

T O O U R F R I E N D S A N D C L I E N T S

August 13, 2004

The New Form 8-K: 15 Items Every General Counsel Needs to Know

On August 23, 2004 the new SEC's Form 8-K rules will become effective for all domestic U.S. companies that are required to file periodic reports with the SEC. The Form 8-K now includes 22 items, increased from 12 items, and in general must be filed within four business days of the event reported, compared to the previous requirement of five business days or 15 calendar days. Companies must now file a Form 8-K when they enter into or terminate a material contract, create a direct financial obligation, restate their financial statements due to an error, conclude that a material charge for impairment of assets is required, or appoint new senior officers or directors. The SEC estimates that, on average, companies will be required to file five additional Form 8-K's each year.

The rules for when a Form 8-K is required are far from clear. Companies will now be required to make difficult judgments regarding whether a Form 8-K is even required. The SEC's adopting release clarified some of the thornier questions raised during the comment period, but numerous open questions remain regarding how to comply with the new requirements. In this article we provide suggestions for adopting disclosure controls in the new Form 8-K environment. In addition, we provide an in-depth analysis of each of the 22 items of the new Form 8-K, consider some of the difficult interpretative questions inherent in the new rules and analyze the implications of a failure to make a time Form 8-K filing. Together, these materials provide a comprehensive guide for compliance with the new rules.¹

Disclosure Controls for the New Form 8-K

All public companies in the United States are required to adopt and implement "disclosure controls" designed to ensure that all of the information necessary to be disclosed in the company's SEC filings (including Form 8-K) is accurately transmitted to the company's senior officers and individuals responsible for the company's periodic reporting. The CEO and CFO are required to evaluate the disclosure controls every quarter and attest in their quarterly certifications as to the sufficiency of the company's disclosure controls.

¹ The SEC release adopting the new Form 8-K can be accessed at www.sec.gov/rules/final/33-8400.htm.



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Every Form 10-Q and Form 10-K must include disclosure about the adequacy of the disclosure controls. With the adoption of the new Form 8-K regimen, the disclosure controls requirement means that companies are required to implement procedures designed to ensure that the company can comply with the new Form 8-K requirements. This is no small task.² What previously was a quarterly evaluation under Form 10-Q has become continuous monitoring of whether disclosure is needed on any given day in a Form 8-K.

As a result of this shift in emphasis, we believe that many companies should consider updating their disclosure controls. We recommend that companies consider adopting some of the following procedures with respect to Form 8-K.

1. ***Distribute the list of Form 8-K triggering events broadly throughout the organization.*** Determining whether a Form 8-K filing was necessary historically has not been a rigorous exercise because the old Form 8-K events were unquestionably significant and unmistakable, such as a change of control or bankruptcy filing. Determining whether a Form 8-K filing was necessary was not a rigorous exercise. The new Form 8-K, however, includes events such as entry into material contracts, termination of material contracts, correspondence with securities exchanges, and creation of material financial obligations or off-balance sheet arrangements. Every company must identify those individuals who will have knowledge of the Form 8-K event and put in place procedures for effective communication within the organization.
2. ***Establish guidelines for which contracts, and categories of contracts, may be deemed “material.”*** The SEC has not changed the definition of a “material contract.” However, most companies previously only had to make the determination four times a year, in connection with filing the Form 10-Q or 10-K. Because of the new requirement to file a Form 8-K upon entering into a definitive material contract, companies should consider adopting internal guidelines so that they are promptly aware when a new contract, supply arrangement, customer agreement, lease, license, loan agreement, employment agreement, compensatory plan or related party transaction will be deemed a definitive “material” agreement. In particular, related party transactions and material leases will now need to be disclosed much sooner than previously required. Part of the analysis may include numerical guidelines, such as “any contract involving more than \$XX dollars” or “any contract which impacts XX% of the company’s revenues,” although numerical guidelines alone should not be used without more to make materiality judgments.

² In the first quarter of 2004 one company included disclosure in its Form 10-Q that, notwithstanding adequate disclosure controls, the company had omitted to file a required Form 8-K in connection with a pension fund blackout period.

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3. ***Establish guidelines for which direct financial obligations and off-balance sheet arrangements may be deemed “material.”*** Companies will be required to file a Form 8-K when they create a material direct financial obligation or a material obligation under an off-balance sheet arrangement. Unlike Item 601(b)(4) of Regulation S-K, which requires the filing of long-term debt instruments that exceed 10% of the company’s total assets, this new Form 8-K item does not contain any specific numerical threshold. However, companies should consider establishing qualitative and/or quantitative guidelines for which financial instruments need to be considered when evaluating materiality for Form 8-K purposes, bearing in mind the SEC’s admonition that numerical thresholds alone are not sufficient determinants of materiality.
4. ***Finance departments should monitor the new accounting-related triggering events.*** A number of the new Form 8-K requirements directly involve the finance, treasury or accounting function, rather than solely the legal, regulatory or corporate secretarial function. In particular, a Form 8-K is required if the company is committed to an exit or disposal plan under which material charges will be incurred under GAAP, or if the company concludes that a material charge for impairment to one or more of its assets is required under GAAP. The Form 8-K implications of these accounting determinations must be kept in mind. Determining precisely when a company is “committed” or reaches a “conclusion” is not necessarily a simple task. The finance and accounting departments should also be involved in determining when direct financial obligations and off balance sheet arrangements will require the filing of a Form 8-K.
5. ***Update M&A checklists.*** Many of the new Form 8-K items may be triggered by mergers and acquisitions. Entering into an acquisition or disposition agreement will trigger a Form 8-K disclosure requirement under Item 1.01 (definitive material agreements) if the agreement is “material.” Consummating the acquisition or disposition will trigger a second Form 8-K requirement under Item 2.01 (completion of acquisition or disposition of assets) if the acquisition or disposition is “significant.” It is possible that a company might deem an acquisition or disposition to be “material” under Item 1.01 but not “significant” under Item 2.01. Financial statements of the acquired entity, and any required pro forma financial statements covering the acquisition, will be required to be filed within 71 days of the date on which the Item 2.01 Form 8-K is due. An acquisition could also trigger a Form 8-K requirement under Item 2.03 (direct financial obligations) if the company borrows money to pay for the acquisition, or Item 3.02 (unregistered sales of equity securities) if equity constituted a portion of the consideration for the acquisition.
6. ***Clarify the authority of corporate officers to take actions related to the Form 8-K items.*** A number of Form 8-K triggering events are tied to decisions of the board, a board committee or an authorized officer where board approval is not required. These include (1) a company’s

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commitment to exit or disposal activities under which material charges will be incurred under GAAP, (2) a company's conclusion that a material charge for impairment is required, and (3) a company's conclusion that previously issued financial statements cannot be relied upon because of an error in such financial statements. Companies should clarify which corporate officers have authority to take actions with respect to these items, or whether any of these items require board approval.

7. ***Keep track of mandatory updates.*** A number of the Form 8-K items involve not only the filing of an initial Form 8-K but also in some cases an updated Form 8-K.

