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Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date

By Gregory Banacki, Jr., Esq.

On March 16, 2004, the Securities and Exchange Commission (“SEC”) adopted final rules (the “Final Rules”)¹ expanding the number of events that are reportable on Form 8-K² under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).³ Specifically, the Final Rules: (i) add eight new disclosure items to Form 8-K and transfer two other disclosure items from the periodic reports, (ii) expand the disclosure required under two existing items on Form 8-K, (iii) shorten the filing deadline for most items to four business days, and (iv) provide a limited safe harbor from liability for failure to timely file a Form 8-K in certain instances. The Final Rules also reorganize the disclosure structure of Form 8-K so that items now fall within topical sections.

The SEC amended Form 8-K in response to Section 409 of the Sarbanes-Oxley Act of 2002⁴ requiring public companies to disclose material information “on a rapid and current basis.”⁵ Prior to these amendments, companies were required to report very few significant corporate events. Even when reporting was required, companies could still often delay disclosure of many significant events until the due date for their next periodic reports. Although the SEC anticipates that the Final Rules will provide investors with better and faster disclosure of material corporate events, companies may find that achieving the quality and accuracy of the information reportable on Form 8-K conflicts with satisfying the accelerated deadlines. As a result of this revised real-time reporting structure, companies will need to reevaluate their disclosure controls and procedures in order to be in a position to satisfy the requirements of the Final Rules.

NEW DISCLOSURE ITEMS

The Final Rules add the following eight new disclosure items to Form 8-K:

Item 1.01 Entry into a Material Definitive Agreement.

Item 1.01 requires a reporting company to disclose “material definitive agreements” entered into by the company that are not made in the ordinary course of business or any material amendment to a material definitive agreement. Disclosure of a material amendment may be required even if the underlying agreement previously has not been disclosed by the company. This item generally excludes the obligation to disclose the entering into of a letter of intent or other non-binding agreement.

When triggered, Item 1.01 requires the company to disclose: (i) the date on which the agreement was entered into or amended, (ii) the identity of the parties to the agreement, (iii) a brief description of any material relationship between the company or its affiliates and any of the parties, and (iv) a brief description of the material terms and conditions of the agreement or amendment. The agreement itself does not need to be filed as an exhibit to the Form 8-K, rather, it must be filed as an exhibit to the company's next registration statement or periodic report.

Reporting companies should be aware that Item 1.01 also requires the disclosure of material definitive agreements related to business combinations. As a result, the filing of the Form 8-K may constitute the first public announcement for purposes of Rule 165⁶ under the Securities Act of 1933, as amended (the "Securities Act"),⁷ and Rule 14d-2(b)⁸ or Rule 14a-12⁹ under the Exchange Act and thereby trigger a filing obligation under those rules. In order to avoid duplicative filings, the SEC amended the cover page to Form 8-K to allow the company to check one or more boxes to indicate that it is simultaneously satisfying its filing obligations under those rules. Reporting companies must make sure that all of the information required thereunder is contained in the Form 8-K.

Item 1.02 Termination of a Material Definitive Agreement.

Item 1.02 requires a reporting company to disclose the termination of a material definitive agreement not made in the ordinary course of business when the effect of the termination is material to the company. Simple expiration or completion of the obligations associated with a material definitive agreement does not trigger disclosure. In addition, no disclosure is required if the company believes in good faith that the material definitive agreement has not been terminated, unless the company has received a notice of termination pursuant to the terms of the agreement. Further, no disclosure is required under Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement is actually terminated.

When triggered, Item 1.02 requires the company to disclose: (i) the date of the termination, (ii) the identity of the parties to the agreement, (iii) a brief description of any material relationship between the company or its affiliates and any of the parties, (iv) a brief description of the material terms and conditions of the agreement, (v) a brief description of the material circumstances surrounding the termination, and (vi) any material early termination penalties incurred by the company.

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Item 2.03 requires a reporting company to disclose when it becomes obligated under a material direct financial obligation, which includes a short-term debt obligation that arises other than in the ordinary course of business, a long-term debt obligation and a capital or operating lease obligation. Item 2.03 also requires disclosure when a reporting company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement.

