

SEC AMENDS FORM 8-K DISCLOSURE REQUIREMENTS AND ACCELERATES FILING DEADLINE

APRIL 6, 2004

The SEC adopted amendments relating to current reports on Form 8-K in a release dated March 16, 2004.¹ The amendments add eight new items to Form 8-K, expand two existing Form 8-K disclosure items and relocate to Form 8-K two disclosure requirements currently addressed only in annual reports on Form 10-K and quarterly reports on Form 10-Q. Because a number of new items have been added to Form 8-K, the reportable items have been reorganized into topical categories under a new numbering system. The amendments also shorten the deadline for filing most current reports on Form 8-K to four business days after the occurrence of the event giving rise to a reporting obligation as compared with the current filing deadlines of five business days to 15 calendar days, depending on the nature of the event.² The new Form 8-K requirements will be effective on August 23, 2004.

EIGHT NEW DISCLOSURE EVENTS

The amendments add the following new items to the list of events or developments the occurrence of which requires a company to file a current report on Form 8-K:

Entry into a Material Definitive Agreement Not Made in the Ordinary Course of Business

This item requires disclosure of material definitive agreements, including material amendments to such agreements, entered into by a company that are not in the ordinary course of business. The agreements covered by this item are the same types of agreements that issuers are required to file under Item 601(b)(10) of Regulation S-K (Material Contracts). The SEC's original proposal included non-binding agreements such as letters of intent. In response to commenters, the SEC eliminated this requirement and limited the rule to material definitive agreements. The material agreement must be filed with the company's next periodic report and does not need to be filed as a Form 8-K exhibit. However, the SEC encourages companies to file the agreement with the Form 8-K when possible. The filing of a Form 8-K under this item may trigger a filing obligation under Rule 165 under the Securities Act (Offers Made in Connection with a Business Combination Transaction), Rule 14d-2b (Pre-commencement Communications in relation to a Tender Offer) or 14a-12 (Solicitation Before Furnishing a Proxy Statement). To

¹ Release Nos. 33-8400 and 34-49424.

² The amendments do not affect the filing deadline for disclosures under Regulation FD or voluntary disclosures.

avoid duplicative filings, the SEC has amended Form 8-K to enable a company to check one or more boxes on the cover page to indicate it is simultaneously satisfying its filing obligations under these rules, provided that the Form 8-K contains all of the information required by those rules.

Termination of a Material Definitive Agreement Not Made in the Ordinary Course of Business

This item requires disclosure if a material definitive agreement not made in the ordinary course of business is terminated. No filing of a Form 8-K is necessary for the expiration of an agreement on a stated termination date or as a result of all the parties completing their obligations under the agreement. Additionally, no disclosure is required if a company believes, in good faith, that the agreement has not been terminated, unless the company has received a notice of termination under the agreement.

Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement

This item requires disclosure if a company becomes obligated under a direct financial obligation that is material to the company or if a company becomes directly or contingently liable for an obligation that is material to the company arising out of an off-balance sheet transaction. The item uses the definition of “off-balance sheet arrangement” in Item 303(a)(4)(ii) of Regulation S-K. A company must provide disclosure regarding off-balance sheet arrangements even if the company is not a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement. If the new financial obligation is a security that has been or will be sold pursuant to an effective registration statement of a company, the company does not need to file a Form 8-K as long as the prospectus for the security contains the information required by this item.

Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement

This item requires disclosure if a triggering event causing the increase or acceleration of a direct financial obligation of a company occurs and the consequences of the event are material to the company. Additionally, if a triggering event occurs causing a company’s obligations under an off-balance sheet arrangement to increase or be accelerated, or causing a company’s contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, and the consequences of such event are material to the company, it must file a Form 8-K disclosing such event.

Costs Associated With Exit or Disposal Activities

This item requires disclosure when a company commits to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146

Accounting for Costs Associated with Exit or Disposal Activities (SFAS No. 146), under which material charges will be incurred under generally accepted accounting principles applicable to the company.

Material Impairments

This item requires disclosure when a company concludes that a material charge for impairment to one or more of its assets, including, without limitation, an impairment of securities or goodwill, is required under the generally accepted accounting principles applicable to the company. If a company concludes it has a material charge as a result of the preparation, review or audit of its financial statements at the end of a period and the charge is disclosed in the company's Exchange Act report for such period, no Form 8-K disclosure is required.

Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

This item requires a company to report its receipt of a notice from the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity securities indicating that: (i) the company or such class of securities does not satisfy a rule or standard for continued listing on the exchange or association, (ii) the exchange has submitted an application to the SEC to delist the company's common equity securities or (iii) the association has taken all necessary steps to delist such securities from its automated inter-dealer quotation system. No Form 8-K is required if the delisting is the result of a redemption, maturity or certain other exceptions relating to an extinguishment of rights under the securities. A company must also disclose if it has notified such exchange or association that it is aware of any material noncompliance with a rule or standard for continued listing. Additionally, if such exchange or association issues a public reprimand letter or similar communication indicating the company has violated a rule or standard, the company must file a Form 8-K summarizing the letter. Any letters from such exchange or association do not need to be filed as exhibits to the Form 8-K. Finally, if a company has taken definitive action to cause the listing of a class of its common equity to be withdrawn from the national securities exchange or terminated from the automated inter-dealer quotation system of a national securities association and such exchange or association maintains the principal listing for such securities, the company must file a Form 8-K. This disclosure requirement does not apply to companies whose securities are quoted exclusively on automated inter-dealer quotation systems (such as the over-the-counter bulletin board) but are not listed on an exchange or association if the securities are no longer quoted on such quotation system.

Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

A company must file a Form 8-K when it concludes that any of its previously issued financial statements covering one or more years or interim periods should no longer be relied on because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20. A company must also disclose if it is notified by its independent accountants

that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements. Under these circumstances, the company must provide the independent accountant with a copy of the Form 8-K no later than the day it files the report with the SEC. The company must also request from the independent accountant a letter addressed to the SEC stating whether the accountant agrees with the company's statements in the Form 8-K and if not, stating the respects in which it does not agree. This letter from the accountant must be filed as an exhibit to an amendment to the previously filed Form 8-K within two business days of the company's receipt of the letter.

ACCELERATED REPORTING FOR EXISTING QUARTERLY/ANNUAL DISCLOSURE ITEMS

The amendments relocated the following two disclosure requirements from Form 10-K and Form 10-Q reports to Form 8-K:

Unregistered Sales of Equity Securities

This item requires the disclosure regarding a company's sale of equity securities in a transaction not registered under the Securities Act previously required in Form 10-K and Form 10-Q reports to be reported in a Form 8-K. A Form 8-K does not need to be filed if the aggregate equity securities sold since a company's last report filed under this item or last periodic report, whichever is more recent, constitutes less than 1% of the company's outstanding securities of that class (or 5% for a small business issuer). All sales not reported in a Form 8-K must be disclosed in periodic reports.

Material Modifications to Rights of Security Holders

This item requires a company to disclose material modifications to the rights of the holders of any class of the company's registered securities that was previously required to be disclosed in Form 10-Q.

EXPANDING DISCLOSURE FOR EXISTING FORM 8-K ITEMS

The amendments expand existing Form 8-K disclosure requirements as follows:

Disclosure When a Director Resigns or Refuses to Stand for Re-Election Due to a Disagreement or is Removed for Cause

A company must file a Form 8-K if a director has resigned or refuses to stand for re-election because of a disagreement with the company on any matter relating to the company's operations, policies or practices, and which disagreement is known to an executive officer of the company or if a director has been removed for cause. If the director provides the company with anything in writing concerning the circumstances surrounding his or her resignation, refusal or removal, the company must file a copy of such writing as an exhibit to the Form 8-K. Under these circumstances, the company must provide the director with a copy of the Form 8-K no

later than the day it files it with the SEC. The company must also provide the director with the opportunity to provide a letter addressed to the company stating whether the director agrees with the company's disclosure in the Form 8-K and if not, stating the respects in which it does not agree. Any letter received from the director must be filed as an exhibit to an amendment to the previously filed Form 8-K within two business days of the company's receipt of the letter.

This item expands on the existing disclosure requirement which requires disclosure only if a director departs as a result of a disagreement, provides a letter to the company describing the disagreement and specifically requests that the company publicly disclose the matter.

Under a separate item, a Form 8-K is also required when a director retires, resigns or is removed or refuses to stand for re-election for any reason other than as a result of a disagreement or for cause. Additionally, if a new director is elected other than by a vote of security holders at an annual meeting or special meeting held for such purpose, a Form 8-K is required to be filed.

Disclosure When Certain Officers Retire, Resign or Are Terminated or When Certain Officers Are Appointed

A company must file a Form 8-K when its principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or a person performing similar functions, retires, resigns or is terminated from that position or when a new person is appointed to that position. The Form 8-K filed when a new officer is appointed must include a brief description of the material terms of any employment agreement.

Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

A company with a class of equity securities registered under Section 12 of the Exchange Act must disclose in a Form 8-K any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy or information statement. A company must also file a Form 8-K if it changes its fiscal year by means other than a submission to a vote of securities holders or by an amendment to its articles of incorporation or bylaws.

SAFE HARBOR

The SEC has adopted a limited safer harbor from public and private claims under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 for companies that fail to file certain Form 8-K reports in a timely manner. The safe harbor was adopted in recognition of the fact that several of the new Form 8-K disclosure items may require management to quickly assess the materiality of an event or to determine whether a disclosure obligation has been triggered. Accordingly, the safe harbor applies to the following new items:

- Entry into a material definitive agreement;

- Termination of a material definitive agreement;
- Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase a direct financial obligation under an off-balance sheet arrangement;
- Costs associated with exit or disposal activities;
- Material impairments; and
- Non-reliance on previously issued financial statements or a related audit report or completed interim review (in the case where a company makes the determination and does not receive a notice from its accountants).

The safe harbor applies only to a failure to file a report on Form 8-K and not to any material misstatements or omissions in a Form 8-K that has been filed. Additionally, the safe harbor extends only until the due date of the periodic report of the company for the relevant period in which the Form 8-K was not filed. If, for example, an event occurs during a quarter and is not reported in a Form 8-K, it must be disclosed in the Form 10-Q for that period.

ELIGIBILITY TO USE FORMS S-2 AND S-3 AND TO RELY ON RULE 144

In order to be eligible to use Form S-2 or S-3, a company must have timely filed all reports required to be filed under Exchange Act Section 13(a) or 15(d) during the 12 months prior to the filing of the registration statement. A company's failure to make timely filings on Form 8-K with respect to the occurrence of the same events which are the subject of the safe harbor described above, will not disqualify the company from using Forms S-2 and S-3 as long as the company remedies its failure to file a required Form 8-K report by including corrective disclosure in the first periodic report filed with respect to the period in which the event occurred. A failure to file a Form 8-K with respect to any other item will continue to result in the loss of Form S-2 and S-3 eligibility for the 12 months following the Form 8-K due date.

The new rules clarify that a company's failure to timely file a Form 8-K will not affect a security holder's ability to rely on Rule 144 of the Securities Act to resell securities.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

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