- The Form 8-K's regarding costs associated with exit or disposal activities under which material charges will be incurred under GAAP, and material impairments, are permitted to omit various estimates, so long as the estimates are provided in an amended Form 8-K within four business days of their determination.
- Similarly, if information related to a new officer's employment terms, or a new director's committees or related party transactions, is not known at the time the Form 8-K is filed, the company must include a statement to this effect in the filing and then must file an amendment to the Form 8-K containing such information within four business days after the information is determined or becomes available.
- The SEC contemplates that some events will require two Form 8-K's. Acquisitions will require an initial Form 8-K if the acquisition agreement is "material" and a second Form 8-K upon completion of the acquisition if it is "significant." In general, an acquisition is "significant" if the target's assets or pre-tax net income are 10% or more of the acquiror's assets or pre-tax net income or if the purchase price is 10% or more of the acquiror's assets. It is possible that an acquisition might be deemed material but not significant. Similarly, an initial Form 8-K will be required upon receipt of a notice of noncompliance from a national securities exchange and a second Form 8-K will be required if the noncompliance leads to formal delisting.
- If an agreement, transaction or arrangement comprises a facility or program that creates or may give rise to direct financial obligations in connection with multiple transactions, the company must (1) disclose in an initial Form 8-K the entering into of the facility, program or similar arrangement if entering into such facility is material to the company, and (2) as direct financial obligations

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arise or are created, disclose in a subsequent Form 8-K the required information to the extent that the obligations are material to the company, including when a series of previously undisclosed individually immaterial obligations become material in the aggregate.

8. ***Keep track of exhibit filings required in later reports.*** A number of the Form 8-K items require or permit the company to file a contract or other document in a later filing rather than in the initial Form 8-K.
 - Upon amending the charter or bylaws, a copy of the amendment must be filed with the initial Form 8-K, but the full charter or bylaws as amended need not be filed until the next periodic report.
 - Also, although a Form 8-K is required upon entering into a material contract, the contract need not be filed until the next Form 10-Q, Form 10-K or registration statement is filed.
 - The Form 8-K requirements regarding the resignation of a director due to a disagreement, and an independent auditor's notice that an audit report may not be relied upon, both include update procedures upon receipt of correspondence from the director or auditor. The correspondence must be filed within two business days of receipt.
9. ***Make Form 8-K filings under multiple items where appropriate.*** Many transactions will not fit neatly into just one Form 8-K item. For example, entering into a material contract might trigger a filing under Item 1.01 (material definitive agreements) but, depending on the contract, could simultaneously require disclosure under Item 2.03 (direct financial obligation) or Item 3.02 (private placements of equity securities). In these cases companies need to remember to file under and comply with the disclosure requirements of each applicable item.
10. ***Careful compliance with the listing requirements is more important than ever before.*** The new rules require the filing of a Form 8-K upon receipt of certain notices from the company's principal national securities exchange or national securities association, or where the company recognizes that it has materially violated a listing standard or rule. Previously these situations could often be cured quietly and quickly, depending on the violation. Under the new rules the matter becomes a matter of public record.
11. ***Technical compliance with the Form 8-K mandated disclosures may be insufficient if material information is omitted.*** None of the new Form 8-K items contains a "mini-MD&A" requirement, as initially proposed. However, in its adopting release the SEC warned that although it was deleting the various requirements that the Form 8-K describe

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management's analysis of the effect of an event, the SEC believes that any disclosure in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading. This applies in particular to the Form 8-K's regarding termination of a material contract, triggering events that accelerate or increase a direct financial obligation, costs associated with exit or disposal activities and material impairments. As a result, companies need to consider disclosing the impact of the event on the company and not just the occurrence of the event itself.³

12. ***With respect to potential terminations of agreements and potential triggering events related to debt instruments, the SEC suggests that companies consider disclosing the company's good faith belief that no disclosure is required.*** Two of the new items require a filing where a material agreement is terminated, or where a triggering event has occurred that accelerated or increased a direct financial obligation. In both cases the rules provide that no disclosure is needed if the company believes, in good faith, that no triggering event has occurred, unless the company has received a notice from the relevant third party. In its adopting release, the SEC suggested that where it is not clear or where there is a dispute as to whether a triggering event has occurred, companies may want to file a Form 8-K stating their good faith belief that a triggering event has not occurred or that not all conditions to the triggering event have been satisfied. The SEC added that an amended Form 8-K would be required within four business days of a change in the company's good faith belief.
13. ***Update the Form 10-Q and Form 10-K disclosure controls.*** Companies need to add additional procedures to their Form 10-Q and Form 10-K preparation checklists to make sure they catch any omitted Form 8-K items. The SEC adopted a safe harbor from 10b-5 liability if a company fails to file certain of the required Form 8-K's, but the safe harbor continues only until the due date of the next Form 10-Q and Form 10-K. As a result, the quarterly and annual reports have been amended to require

³ This is similar to the SEC's view that a CEO's certification that the financial information "fairly presents" an issuer's results of operations is broader than merely a statement about compliance with GAAP. "We believe that Congress intended this statement to provide assurances that the financial information disclosed in a report, viewed in its entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under generally accepted accounting principles. In our view, a 'fair presentation' of an issuer's financial condition, results of operations and cash flows encompasses the selection of appropriate accounting policies, proper application of appropriate accounting policies, disclosure of financial information that is informative and reasonably reflects the underlying transactions and events and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete picture of an issuer's financial condition, results of operations and cash flows." Release No. 33-8124, "Certification of Disclosure in Companies' Quarterly and Annual Reports" (August 28, 2002).

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disclosure of any event that should have been disclosed in a Form 8-K during the reporting period.

14. ***The Form 8-K filing deadline is four business days, subject to exceptions.*** Although almost all of the Form 8-K items are subject to the new four business day deadline, there are various exceptions.
- The Form 8-K requirements regarding the resignation of a director due to a disagreement, and an independent auditor's notice that an audit report may not be relied upon, both require the company to file correspondence from the director or auditor within two business days of receipt.
 - If neither the company nor any of its affiliates is a party to a transaction creating a contingent obligation resulting from an off-balance-sheet transaction, the Form 8-K filing must be made by the earlier of (1) the eighth business day after the contingent obligation is created or (2) the fourth business day after which an executive officer of the company becomes aware of the contingent obligation.
 - The Form 8-K required upon the hiring of various principal officers may be delayed until the company publicly announces the hiring.
 - Regulation FD filings must be made simultaneously with the public disclosure, if intentional, or promptly (within 24 hours) after the public disclosure, if unintentional.
 - Earnings releases must be filed on Form 8-K prior to a quarterly earnings conference call in order to obtain the benefits of the SEC safe harbor for conference calls.
 - Voluntary Form 8-K's under Item 8.01 still can be filed at any time.
15. ***A filing is required upon entering into a material amendment to a material contract, even if the material contract was not previously filed.*** The new rules require a Form 8-K filing when the company enters into a material amendment to a material contract. The original material contract may never have been filed, because the contract may not have been material previously. Companies will need to consider their filing obligations whenever they amend contracts that arguably are material.

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Attached hereto is a comprehensive item-by-item analysis of the new Form 8-K, which reviews in detail all of the new requirements and many of the interpretative questions inherent in the form. We have also attached a short “Form 8-K in a Nutshell” which lists all of the required disclosure items in a short, easy to use format. If you have any questions regarding this material, please do not hesitate to call your regular Fried Frank contact or any of the individuals listed below.

