



# SECURITIES LAW INSTITUTE RELEASE

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The Securities Law Institute is dedicated to implementing a system of disseminating material information relative to issuers and individuals involved in the ownership and management of public issuers.

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

The Securities and Exchange Commission, in response to the "real time issuer disclosure" mandate of Section 409 of the Sarbanes-Oxley Act of 2002, amended Form 8-K, significantly expanding the content of current disclosures required by public companies, effective August 23, 2004. The number of events triggering a Form 8-K filing requirement more than doubled and the deadline for required reports has been reduced to four business days.

The amended Form 8-K:

- Adds eight new disclosure events, expands the scope of two existing disclosure events, and moves two disclosure events from annual (10-KSB) and quarterly (10-QSB) reports to Form 8-K;
- Accelerates the Form 8-K filing deadline for all required disclosures to four business days after the reportable event; and
- Creates a limited safe harbor for certain violations of the Form 8-K.

### Shortened Form 8-K Filing Deadline

The amendments to Form 8-K require issuers that are subject to the reporting requirements of Section 13(a) and Section 15(d) of the Exchange Act to file required current reports on Form 8-K within four business days of a triggering event. These amendments do not affect the filing deadline for disclosures under Regulation FD (Item 7.01), voluntary disclosures (Item 8.01) and certain exhibits.

### Reorganization of Form 8-K Items

The amendments organize the Form 8-K items under the section headings and with the new numbering system referenced below.

*Summary of Revised Form 8-K Disclosure Events*

### Section 1 - Registrant's Business and Operations

Item 1.01 *Entry into a Material Definitive Agreement*

- Date agreement entered into or amended
- Identity of the parties and a description of any material relationship between the registrant and any of the parties
- Brief description of the terms and conditions of the amendment or agreements that are material to the registrant
- When feasible, the agreement itself, particularly if confidential treatment not requested

Item 1.02 *Termination of a Material Definitive Agreement*

- Date of termination of the agreement
- Identity of the parties and a description of any other material relationship between the parties
- Brief description of the terms and conditions of the agreement
- Brief description of the material circumstances surrounding the termination
- Any material early termination penalties incurred

Item 1.03 *Bankruptcy or Receivership*

- If a receiver has been appointed for registrant or parent in a bankruptcy proceeding or a court has assumed jurisdiction over a registrant, the registrant must disclose:

- Name of proceeding
  - Identity of court or governmental authority
  - Date jurisdiction assumed
  - Identity of receiver and date of his or her appointment
- If an order confirming a plan of reorganization or liquidation has been entered, a registrant must disclose:
    - Identity of court or governmental authority issuing order
    - Date order confirming plan entered
    - Summary of material features of plan
    - Number of shares of registrant issued and outstanding
    - Assets and liabilities of registrant
    - File plan as Exhibit to 8-K
- Description of the agreement under which the triggering event occurred
  - Date and a description of the triggering event
  - Amount of the direct financial obligation that may arise, increase or become accelerated
  - Any other material obligations of the registrant that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event
- If a triggering event occurs causing a registrant's obligation under an off-balance sheet arrangement to increase, be accelerated, or become a direct obligation of the registrant, the registrant must disclose:
    - Date and brief description of the arrangement and triggering event
    - Nature and amount of the obligation and terms of applicable payment or acceleration
    - Any other material obligations of the registrant that are accelerated due to this triggering event

## Section 2 - Financial Information

### Item 2.01 *Completion of Acquisition or Disposition of Assets*

- Date and manner of the acquisition
- Brief description of the assets involved, the nature and amount of consideration, and the principle followed in determining the amount of consideration
- Identity of the buyer/seller and any material relationship between such persons and the registrant
- Source of funds

### Item 2.02 *Results of Operations and Financial Condition*

- If registrant issues a press release with material non-public information regarding results of operations or financial condition, must disclose:
  - Date of announcement
  - Identifying information regarding announcement
  - Text of announcement as exhibit

### Item 2.03 *Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant*

- Brief description of the transaction or agreement and date on which registrant becomes obligated on direct financial obligation
- Nature and amount of the financial obligation, including a description of the events that may cause the obligation to arise, increase or become accelerated and the nature of any recourse provisions that would enable the registrant to recover from third parties
- If registrant becomes directly or contingently liable for an obligation arising out of an Off-balance sheet arrangement, date on which registrant becomes directly or contingently liable on the obligation and brief description of transaction/agreement creating obligation
- Nature and amount of registrant's financial obligation, including the material terms under which it may become a direct obligation, and nature of any recourse provisions that would enable the registrant to recover from third parties
- Maximum potential amount of future payments (undiscounted) the registrant may be required to make, if different