Specifically, Item 2.03 requires the company to disclose: (i) the date on which the company becomes obligated or liable, (ii) a brief description of the transaction or agreement creating the obligation, (iii) the nature and amount of the obligation, including the terms of its payment and the terms under

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which a contingent liability may become a direct obligation, (iv) a brief description of the material terms under which the obligation may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties, (v) the maximum potential amount of future payments (undiscounted) that the company may be required to make, if different (for material obligations arising out of an off-balance sheet arrangement), and (vi) a brief description of any other material terms and conditions.

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Item 2.04 requires a reporting company to disclose when an event causes the increase or acceleration of a direct financial obligation or off-balance sheet arrangement, or causes a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation, and the consequences of any such event are material to the company.

When triggered, Item 2.04 requires the company to disclose: (i) the date of the triggering event and a brief description of the agreement or transaction under which the financial obligation was created and is increased or accelerated or a brief description of the off-balance sheet arrangement, as applicable, (ii) a brief description of the triggering event, (iii) the amount of the obligation, as increased if applicable, and the terms of payment or acceleration that apply, and (iv) any other material obligations of the company that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the obligation or its becoming a direct financial obligation of the company.

Item 2.05 Costs Associated with Exit or Disposal Activities.

Item 2.05 requires a reporting company to disclose when the board of directors, a board committee or an authorized officer of the company commits the company to an exit or disposal plan, disposes of a long-lived asset or terminates employees under certain plans of termination, as a result of which, material charges to the company's operating results will be incurred under generally accepted accounting principals ("GAAP").

Specifically, Item 2.05 requires the company to disclose: (i) the date of the commitment to the course of action and a description of the course of action involving exit or disposal activity, including the facts and circumstances leading to the expected action and the expected completion date, and (ii) estimates of the total amount or range of amounts expected to be incurred in connection with the action, including each major type of cost associated with the action and expected cash expenditures. If at the time of filing the company cannot estimate these amounts in good faith, the company does not have to disclose them at that time, but must file an amended Form 8-K within four days after it is able to make such estimates.

Item 2.06 Material Impairments.

Item 2.06 requires a reporting company to disclose the conclusion by a company's board of directors, a committee of the board or an authorized officer of the company that the company is required

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under GAAP to record a material charge or impairment to one or more of its assets, including securities or goodwill.

Specifically, Item 2.06 requires the company to disclose: (i) the date on which the conclusion was reached, (ii) a description of the asset(s) subject to impairment, and (iii) the facts and circumstances leading to the conclusion that the charge for impairment is required and the estimated amount of the impairment. As under Item 2.05, if the company cannot estimate these amounts in good faith at the time of the triggering event, it would have to file an amended Form 8-K within four days after it is able to make such estimates. Further, in recognizing that tests for impairment or recoverability often occur in connection with the preparation, review or audit of financial statements, the SEC is not requiring disclosure pursuant to this item if the conclusion regarding the material charge is made at the end of a fiscal quarter or year and the plan is disclosed in the company's report for that period.

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

Item 3.01 requires a reporting company to disclose when: (i) it receives notice regarding delisting matters from the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity, (ii) the company notifies the listing body that it is aware of any material noncompliance with a rule or standard for continued listing on the exchange or association, (iii) the listing body issues a public reprimand or similar communication indicating that the company has violated a rule or standard of the exchange or association, or (iv) the company has taken definitive action to cause the listing of a class of its common equity to be withdrawn from such exchange or association. The company must provide the relevant disclosure even if the company has the benefit of a grace period or similar extension period during which it may cure the deficiency that triggers the disclosure requirement.

When triggered, Item 3.01 requires the company to disclose: (i) the date of the notice or notification, (ii) a summary of the contents of the letter or communication, (iii) the applicable rule or standard for continued listing that has not been met, and (iv) any action that the company has determined to take in response to the notice. The SEC did not adopt as proposed the provision requiring companies to file the actual written notice received from the exchange or association as an exhibit to the Form 8-K.

Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

Item 4.02 requires a reporting company to disclose when (i) the board of directors, a committee of the board of directors or an authorized officer of the company concludes that previously issued financial statements for interim or annual periods should no longer be relied upon because of an error in such financial statement applying GAAP, or (ii) the company's independent auditor notifies the company that disclosure should be made or action taken to prevent future reliance on a previously issued audit report or completed interim review of previously issued financial statements.