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Item by Item Analysis of the new Form 8-K

Item 1.01: Entry into a Material Definitive Agreement

This new item is probably the most important for the most companies. This item requires companies to disclose if they have “entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant.” The term “material definitive agreement” is defined to include “an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.”⁴

This item can cover a wide range of agreements including customer contracts, supply arrangements, leases, licenses, related party agreements, debt agreements, acquisition or divestiture agreements, underwriting agreements, equity purchase agreements, joint ventures, employment agreements and compensation arrangements. It requires companies to carefully monitor their contracts so that they do not inadvertently omit a required Form 8-K. Companies need to consider not only new contracts that they may enter into, but also existing agreements, and amendments to existing agreements, which may become material contracts over time. An agreement may be disclosable under Item 1.01 (material definitive agreements) even if it also triggers disclosure under another item of Form 8-K such as Item 2.03 (direct financial obligations) or Item 3.02 (unregistered sale of equity securities).

Under the rules, an agreement is not deemed to be made in the “ordinary course of business,” even if it ordinarily accompanies the kind of business conducted by the company, if it involves the subject matter identified in Item 601(a)(10)(ii) of Regulation S-K. Item 601(a)(10)(ii) identifies the following categories of material agreements which must be filed with periodic reports and registration statements:

- ***Related Party Agreements.*** Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration

⁴ The SEC’s adopting release states that “for example, a material definitive agreement which is subject to customary closing conditions, such as the delivery of legal opinions or comfort letters, completion of due diligence or regulatory approval, must be disclosed under Item 1.01 when such agreement is enforceable against or by the company despite the fact that such conditions have not yet been satisfied. However, if a company enters into a non-binding letter of intent or memorandum of understanding that also contains some binding, but non-material elements, such as a confidentiality agreement or a no-shop agreement, the letter or memorandum does not need to be filed because the binding provisions are not material.”

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statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

- ***Contracts on Which the Company is Substantially Dependent.*** Any contract upon which the registrant's business is substantially dependent, as in the case of continuing contracts to sell the major part of registrant's products or services or to purchase the major part of registrant's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which registrant's business depends to a material extent;
- ***Acquisition/Sale Agreements.*** Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15 percent of the fixed assets of the registrant on a consolidated basis; or
- ***Material Leases.*** Any material lease under which a part of the property described in the registration statement or report is held by the registrant.

In addition, an agreement involving the subject matter described in Item 601(b)(10)(iii)(A) or (B) of Regulation S-K related to management contracts and compensatory plans must also be disclosed, with certain limited exceptions. Item 601(b)(10)(iii) requires the following items to be filed as exhibits to periodic reports and registration statements:

- ***Management Contracts and Compensatory Plans.*** Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers⁵ of the registrant participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.⁶

⁵ The term "named executive officer" is defined in Item 402 of Regulation S-K to include (1) all individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year ("CEO"), regardless of compensation level; (2) the registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and (3) up to two additional individuals for whom disclosure would have been provided pursuant to clause (2) but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year. The determination as to which executive officers are most highly compensated is made by reference to total annual salary and bonus for the last completed fiscal year.

⁶ An instruction to Item 601(b)(10) of Regulation S-K states that "with the exception of management contracts, in order to comply with paragraph (iii) above, registrants need only file copies of the various compensatory plans and need not file each individual director's or

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- ***Equity Compensation Plans Not Approved by Shareholders.*** Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the registrant) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a registrant in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make further grants or awards of its equity securities shall be considered a compensation plan of the registrant for purposes of the preceding sentence.

The SEC initially would have required disclosure of letters of intent and other non-binding agreements, in addition to definitive material agreements. In response to comments, the SEC eliminated the requirement that companies disclose their entry into non-binding agreements. As a result, it is clear that a nonbinding letter of intent does not require a Form 8-K, whereas a final acquisition agreement subject only to basic closing conditions such as Hart-Scott-Rodino clearance does require a Form 8-K.

The new Form 8-K and the SEC's adopting release do not discuss whether oral agreements require the filing of a Form 8-K. However, given the SEC staff's telephone interpretation with respect to Item 6.01 of Regulation S-K that an oral agreement must be filed with the SEC by filing a written description of the contract, it is quite possible that the SEC could take the position that entering into an oral agreement requires a filing of an Form 8-K.

Material amendments to a material contract require the filing of a Form 8-K, even if a Form 8-K was not filed when the original contract was entered into. This might occur because the contract wasn't material without the amendment, or because the original contract was entered into before August 23, 2004.

If the item is triggered, companies must disclose (1) the date on which the agreement was entered into or amended, (2) the identify of the parties to the agreement or amendment, (3) a brief description of any material relationship between the company or its affiliates and any of the parties to the agreement, and (4) a brief description of the terms and conditions of the agreement or amendment that are material to the company.⁷ Given these disclosure requirements,

executive officer's personal agreement under the plans unless there are particular provisions in such personal agreements whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.”

⁷ As proposed, the disclosure would have also required a description of each party's rights and obligations under the agreement and the duration and termination provisions of the agreement. These specific requirements were deleted from the final rules, but are still required to the extent they are material to the company.

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companies should make sure that their material contracts do not contain confidentiality provisions which would prohibit compliance with the new Form 8-K disclosure rules.

The material agreement itself does not need to be filed as an exhibit to the Form 8-K, although the SEC encourages companies to do so if confidentiality is not sought. In any event, the agreement must be filed as an exhibit in the company's next periodic report or registration statement.

Item 1.02: Termination of a Material Definitive Agreement

This new item requires companies to disclose if a material definitive agreement which was not made in the "ordinary course of business" and to which the company is a party is terminated, if the termination is material to the company. The item is not triggered by expiration of the agreement on its stated termination date or terminations resulting from all parties completing their obligations under the agreement.

No disclosure is required by this item "during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated." Also, no disclosure is required "if the registrant believes in good faith that the material definitive agreement has not been terminated, unless the registrant has received a notice of termination pursuant to the terms of the agreement."

If the item is triggered, companies must disclose (1) the date of the termination, (2) the identity of the parties to the agreement, (3) a brief description of any material relationship between the company or its affiliates and any of the parties, (4) a brief description of the terms and conditions of the agreement that are material to the company, (5) a brief description of the material circumstances surrounding the termination, and (6) any material early termination penalties incurred by the company.

There is no requirement, as initially proposed, that the disclosure include management's analysis of the effect of the termination. However, the SEC stated in its adopting release that "any disclosure in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading."

Item 1.03: Bankruptcy or Receivership

This item was carried forward from the prior Form 8-K. The item requires disclosure where a court or governmental authority assumes jurisdiction over the company in a bankruptcy proceeding or where the existing directors and officers remain in possession but subject to the supervision of a court. The item also requires a Form 8-K to be filed if an order confirming a plan of reorganization is entered by a court having jurisdiction over substantially all the assets or business of the company.

Item 2.01: Completion of Acquisition or Disposition of Assets

This item was carried forward from the prior Form 8-K. The item requires disclosure when the company or any of its majority-owned subsidiaries completes the acquisition or disposition of a “significant amount” of assets other than in the ordinary course of business.