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

- If a triggering event causing the increase or acceleration of a direct financial obligation of the registrant occurs and the consequences are material:

### Item 2.05 *Costs Associated with Exit or Disposal Activities*

- Date on which the commitment was made
- Description of the course of action and the facts and circumstances leading to the expected action and the expected completion date
- Estimated amount of the charge for each major type of cost associated with course of action (for example, contract termination costs), as well as an estimate of the total amount of the charge
- Estimated amount that will result in future cash expenditures

### Item 2.06 *Material Impairments*

- Date on which the conclusion was reached
- Description of the assets subject to the impairment and the facts leading to the conclusion that charge for impairment required
- Estimated amount of the impairment charge that will result in future cash expenditures

## Section 3 - Securities and Trading Market

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

- If a registrant receives a notice indicating that the registrant does not satisfy a continued listing standard, the exchange has submitted an application to delist the registrant's securities, or a national securities association has taken all necessary steps to stop trading in a registrant's securities on an automated inter-dealer quotation system (does not include the OTC:BB), a registrant must disclose:
  - Date the registrant received the notice
  - Listing standard that the registrant did not satisfy
  - Discussion of the planned response to the notice
- If a registrant has notified an exchange that the registrant is aware of any material noncompliance with a rule or standard for continued listing, a registrant must disclose:
  - Date registrant provided such notice
  - Rule the registrant fails to satisfy
  - Discussion of the planned response to the notice
- If an exchange issues a public reprimand letter to a registrant, registrant must state the date and contents of the letter

- If a registrant's board or an authorized officer takes definitive action to delist the registrant's securities or remove the securities from an automated intra-dealer quotation system, registrant must state the date of the action and describe any action taken

#### Item 3.02 *Unregistered Sales of Equity Securities*

- Disclose sales of unregistered securities constituting at least 5% of the registrant's outstanding securities
- Aggregate offering price of equity securities in unregistered transactions
- Exemption from registration claimed
- Terms of conversion or exercise

#### Item 3.03 *Material Modifications to Rights of Security Holders*

- If constituent instruments defining rights of holders of any class of registered securities of a registrant have been materially modified, disclose date of modification, class affected, and general effect of modification
- If rights of other classes affected by such a modification, disclose date and effect of the modification on the rights of other classes

### Section 4 - Matters Related to Accountants and Financial Statements

#### Item 4.01 *Changes in Registrant's Certifying Accountant*

- If independent auditor resigns, refuses to stand for re-appointment after current audit, or is dismissed, or if a new independent auditor has been engaged, make disclosures required by Item 304(a)(2) of Regulation S-B

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

- Date of conclusion regarding non-reliance and identification of financial statements and years or periods covered that should no longer be relied upon
- Brief description of facts underlying conclusion
- Statement of whether the audit committee discussed with independent accountant the subject matter giving rise to conclusion
- Disclosure also required under section if registrant receives notice from independent auditor that disclosure or other action should be taken to prevent further reliance on a previously-issued audit report or completed interim review

### Section 5 - Corporate Governance and Management

#### Item 5.01 *Changes in Control of Registrant*

- Identity of person who acquired control
- Date and description of transaction that resulted in change of control
- Basis of control (including share ownership)
- Amount of consideration used by such person
- Source of funds of person
- Information required by Item 403(c) of Regulation S-B

#### Item 5.02 *Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers*

- When a director resigns or refuses to stand for re-election due to a disagreement or is removed for cause:

- Date of such resignation, refusal to stand for re-election or removal
- Positions held by director on any committee at time of resignation, refusal to stand for re-election or removal
- Brief description of circumstances representing disagreement that registrant believes led to director's actions
- File any written correspondence with director as exhibit
- Provide director with disclosures and give director opportunity to furnish letter to registrant stating whether he agrees with registrant's disclosures in response to this Item, and file any response letter as an exhibit by an amendment to previously-filed 8-K within two business days after receipt

- If a principal officer retires, resigns, or is terminated, or if a director retires, resigns, is removed, or refuses to stand for re-election for any reason other than as a result of a disagreement or for cause