Specifically, Item 4.02 requires the company to disclose: (i) the date the conclusion was reached or on which it was advised or notified, (ii) identification of the financial statements that should no longer

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be relied upon and a brief description of the facts underlying the conclusion, and (iii) a statement indicating whether the audit committee or the board of directors discussed the matter with the company's independent auditors.

Further, if the company receives such advice or notice from its independent auditors, the company must provide its auditors with the disclosure called for by this item no later than the same day it files the Form 8-K with the SEC and request that the auditor provide a letter addressed to the SEC as promptly as possible stating whether the auditor agrees with the disclosure. The company would then amend its Form 8-K to include the auditor's letter as an exhibit within two business days of receipt of same.

TRANSFERRED DISCLOSURE ITEMS

The Final Rules transfer the reporting of the following items to Form 8-K from Forms 10-Q¹⁰ and 10-K¹¹:

Item 3.02 Unregistered Sales of Equity Securities.

A reporting company that sells equity securities in a transaction that is not registered under the Securities Act must now disclose the same information that it had previously been required to provide on a quarterly basis on Form 10-Q on a Form 8-K within four business days of the sale. This information includes: (i) the date of the sale, (ii) the title and amount of securities sold, (iii) the consideration paid for the securities, (iv) the exemption from registration claimed, and (v) the terms of conversion or exercise of the securities, if any. Item 3.02 is not triggered, however, if the securities sold since the most recent disclosure of such sale does not exceed 1% (5% for small business issuers) of the outstanding securities of that class. Issuances of unreported equities securities not reported on Form 8-K will continue to be required to be reported in periodic reports.

Item 3.03 Material Modification to Rights of Security Holders.

A reporting company must now disclose on Form 8-K if there has been any material modification to the rights of security holders of any class of registered securities or material limitations or qualifications to the rights of security holders of any class of registered securities as a result of the issuance of another class of securities. Once a company reports a material modification to the rights of its securities holders on Form 8-K, the company is not required to make any duplicative disclosure about the modification in any of its subsequent periodic reports.

EXPANDED DISCLOSURE ITEMS

The Final Rules expand the scope of the following two existing Form 8-K triggering events and their related disclosures:

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Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers.

Under the former requirement, a company was required to disclose if one of its directors had departed as a result of a disagreement with the company and the director sent a letter to the company describing the disagreement and requesting such disclosure. Under new Item 5.02, a director is not required to take any action for this requirement to be triggered. If an executive officer knows that 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, or if a director has been removed for cause, the company must disclose: (i) the date of such resignation, refusal to stand for re-election or removal, (ii) any committee positions held by the director at such time, and (iii) a brief description of the disagreement. If the director furnishes the company with any written correspondence concerning such resignation, refusal or removal, the company must file it as an exhibit to the Form 8-K regardless of whether the director requests such action. The company must also provide such director with a copy of the company's disclosure no later than the day of the Form 8-K filing. Moreover, the company must file any letter received from the former director in response to the company's disclosure as an exhibit by amending the previously filed Form 8-K within two business days after receipt of such letter by the company.

Disclosure is also required when: (i) the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns or is terminated from that position, (ii) a director retires, resigns, is removed or declines to stand for re-election under circumstances where there is no disagreement requiring disclosure as described above, (iii) the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions, or (iv) a new director is elected to the board of directors other than by vote of shareholders at a meeting held for such purpose. The SEC eliminated the proposed requirement that the company disclose the reasons for the departure of an officer.

If the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions, the company must disclose the officer's name, position, date of appointment, background, including certain related transactions with the company, and a brief description of any material terms of any employment agreement between the company and the officer. If a new director is elected to the board of directors other than by vote of shareholders at a meeting held for such purpose, the company must disclose the director's name, election date, a brief description of any arrangement or understanding pursuant to which the new director was selected, any committees to which the new director has been or is expected to be named, and information regarding certain related transactions between the new director and the company. To the extent that information regarding an employment contract of a newly appointed executive officer, or the board committee or related transaction information associated with a newly elected director, is not determined or is unavailable at the time of the required Form 8-K filing, a company must include a statement to this effect in the filing and then must file an amendment to the Form 8-K filing containing this information within four business days after the information is determined or becomes available. Further, a company may delay the disclosure of the appointment of an officer in order to ensure a smooth transition until the day on which the company first makes a public announcement of the appointment if