An acquisition or disposition is deemed to involve a “significant amount” of assets if (1) the company’s equity in the net book value of the assets, or the amount paid or received for the assets, exceeds 10% of the total consolidated assets of the company, or (2) it involves a business that is “significant.” A business combination or disposition is considered significant if (a) a comparison of the most recent annual financial statements of the business acquired or to be acquired and the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition indicates that the business would be a “significant subsidiary” or (b) the business to be disposed of meets the conditions of a “significant subsidiary.”⁸

Under the new Form 8-K rules, companies will need to comply with a number of different disclosure requirements when making acquisitions. Entering into the acquisition agreement will trigger a Form 8-K disclosure requirement under Item 1.01 if the agreement is “material.” The company can check a box on the cover of the Form 8-K in order to simultaneously satisfy any other filing

⁸ The term “significant subsidiary” is defined in Rule 1-02(w) of Regulation S-X as a subsidiary, including its subsidiaries, which meets any of the following conditions: (i) the registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its consolidated subsidiaries as of the end of the most recently completed fiscal year (for a proposed business combination to be accounted for as a pooling of interests, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or (ii) the registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or (iii) the registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

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obligation under Rule 165 (exemption from Section 5 for communications made before filing a registration statement), Rule 14d-2(b) (permitting communications by the bidder before commencement of a tender offer), Rule 14a-12 (permitting solicitations before a proxy statement is furnished to security holders) and/or Rule 13e-4(c) (provision requiring the filing of written communications and Schedule TO in connection with issuer tender offers). Consummating the acquisition will trigger a second Form 8-K requirement under Item 2.01 if the acquisition is “significant.” It is possible that a company might deem an acquisition to be “material” under Item 1.01 but not “significant” under Item 2.01. Financial statements of the acquired entity, and any required pro forma financial statements, will be required to be filed within 71 days of the date on which the Item 2.01 Form 8-K is due. The acquisition could also trigger a Form 8-K requirement under Item 2.03 (direct financial obligation) if the company borrows money to pay for the acquisition or Item 3.02 (unregistered sales of equity securities) if equity constituted a portion of the consideration for the acquisition.

Item 2.02: Results of Operations and Financial Condition

This item, which requires issuers to file their earnings releases on Form 8-K, was carried forward from the prior Form 8-K. Under this item, if a company, or any person acting on its behalf, makes any public announcement or release disclosing material non-public information about the company’s results of operations or financial condition for a completed quarterly or annual fiscal period, the company must disclose the date of the announcement or release, briefly identify the announcement or release, and include the text of the announcement or release as an exhibit. Information furnished pursuant to this item is not deemed “filed” for purposes of Section 18 of the Exchange Act, unless the company specifically states that the information is to be considered “filed” or incorporates it by reference into a filing under the Securities Act or the Exchange Act.

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

This new item, like the item covering entry into material definitive agreements, is likely to have the most impact on public companies. Disclosure is required in two different circumstances.

- ***Direct Financial Obligations.*** First, this item requires disclosure “if the registrant becomes obligated on a direct financial obligation that is material to the registrant.”⁹ No disclosure is required “until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the direct financial obligation will arise

⁹ The term “direct financial obligation” means (1) a long-term debt obligation, (2) a capital lease obligation, (3) an operating lease obligation, or (4) a short-term debt obligation that arises other than in the “ordinary course of business.” A short-term debt obligation is defined as a payment obligation under a borrowing arrangement that is scheduled to mature within one year or, for companies that use the operating cycle concept of working capital, within a company’s operating cycle that is longer than one year.

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or be created or issued. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the direct financial obligation arises or is created.”

The rule is not absolutely clear as to whether entry into a material loan agreement should be disclosed under Item 1.01 (material agreements) or Item 2.03 (direct financial obligations). In the absence of any SEC guidance, the conservative approach is to disclose the agreement under both items.

The required disclosures include (1) the date on which the company became obligated, (2) a brief description of the transaction creating the obligation, (3) the amount of the obligation, including the terms of payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased, and (4) a brief description of the other terms and conditions that are material to the company.

- ***Off-Balance Sheet Arrangements.*** Second, this item also requires disclosure “if the registrant becomes directly or contingently liable for an obligation that is material to the registrant arising out of an off-balance sheet arrangement.”¹⁰

Disclosure is required whether or not the registrant is also a party to the transaction or agreement creating a contingent obligation. If neither the company nor any of its affiliates is a party to the transaction or agreement

¹⁰ The term "off-balance sheet arrangement" is defined by using the MD&A definition of "off-balance sheet arrangement." The term means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has (1) any obligation under a guarantee contract that has any of the characteristics identified in paragraph 3 of FASB Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) ("FIN 45"), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FIN 45 pursuant to paragraphs 6 or 7 of that Interpretation, (2) a retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets, (3) any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement of financial position, and therefore excluded from the scope of FASB Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998), pursuant to paragraph 11(a) of that Statement, as may be modified or supplemented, or (4) any obligation, including a contingent obligation, arising out of a variable interest (as referenced in FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

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creating the contingent obligation, the Form 8-K filing must be made within four business days of the earlier of (1) the fourth business day after the contingent obligation is created or (2) the day on which an executive officer of the company becomes aware of the contingent obligation.

The required disclosures include (1) the date on which the company became liable, (2) a brief description of the transaction or agreement creating the arrangement and obligation, (3) a brief description of the nature and amount of the obligation, including the material terms whereby it may become a direct obligation or may be accelerated or increased, (4) the maximum potential amount of future payments that the company may be required to make, if different, and (5) a brief description of the other terms and conditions of the obligation or arrangement that are material to the company.

Revolving credit facilities or commercial paper facilities must be disclosed if they are material, even if no borrowing is made at the time the facility is entered into. If an agreement, transaction or arrangement comprises a facility or program that creates or may give rise to direct financial obligations in connection with multiple transactions, the company must (1) disclose the entering into of the facility, program or similar arrangement if entering into such facility is material to the company, and (2) as direct financial obligations arise or are created, disclose the required information to the extent that the obligations are material to the company, including when a series of previously undisclosed individually immaterial obligations become material in the aggregate. This means that takedowns under financing facilities must have an 8-K filing each time the amount drawn is material.

A Form 8-K is not required under Item 2.03 in the case of a security that has been or will be sold pursuant to an effective registration statement, so long as the prospectus relating to the sale contains the information required by this item and is filed within the required time period under Rule 424. As a result, debt shelf takedowns and public debt offerings—but not Rule 144A debt offerings—are generally exempt from this requirement. However, despite this exception, companies need to consider whether the transaction requires disclosure under Item 1.01 (definitive material agreements) upon entering into a new underwriting agreement or indenture.

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

This new item requires disclosure if a triggering event¹¹ causing the increase or acceleration of a direct financial obligation occurs and the

¹¹ 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

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consequences of the event are material to the company. The required disclosures include (1) the date of the triggering event, (2) a brief description of the agreement or transaction, (3) a brief description of the triggering event, (4) the amount of the direct financial obligation, as increased, if applicable, and the terms of payment or acceleration that apply, and (5) 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 direct financial obligation.¹²

Similar disclosures are required if a triggering event occurs causing an obligation under an off-balance sheet arrangement to increase or be accelerated, or causing a contingent obligation of the company under an off-balance sheet arrangement to become a direct financial obligation of the company, and the consequences of the event are material to the company. Disclosure is required if a triggering event occurs, whether or not the registrant is also a party to the transaction or agreement under which the triggering event occurs.