- If a registrant appoints a new principal officer, the registrant must disclose his or her:
  - Name, position and date of appointment
  - Background information and certain related transactions with the registrant
  - Brief description of the material terms of his or her employment agreement

- If a new director is elected to the board, the registrant must disclose his or her:
  - Name and election date
  - Any committees to which the new director has been named
  - Any arrangements or understandings pursuant to which the new director was elected
  - Certain related transactions between the new director and the registrant

Brief description of the material terms of his or her employment agreement

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

- Effective date of amendment
- Description of the provision adopted or changed by amendment
- Text of previous provision
- If a registrant determines to change its fiscal year other than by a proxy statement or an amendment to its articles of incorporation or bylaws, the registrant must disclose:
  - Date of such determination
  - Date of the new fiscal year end
  - Form on which the report covering the transition period will be filed

#### Item 5.04 *Temporary Suspension of Trading Under Registrant's Employee Benefit Plans*

- No later than the fourth business day after a registrant receives the notice required by Section 101(i)(2)(E) of ERISA, or on the same date by which a registrant transmits a timely notice to an affected officer or director under the relevant statutes, provide information required by applicable statutes

#### Item 5.05 *Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics*

- Briefly describe nature and date of any amendment to a registrant code of ethics that applies to a registrant's CEO, CFO, principal accounting officer or controller
- Briefly describe nature, date, and person to whom a waiver of a provision of the code of ethics was granted

#### Section 6 – Reserved

#### Section 7 – Regulation FD Disclosure

- Regulation FD information, unless disclosed under Item 8.01

#### Section 8 – Other Events

- Any events a registrant deems of importance to security holders
- Regulation FD information, unless disclosed under Item 7.01

#### Section 9 – Financial Statements and Exhibits

- Financial statements of businesses acquired
- Pro forma financial information
- Exhibits furnished in accordance with provisions of Item 601 of Regulation S-B

#### Safe Harbor and Eligibility to Use Forms S-2 and S-3 and to Rely on Rule 144

The SEC has adopted a new limited safe harbor from public and private claims under Exchange Act Section 10(b) and Rule 10b-5 for a failure to timely file a Form 8-K regarding the following items:

- Item 1.01 Entry into a Material Definitive Agreement
- Item 1.02 Termination of a Material Definitive Agreement
- Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant
- Item 2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation under an Off-Balance Sheet Arrangement
- Item 2.05 Costs Associated with Exit or Disposal Activities

#### Item 2.06 Material Impairments

Item 4.02 (a) Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review (in the case where a registrant makes the determination and does not receive a notice described in Item 4.02(b) from its accountant)

The safe harbor for these items states that no failure to file a report on Form 8-K that is required solely pursuant to the provisions of Form 8-K shall be deemed to be a violation of Section 10(b) and Rule 10b-5 under the Exchange Act. The safe harbor only applies to a failure to file a report on Form 8-K. Thus, material misstatements or omissions in a Form 8-K will continue to be subject to Section 10(b) and Rule 10b-5 liability.

In addition, if the registrant has a duty to disclose information that is the subject of any of the Form 8-K items covered by the safe harbor for any reason apart from the Form 8-K requirement, the safe harbor will not provide protection from Section 10(b) and Rule 10b-5 that may arise from the registrant's failure to satisfy such separate disclosure obligation. For example, if a registrant publicly sells or repurchases its own securities while in possession of material non-public information that is required to be disclosed in a Form 8-K report pursuant to an item that is covered by the safe harbor, the safe harbor will not protect the registrant from Section 10(b) and Rule 10b-5 liability regarding its separate disclosure obligation pursuant to the offering of securities.

In view of the new reporting requirements, we are suggesting that public companies should:

- Review existing disclosure controls and procedures and develop a plan for timely obtaining information that must be disclosed, especially given the increased amount and rapidity of disclosure required and the difficulty materiality judgments companies are required to make when deciding if disclosure obligations have been triggered;
- Review existing investor and public relations policies that may need to be updated in view of the expanded disclosure requirements;
- Educate directors and executive officers, as well as any personnel in the company who would have access to relevant information, about the new requirements; and
- Consider amending securities trading policies to impose trading blackouts on insiders during the period from the event triggering a required Form 8-K filing until one or two business days after the event is disclosed.

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