company desires to publicly announce the appointment of a new officer other than by means of a Form 8-K, the company can delay filing a Form 8-K for such appointment until the public announcement is made.
- ***Amendments to a company's certificate of incorporation or bylaws; change in fiscal year (Item 5.03).*** Disclosure under this item is required only if the proposed amendment or change was not previously disclosed in a proxy or information statement. The company must disclose the effective date of the amendment and describe the amendment and the previous provision if applicable. If only the amendment is filed as an exhibit to the Form 8-K, the restated articles of incorporation or bylaws must be filed as an exhibit to the next periodic report. Disclosure of amendments to certificates of incorporation or bylaws must only be made by companies with registered equity securities; changes in fiscal years must be disclosed by all reporting companies.

Accelerated Filing Date

The new rules require companies subject to Exchange Act reporting requirements (other than foreign private issuers) to file the Form 8-K within four business days of a triggering event, compared with the five business or fifteen calendar day period generally required under current rules or the previously proposed two business day deadline with a possible two business day extension.

Commentary:

- However, these new deadlines do not affect filing deadlines for disclosures made under Regulation FD (now Item 7.01), voluntary disclosures and certain exhibits.
- The period for filing the financial statements and pro forma information in connection with an acquisition has been extended to up to 71 days, thereby preserving the current 75-day total period to file the financial statements (four business days for initially reporting the acquisition plus 71 calendar days to file the financial statements).

Safe Harbor

In response to concerns that the accelerated filing period would not be sufficient for companies to adequately assess their disclosure obligations under the new rules, the rules include a limited safe harbor from claims under Section 10(b) of the Exchange Act and Rule 10b-5 for failure to timely file a Form 8-K. The safe harbor generally applies to the new disclosure items added to Form 8-K (other than notices of delisting or noncompliance with exchange standards) and extends only until the due date of the periodic report for the period that the Form 8-K was not timely filed.

Commentary:

- Similarly, companies that fail to file timely Form 8-Ks for items covered by the safe harbor will still remain eligible to file Form S-3 registration statements, as long as the company has disclosed the required information on or before the date the Form S-3 is filed. Rule 144 was also amended to clarify that a company need not have filed all these new item Form 8-Ks in order to satisfy the rule's "current public information" condition.
- The safe harbor only applies to the failure to timely file the relevant Form 8-K. Thus, material misstatements or omissions or the failure to satisfy a separate disclosure obligation will continue to be subject to Section 10(b) and Rule 10b-5 liability.

Amendments

Because of the new numbering system, persons searching the EDGAR system for examples of specific events need to search under both the new and the old numbers. Amendments filed after the effective date of the new rules to Form 8-Ks filed before the effective date must use the new numbering system.

* * * * *

If you wish to obtain additional information regarding these new Form 8-K reporting requirements, please contact Serge Benchetrit, John S. D'Alimonte, Steven J. Gartner, Yaacov M. Gross, Jeffrey S. Hochman or the corporate partner with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is 212-728-8000, and our facsimile number is 212-728-8111. Our website is located at www.willkie.com.

March 29, 2004

Copyright © 2004 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information.

Annex I -- Reorganization of Form 8-K Items

Section 1 - Registrant's Business and Operations

Item 1.01	Entry into a Material Definitive Agreement	NEW
Item 1.02	Termination of a Material Definitive Agreement	NEW
Item 1.03	Bankruptcy or Receivership	Substantially the same as former Item 3

Section 2 - Financial Information

Item 2.01	Completion of Acquisition or Disposition of Assets	Substantially the same as former Item 2
Item 2.02	Results of Operations and Financial Condition	Substantially the same as former Item 12
Item 2.03	Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant	NEW
Item 2.04	Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	NEW
Item 2.05	Costs Associated with Exit or Disposal Activities	NEW
Item 2.06	Material Impairments	NEW

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	NEW
Item 3.02	Unregistered Sales of Equity Securities	Moved from periodic report requirement
Item 3.03	Material Modifications to Rights of Security Holders	Moved from periodic report requirement

Section 4 - Matters Related to Accountants and Financial Statements

Item 4.01	Changes in Registrant's Certifying Accountant	Substantially the same as former Item 4
Item 4.02	Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	NEW

Section 5 - Corporate Governance and Management

Item 5.01	Changes in Control of Registrant	Substantially the same as former Item 1
Item 5.02	Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers	Expanded from previous Item 6
Item 5.03	Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	Expanded from previous Item 8
Item 5.04	Temporary Suspension of Trading under Registrant's Employee Benefit Plans	Same as previous Item 11
Item 5.05	Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics	Same as previous Item 10

Section 6 - [Reserved]

Section 7 - Regulation FD

Item 7.01	Regulation FD Disclosure	Same as previous Item 9
-----------	--------------------------	--------------------------------

Section 8 - Other Events

Item 8.01	Other Events	Same as previous Item 5
-----------	--------------	--------------------------------

Section 9 - Financial Statements and Exhibits

Item 9.01	Financial Statements and Exhibits	Conforming changes made to previous Item 7
-----------	-----------------------------------	---