No disclosure is required until a triggering event has occurred in accordance with the terms of the relevant agreement including, if required, the sending to the company of notice of the occurrence of a triggering event and the satisfaction of all conditions to such occurrence, “except the passage of time.” Also, similar to the requirement governing termination of material contracts, no disclosure is needed if the company believes in good faith that no triggering event has occurred, unless the company has received a notice pursuant to the terms of the governing agreement.

There is no requirement, as initially proposed, that the disclosure include management’s analysis of the effect of the triggering event on the company. However, the SEC stated in its adopting release that any disclosure in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading.

Item 2.05: Costs Associated with Exit or Disposal Activities

This new item requires disclosure if the company’s board, a committee of the board or an authorized officer commits the company to an exit or disposal plan, or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in SFAS No. 146 (Paragraph 8), under which

out of an off-balance sheet arrangement becomes a direct financial obligation of the registrant.”

¹² The term “direct financial obligation” is the same in Item 2.04 as in Item 2.03 but also includes an item arising out of an off-balance sheet arrangement that is accrued under SFAS No. 5 as a probable loss contingency.

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material charges will be incurred under GAAP.¹³ It may be difficult initially for companies to determine exactly when the board, committee or officer has “committed” the company to an exit or disposal plan, since these plans often develop over time. In light of the Form 8-K requirement, companies may want to formalize their consideration of exit or disposal plans so that it is clear when the filing obligation arises.

The required disclosures include (1) the date of the commitment to the course of action, (2) a description of the course of action, including the facts and circumstances leading to the action and the expected completion date, (3) for each major type of cost associated with the course of action, an estimate of the total amount or range of amounts expected to be incurred, (4) an estimate of the total amount or range of amounts expected to be incurred, and (5) the company’s estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

Disclosure of the estimates is not required if the company determines at the time of filing that it is unable in good faith to determine an estimate. However, an amended Form 8-K will be required within four business days after the company makes a determination of the estimate or range.

Item 2.06: Material Impairments

This new item requires disclosure if the company’s board, a committee of the board or an authorized officer concludes that a material charge for impairment to one or more of its assets, including without limitation impairments of securities or goodwill, is required under GAAP. However, no Form 8-K filing is required if the conclusion is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or year, the related periodic report is filed on a timely basis and the conclusion is disclosed in that report. This exception should significantly reduce the number of Form 8-K’s required to be filed by this item.

The required disclosures include (1) the date of the conclusion that a material charge is required, (2) a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge is required,

¹³ Paragraph 8 of SFAS No. 146 (“Accounting for Costs Associated With Exit or Disposal Activities”) describes a one-time benefit arrangement for current employees established by a plan of termination that applies for a specified termination event or for a specified future period. The benefit arrangement exists at the date the plan of termination meets the following criteria and has been communicated to employees: (1) management, having authority to approve the action, commits to a plan of termination; (2) the plan identifies the number of employees to be terminated, their job classifications or functions and their locations, and the expected completion date; (3) the plan establishes the terms of the benefit arrangement in sufficient detail to enable employees to determine the type and amount of benefits they will receive if they are involuntarily terminated; and (4) actions taken to complete the plan indicate that it is unlikely that significant changes to the plan will be made or that the plan will be withdrawn.

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(3) the company's estimate of the amount or range of amounts of the impairment charge, and (4) the company's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures. As with the disclosure of the costs associated with exit or disposal activities, disclosure of estimates related to the impairment is not required if the company determines at the time of filing that it is unable in good faith to determine an estimate. However, an amended Form 8-K will be required within four business days after the company makes a determination of the estimate or range.

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

This new item requires a Form 8-K in four different circumstances related to the company's listing status.¹⁴

- ***Involuntary Delisting.*** First, disclosure is required if the company receives a notice from the relevant national securities exchange or national securities association (whichever maintains the principal listing for any class of the company's common equity) that (1) the company or such class does not satisfy a rule or standard for continued listing (even if the company has a grace period or cure period), with no materiality standard included, or (2) the exchange has submitted an application to the SEC to delist such class, or (3) the association has taken all necessary steps under its rules to delist the security.

Certain delistings do not require a Form 8-K filing. These include delistings where (1) the entire class of the security is called for redemption, (2) the entire class has been redeemed or paid at maturity, (3) the instruments representing the entire class of securities have come to evidence other securities in substitution therefore and represent no other right except the right to receive an immediate cash payment, or (4) all rights pertaining to the class of the security have been extinguished.

The SEC adopting release clarifies that an early warning notice that merely informs the company that it is in danger of falling out of compliance with a rule or standard for continued listing does not trigger a disclosure obligation. However, if the warning notice states that the company is out of compliance, but will not be delisted if it cures the problem within a specified time, such a notice will trigger a Form 8-K filing requirement.

¹⁴ This provision applies to securities listed on a national securities exchange, such as the New York Stock Exchange or the American Stock Exchange, or a national securities association (or facilities thereof), such as Nasdaq. It does not apply to securities quoted exclusively on an automated inter-dealer quotation system, such as the over-the-counter bulletin board, or the Electronic Pink Sheets.

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The required disclosures include (a) the date the notice was received, (b) the rule or standard that the company has failed to satisfy and (c) any action or response that the company has determined to take. The actual written notice received from the exchange or association need not be filed as an exhibit to the Form 8-K.

- ***Material Noncompliance.*** Second, disclosure is required if the company notifies the exchange or national securities association that maintains the principal listing for any class of its common equity that the company is aware of any material noncompliance with a rule or standard for continued listing (even if the company has the benefit of a grace period or cure period). The required disclosures include (a) the date the notice was provided to the exchange or association, (b) the rule or standard that the company fails and (c) any action or response that the company has determined to take.
- ***Public Reprimand Letter.*** Third, disclosure is required if the national securities exchange or national securities association issues a public reprimand letter “or similar communication” indicating that the company has violated a rule or standard for continued listing. The company must disclose the date and summarize the contents of the letter or communication.
- ***Voluntary Delisting.*** Fourth, disclosure is required if the company’s board, a committee of the board, or an authorized officer takes definitive action to cause the listing of a class of common equity securities to be withdrawn or terminated, including by reason of a transfer of the listing or quotation to another securities exchange or quotation system.

A typical involuntary delisting procedure will require two Form 8-K’s: one Form 8-K upon receipt of notice that the company is in violation of a listing standard, and a second Form 8-K upon receipt of a second notice stating that the security has been delisted. However, notices or other communications sent subsequent to the initial notice, which simply indicate that the company continues not to satisfy the same rule or standard initially described, do not require a new Form 8-K.