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the company intends to make a public announcement of the appointment other than by means of a report on Form 8-K.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

Item 5.03 is triggered if a reporting company amends its articles of incorporation or bylaws and the amendment was not disclosed in a previously filed proxy or information statement. The company is required to disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and to file the text of the amendment as an exhibit to the Form 8-K. If the company chooses to only file the text of the amendment as an exhibit to the Form 8-K, the company must file the full text of the restated articles of incorporation or bylaws as an exhibit to the company's next periodic report. In addition, if the company changes its fiscal year end other than by a vote of security holders through the solicitation of proxies or through an amendment to its articles of incorporation or bylaws, it must disclose the date of the new fiscal year end and the form on which the report covering the transition period will be filed.

ACCELERATED DEADLINES

Events meeting the requirements for Form 8-K will now have to be reported within four business days of the date of the event prompting disclosure, shortened from the previous five or fifteen day windows under the prior rules. However, the new four day deadline does not apply to Regulation FD filings (Item 7.01), voluntary disclosures (Item 8.01) and certain exhibits.

LIMITED SAFE HARBOR

Due to the concern that the accuracy of reporting on Form 8-K may be jeopardized because management may be required to quickly assess the materiality of certain events or to determine whether a disclosure obligation has been triggered, the Final Rules create a limited safe harbor protecting companies from potential liability under Section 10(b)¹² and Rule 10b-5¹³ of the Exchange Act for failure to timely file a Form 8-K. The limited safe harbor applies only to the new disclosure items, excluding the new disclosure obligations regarding delisting from an exchange or association and non-reliance on previously issued financial statements. This limited safe harbor only applies to a failure to file a report on Form 8-K and not to material misstatements or omissions contained in a filed Form 8-K. If the safe harbor does apply, it is available only until the due date of the company's next periodic report at which time the company must provide the disclosure prescribed by the relevant Form 8-K item in such periodic report. Further, the safe harbor is not available if the company has an independent duty to disclose information arising from a source other than the Form 8-K requirement.

CONCLUSION

As a result of the adoption of the Final Rules by the SEC, reporting companies will need to reevaluate the effectiveness of their disclosure controls and procedures in order to make accurate, timely disclosures based on the new reporting requirements on Form 8-K. In its adopting Release,¹⁴ the SEC reminds reporting companies that in addition to the information specifically required under the Final Rules, any disclosure made in a report on Form 8-K must include all other information, if any, that is

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necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading.¹⁵

In addition to exercising special care to avoid material misstatements or omissions in a rush to satisfy the new Form 8-K accelerated filing deadlines, companies will need to be in a position to make initial determinations as to whether certain events are “material” and therefore required to be disclosed. Client familiarity with the topical categories contained in the reorganized disclosure structure of Form 8-K and the disclosure triggers thereunder will aid in their ability to identify reportable events and allow counsel adequate time to file the required disclosure on their behalf.

ENDNOTES

¹ 17 CFR 228, 229, et al.; Release Nos. 33-8400, 34-49424, “Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date” (March 16, 2004), as proposed in Release Nos. 33-8106, 34-46084, “Proposed Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date” (June 17, 2002). For the full text of the final rule release, see <http://www.sec.gov/rules/final/33-8400.htm>. For the full text of the proposed rule release, see <http://www.sec.gov/rules/proposed/33-8106.htm>.

² 17 CFR. 249.308.

³ 15 U.S.C. 78a et seq.

⁴ P.L. 107-204, 116 Stat. 745.

⁵ 15 U.S.C. 78m(l).

⁶ 17 CFR 230.165.

⁷ 15 U.S.C. 77a et seq.

⁸ 17 CFR 240.14d-2(b).

⁹ 17 CFR 240.14a-12.

¹⁰ 17 CFR 249.308a.

¹¹ 17 CFR 249.310.

¹² 15 U.S.C. 78j(b).

¹³ 17 CFR 240.10b-5.

¹⁴ See Note.

¹⁵ See Rule 12b-20 under the Exchange Act, as well as Section 10(b) and Rule 10b-5, thereunder.

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