Item 3.02: Unregistered Sales of Equity Securities

This new item was moved, in a modified fashion, from Form 10-Q and Form 10-K. The item requires disclosure if “equity securities” are sold by the company in a private placement. The term equity securities includes common stock, preferred stock, convertible debt, limited partnership interests, and options, rights and warrants to acquire equity securities. A report is required only if the equity securities sold, in the aggregate since the last report filed under this item or the company’s last periodic report, whichever is more recent, constitute more than

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1% of the number of shares outstanding (on a non-fully diluted basis) of the class of equity securities sold.¹⁵

A Form 8-K is not required until the company enters into an agreement enforceable against the company, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the company must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement in which the equity securities are to be sold.

The required disclosures include (1) the date of sale, (2) the title and amount of securities sold, (3) for securities sold for cash, the aggregate offering price and underwriting discounts or commissions, (4) for securities sold other than for cash, the nature of the transaction and the nature and amount of consideration received, (5) the law or rule under which exemption from registration is claimed and the facts relied upon to make the exemption available, and (6) if the securities are convertible or exchangeable into equity securities, or are options or warrants representing equity securities, the terms of conversion or exercise of the securities. The rules specifically omit the requirement in Item 701(b) of Regulation S-K to name the principal underwriters for the offering or the names of the persons or the class of persons to whom the securities were sold.¹⁶

A Rule 144A offering of convertible debt securities would require disclosure under this item if the amount of securities sold exceeds the 1% threshold. Such a Rule 144A transaction would also be disclosed under Item 2.01 (direct financial obligations) if material to the company.

In some cases compensatory grants of stock options or other equity securities in amounts in excess of the 1% threshold could require disclosure under this item. In most cases the equity will be granted pursuant to a Form S-8 and will therefore not be covered by this item. However, in some cases grants of restricted stock or stock options may be made outside of a plan in a private placement in reliance on Regulation D or another exemption from registration.

¹⁵ The Form 10-Q and Form 10-K still require disclosure of all information required by Item 701 of Regulation S-K regarding equity securities sold by the company in the most recent quarterly period in a private placement, unless the information was already disclosed in a Form 8-K or (in the case of Form 10-K) a Form 10-Q.

¹⁶ Although the Form 8-K can omit the names of the underwriters and the persons buying the securities, the Form 10-Q and Form 10-K require disclosure of all information required by Item 701 with respect to all private sales of equity securities in the prior period unless previously disclosed on a Form 8-K or Form 10-Q. Therefore, unless the SEC issues guidance to the contrary, the disclosure permitted to be omitted from the Form 8-K seems to be required in the next periodic report.

Item 3.03: Material Modifications to Rights of Security Holders

This new item was moved from the Form 10-Q. The item requires disclosure in two circumstances. First, if the constituent instruments defining the rights of the holders of any class of registered securities have been materially modified, the company must disclose the date of the modification, the title of the class of securities and a description of the general effect of such modification. Second, if the rights evidenced by any class of registered securities are materially limited or qualified by the issuance or modification of any other class of securities, the company must disclose the date of the issuance or modification and the general effect of the issuance or modification. Working capital restrictions and other limitations on the payment of dividends must be reported under this item.

Item 4.01: Changes in the Company's Certifying Accountant

This item was carried forward from the prior Form 8-K. The item requires disclosure if the company's principal auditor resigns or is dismissed, or if a new independent accountant is engaged either as the company's principal auditor or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary. An instruction clarifies that the resignation of the company's auditor is a reportable event separate from the engagement of a new auditor; in some cases two Form 8-K's will be needed for a single change in accountants, one for the resignation and a second for the new engagement.

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

This new item requires disclosure in two different circumstances related to restatements of financial statements.

- **Issuer Conclusion.** First, disclosure is required if the company's board, a board committee or an authorized officer concludes that any previously issued financial statements, covering one or more years or interim periods for which the company is required to provide financial statements, should no longer be relied upon "because of an error in such financial statements" as addressed in APB Opinion No. 20.¹⁷

The required disclosures include (1) the date of the conclusion regarding non-reliance, (2) identification of the financial statements and years or periods covered, (3) a brief description of the facts underlying the

¹⁷ APB Opinion No. 20 ("Accounting Changes") (July 1971) covers the reporting of a correction of an error in previously issued financial statements. The Opinion states that "[e]rrors in financial statements result from mathematical mistakes, mistakes in the application of accounting principles, or oversight or misuse of facts that existed at the time the financial statements were prepared."

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conclusion, and (4) a statement of whether the audit committee, the board or an authorized officer discussed these matters with the independent auditors.

The SEC's adopting release clarifies that restatements only require disclosure when they result from an error in the financial statements. In contrast, retroactive restatements that are required as a result of a stock split, or as a result of a plan to discontinue operations, do not trigger Form 8-K disclosure.

- ***Auditor Notice.*** Second, disclosure is required if the company is advised by, or receives notice from, its independent accountant that disclosure should be made or action taken to prevent further reliance on a previously issued audit report or completed interim review. The required disclosures include (1) the date on which the company was so advised or notified, (2) identification of the financial statements, (3) a brief description of the information provided by the accountant, and (4) a statement of whether the audit committee, the board or an authorized officer discussed these matters with the independent auditors.

Any written notice from the current or prior independent accountant that the accountant is withdrawing a previously issued audit report, or that a previously issued audit report or review should no longer be relied upon, must be filed as an exhibit to the Form 8-K.

The SEC rules include a procedure for the independent auditors to review the disclosure in the Form 8-K. The auditors must receive a copy of the disclosure no later than the day it is filed with the SEC. The company must request the auditor to furnish to the company "as promptly as possible" a letter addressed to the SEC stating whether or not it agrees with the disclosure and, if not, stating the respects in which it disagrees. The company must amend the previously filed Form 8-K by filing this letter as an exhibit to the Form 8-K no later than two business days after its receipt of the letter.

Item 5.01: Changes in Control of the Company

This item, carried forward from the prior Form 8-K, requires disclosure when the board, a board committee or an authorized officer becomes aware that a change in control of the company has occurred.

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

This item, which significantly expands a pre-existing Form 8-K item, covers four different events regarding directors and principal officers.¹⁸

- ***Director Departure due to Disagreement.*** Disclosure is required if a director resigns or refuses to stand for reelection since the date of the last annual meeting because of a disagreement with the company, known to an executive officer¹⁹, on any matter relating to the company's operations, policies or practices, or if a director is removed for cause from the board. Required disclosures include (1) the date of the resignation or removal, (2) the director's committee positions, and (3) a brief description of the circumstances representing the disagreement. If the director provides any written correspondence regarding the resignation or removal, the correspondence must be filed as an exhibit to the Form 8-K.

The SEC rules also include a procedure for the director to review the disclosure in the Form 8-K. The director must receive a copy of the disclosure no later than the day it is filed with the SEC. The company must provide the director with an opportunity to furnish to the company "as promptly as possible" a letter addressed to the company stating whether or not he or she agrees with the disclosure and, if not, stating the respects in which he or she disagrees. The company must amend the previously filed Form 8-K by filing any letter received as an exhibit to the Form 8-K no later than two business days after its receipt of the letter.

- ***Departure of Principal Officer or Director.*** If 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, or if a director retires,

¹⁸ The new Form 8-K introduces a new officer group into the securities laws, the "principal officer," which includes the principal executive officer, principal financial officer, principal accounting officer, principal operating officer and the president. This contrasts with a separate group—the principal executive officer, the principal financial officer, the principal accounting officer and the controller—who are generally subject to the company's code of ethics (unless the company discloses it does not have a code of ethics) and for whom waivers of the code of ethics must be disclosed. It also contrasts with the "named executive officers" in the summary compensation table in the annual meeting proxy statement, which generally includes the CEO and the next four most highly compensated executive officers.

¹⁹ The term "executive officer" is defined in Rule 3b-7 as a registrant's president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

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resigns, is removed, or refuses to stand for re-election (other than due to a disagreement), the company must disclose the event and the date of the event. The company need not disclose the reasons for the departure.

- ***New Principal Officer.*** Disclosure is required if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions. If the company intends to make a public announcement of the appointment, the company can delay filing the Form 8-K until the day on which the company otherwise makes the public announcement.

Required disclosures include (1) the name, age and position of the officer, (2) the date of the officer's appointment, (3) a brief description of the material terms of any employment agreement, (4) related party transactions between the officer (and entities related to the officer) and the company, (5) family relationships between the officer and other executive officers and directors, and (6) the officer's business experience during the last five years, including the name and principal business of any organization in which his principal employment was carried on.

- ***New Director.*** Disclosure is required if the company elects a new director, other than by a vote of security holders at an annual meeting or a special meeting convened for that purpose. Required disclosures include (1) the name of the director, (2) the date of his or her election, (3) a brief description of any arrangement or understanding pursuant to which such director was selected as a director, (4) the committees on which the director will serve, and (5) related party transactions between the director (and entities related to the director) and the company.

If information related to a new officer's employment terms, or a new director's committees or related party transactions, is not known at the time the Form 8-K is filed, the company must include a statement to this effect in the filing and then must file an amendment to the Form 8-K filing containing such information within four business days after the information is determined or becomes available.

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

This new item requires companies with a class of equity securities registered under Section 12 of the Exchange Act to file a Form 8-K when they amend their articles or bylaws and a proposal for the amendment was not disclosed in a proxy statement filed by the company. It does not matter if the amendment is material or only procedural or mechanical in nature. The Form 8-K must disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and, if applicable, the previous provision. The item also requires disclosure if the company determines to change

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its fiscal year, other than by means of a submission to a vote of shareholders or an amendment to the articles or bylaws.

The text of any charter or bylaw amendment—not a complete copy of the charter or bylaws as amended—must be filed as an exhibit to the Form 8-K. A complete copy of the charter or bylaws as amended is only required to be filed as an exhibit to the next Securities Act registration statement or periodic report filed by the company.

This item only applies to companies with a class of equity securities registered under Section 12. Therefore, for example, it does not apply to private companies with only debt securities publicly traded, such as high yield debt issuers following their initial registered exchange offer.

Item 5.04: Temporary Suspension of Trading Under the Company's Employee Benefit Plans

This item is carried forward from the pre-existing Form 8-K. In general, Regulation BTR (Blackout Trading Restriction) provides that if a blackout period occurs under certain of the company's employee benefit plans such as a 401(k) plan, (1) the plan administrator must provide timely notice of such blackout period to the issuer of the securities subject to the blackout period and (2) the company must timely notify each of the company's directors and officers and the SEC of the blackout period.

Notice to an affected director or officer is considered timely if it is provided no later than five business days after the date the issuer receives notice of the blackout period or, if no such notice is received by the issuer, a date at least 15 calendar days before the actual or expected beginning date of the blackout period. If there is a subsequent change in the beginning or ending dates of the blackout period, an issuer must provide directors and officers with an updated notice as soon as reasonably practicable explaining the reasons for the change.

Notice to the SEC is considered timely under Regulation BTR if the issuer files a Form 8-K within the time period prescribed for filing under Form 8-K.²⁰ The Form 8-K rules require companies to file the Form 8-K within four business days of their receipt of notice of a blackout period or, if the company does not receive such notice, on the same day that the company sends a notice of such a blackout period to its affected officers or directors.

Regulation BTR also provides that if there is a subsequent change in the beginning or ending dates of the blackout period as previously disclosed in the notice to the SEC, an issuer must file a new Form 8-K containing the updated beginning or ending dates of the blackout period, explaining the reasons for the

²⁰ In the case of foreign private issuers, the issuer must include the information in the first annual report on Form 20-F or 40-F required to be filed after receipt of the notice of a blackout period or in an earlier filed report on Form 6-K.

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change in the date or dates and identifying all material changes in the information contained in the prior report. The updated notice is required to be provided as soon as reasonably practicable.

Item 5.05: Amendments to the Company's Code of Ethics, or Waiver of a Provision of the Code of Ethics

This item is carried forward from the pre-existing Form 8-K. The item requires a brief description of the date and nature of any amendment to or waiver of a provision in the company's "code of ethics" that applies to its principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions. However, a Form 8-K is not required if the information is disclosed on the company's internet website within four business days following the date of the amendment or waiver and the company has disclosed in its most recently filed annual report its internet address and its intention to provide disclosure regarding ethics code waivers in this manner. If website disclosure is used, the information must remain available on the website for at least 12 months, and thereafter must be retained by the issuer for at least five years.

Item 7.01: Regulation FD Disclosure

This item, unchanged from the previous Form 8-K, is used to disclose information that the company elects to disclose through Form 8-K pursuant to Regulation FD. Regulation FD provides, in general, that whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to a broker-dealer, an investment adviser, an institutional investment manager, an investment company or a holder of the issuer's securities (where it is reasonably foreseeable that the shareholder will trade on the information), the issuer must make "public disclosure" of that information either simultaneously, in the case of an intentional disclosure, or promptly, in the case of a non-intentional disclosure. An issuer can make public disclosure by filing the information on a Form 8-K or by using another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

Information furnished pursuant to Item 7.01 is not deemed "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the information is to be considered "filed" or incorporates it by reference into a filing under the Securities Act or the Exchange Act.²¹ However,

²¹ Section 18 of the Exchange Act provides that any person who makes or causes to be made any statement in any application, report, or document filed pursuant to the Exchange Act or any rule or regulation thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading.

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an instruction to the Form 8-K states that “when considering current reporting on this form, particularly of other events of material importance pursuant to Item 7.01 (Regulation FD Disclosure) and Item 8.01 (Other Events), registrants should have due regard for the accuracy, completeness and currency of the information in registration statements filed under the Securities Act which incorporates by reference information in reports filed pursuant to the Exchange Act, including reports on this form.” In particular, if companies have registration statements on Form S-3 and/or Form S-8 outstanding, they need to consider whether the information filed furnished pursuant to Regulation FD needs to be incorporated by reference into such registration statements.

Item 8.01: Other Events

Companies can disclose under this item any events, with respect to which information is not otherwise called for by the Form 8-K, that the company deems of importance to security holders. In addition, companies can disclose under this item the nonpublic information required to be disclosed by Regulation FD, if the company wants the information to be incorporated by reference into its short-form registration statements.

Item 9.01: Financial Statements and Exhibits

This item is largely unchanged from the prior Form 8-K and covers the following disclosure obligations:

- ***Financial statements of acquired entities.*** If a Form 8-K is required with respect to a business acquisition under Item 2.01, financial statements of the acquired entity are required to be filed for the periods specified in Regulation S-X, together with a manually signed accountant’s report.²²

²² Rule 3-05 of Regulation S-X provides that the periods for which financial statements of a business acquired or to be acquired are to be filed is determined by comparing (a) the assets of the target to the assets of the acquiror, (b) the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the target to the equivalent income of the company, and (c) the purchase price being paid by the acquiror to the assets of the target. The determination shall be made by comparing the most recent annual financial statements of the target to the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition.

The number of years of financial statements required is as follows: (1) If none of the conditions exceeds 20 percent, financial statements are not required. However, if the aggregate impact of the individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for at least the most recent fiscal year and any interim periods specified in Rule 3-01 and Rule 3-02. (2) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements shall be furnished for at least the most recent fiscal year and any interim periods specified in Rule 3-01 and Rule 3-02. (3) If any of the conditions exceeds 40 percent, but none exceed 50 percent, financial statements shall be furnished for at least the two most recent fiscal years and

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Required financial statements with respect to acquisitions may be filed with the initial Form 8-K or by amendment not later than **71** calendar days after the date that the initial report on Form 8-K must be filed.

An instruction clarifies that during the period after a company reports a business combination, until the date on which the required financial statements are filed, the company will be deemed current for purposes of its reporting obligations. However, with respect to Securities Act filings, registration statements will not be declared effective unless the required financial statements are provided. Also, offerings should not be made pursuant to effective registration statements, or pursuant to Rules 505 and 506 of Regulation D where any purchasers are not accredited investors, until the audited financial statements are filed; provided that the following offerings or sales of securities may proceed even though the financial statements of the acquired business are not filed: sales pursuant to Rule 144, secondary offerings, employee benefit plans, dividend reinvestment plans, and offerings or sales of securities upon the conversion of convertible securities or upon the exercise of outstanding warrants or rights.

- ***Pro forma financial statements.*** For any acquisition or disposition required to be disclosed under Item 2.01, the company must provide any pro forma financial information that would be required pursuant to Article 11 of Regulation S-X. Pro forma financial statements with respect to acquisitions must be filed within 71 days following the due date of the related Form 8-K.
- ***Exhibits.*** This item is used for filing or furnishing any exhibits that the company elects to or is required to file with the Form 8-K. Most typically the item is used to file a press release under Item 2.02 (results of operations and financial condition), Item 7.01 (Regulation FD disclosure) or Item 8.01 (other events). The item may also be used to file a letter from an independent auditor (Item 4.02), a letter from a departed director (Item 5.02) or the text of an amendment to the charter or bylaws (Item 5.03). The form clarifies that if the Form 8-K includes disclosures under Item 2.02 (results of operations and financial condition) or Item 7.01 (Regulation FD disclosure), all exhibits to the report relating to those items will be deemed furnished, and not filed, unless the registrant specifies otherwise.

any interim periods specified in Rule 3-01 and Rule 3-02. (4) If any of the conditions exceeds 50 percent, the full financial statements specified in Rule 3-01 and Rule 3-02 shall be furnished. However, financial statements for the earliest of the three fiscal years required may be omitted if net revenues reported by the acquired business in its most recent fiscal year are less than \$ 25 million.

Repercussions of a Late or Omitted Form 8-K Filing

Almost all Form 8-K's are now due within four business days of the event reported, with limited exceptions.²³ This contrasts with the old Form 8-K deadlines of five business or 15 calendar days, as well as the SEC's initial proposal of two business days.

As a result of the shortened period of time for filing most Form 8-K's, the SEC amended a number of its rules to minimize the impact of a failure to make a timely Form 8-K filing.

- **Form S-2/Form S-3.** One of the requirements for the use of the short form registration statements is that the company has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement. The SEC amended this provision to exclude Form 8-K's required by Items 1.01 (entry into a material contract), 1.02 (termination of a material contract), 2.03 (creation of a direct financial obligation), 2.04 (triggering events that accelerate or increase a direct financial obligation), 2.05 (exit or disposal activities), 2.06 (material impairments) or 4.02(a) (issuer conclusion that financial statements can no longer be relied on). Therefore, a company is entitled to file on Form S-2 or Form S-3 even if it failed to make a timely Form 8-K filing in one of the seven enumerated items in the twelve preceding months, so long as by the time the Form S-2 or S-3 is filed all required Form 8-K's have been filed (even if not timely) or the omitted Form 8-K disclosures have been made in a Form 10-Q or 10-K.
- **Rule 144.** One of the requirements for the use of Rule 144 is that a company has filed all of the reports required to be filed during the 12 months preceding the sale. The SEC amended this provision to exclude Form 8-K filings. Therefore, the failure to file a required Form 8-K, on a timely basis or at all, will not impact the ability of company insiders or shareholders to use Rule 144.
- **Rule 10b-5 Safe Harbor.** The failure to timely file a Form 8-K required by Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a) will not be deemed to be a violation of Section 10(b) of the Exchange Act or Rule 10b-5 adopted

²³ Form 8-K's filed in accordance with Regulation FD must be filed either simultaneously with the disclosure to others, in the case of an intentional disclosure, or promptly (within 24 hours) following disclosure to others, in the case of a non-intentional disclosure. Also, voluntary Form 8-K's, using Item 8.01, have no time deadline. Financial statements of significant acquired entities must be filed within 71 days of the due date for the related Form 8-K under Item 2.01.

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thereunder.²⁴ However, the failure to file any required Form 8-K will still be a violation of Section 13(a) or 15(d) of the Exchange Act, and material misstatements or omissions in any Form 8-K will continue to be a violation of Section 10(b) and Rule 10b-5. Also, the safe harbor will not be applicable if the company otherwise has a duty to disclose information other than pursuant to the Form 8-K filing requirement.

- ***10-Q/10-K Disclosure.*** The Form 10-Q and Form 10-K have been amended to require disclosure of any information required to be disclosed in a report on Form 8-K during the period covered by the 10-K or 10-Q which was not reported on Form 8-K as required. Once disclosed in the Form 10-Q or Form 10-K, the disclosure need not be repeated in a Form 8-K. This means that the Rule 10b-5 safe harbor applicable to Form 8-K only applies through the due date of the subsequent Form 10-Q or Form 10-K.
- ***Section 906 Certification.*** The SEC clarified that the Section 906 certification does not cover Form 8-K.
- ***Form 12b-25.*** Form 12b-25 is used by companies to extend the deadlines for filing of Form 10-K (15 days) and Form 10-Q (5 days). Form 12b-25 is not available to extend the deadline for filing of Form 8-K.

²⁴ Rule 102 of Regulation FD also provides that no failure to make a public disclosure required solely by Regulation FD shall be deemed a violation of Rule 10b-5. Rule 103 of Regulation FD also provides that a failure to make a public disclosure required solely by Regulation FD will not affect whether (1) for purposes of Forms S-2, S-3 and S-8 under the Securities Act, an issuer is deemed to have filed all the material required to be filed pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 or, where applicable, has made those filings in a timely manner; or (2) there is adequate current public information about the issuer for purposes of Rule 144.