Paul|Weiss

December 2004

# Update: Disclosure Rules for Current Reports on Form 8-K

In March 2004, the SEC adopted sweeping changes to the Form 8-K disclosure requirements for U.S. companies that are subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act"). The new disclosure requirements became effective in August 2004. In response to a number of questions regarding the implementation and interpretation of the new Form 8-K items, the SEC released *Current Report on Form 8-K Frequently Asked Questions* on November 23, 2004 (the "November FAQ"). This memorandum updates our previous March 2004 memorandum on the new Form 8-K rules to reflect the SEC's responses in the November FAQ.

**Executive Summary**

**The New Rules**

Specifically, the revised rules:

- add new items and events to be disclosed in Form 8-K reports, including:
  - the entry into and termination of definitive material agreements;
  - the creation, acceleration or increase of a direct or contingent financial obligation or an obligation under an off-balance sheet arrangement;
  - the incurrence of material charges as a result of exit or disposal activities and impairments;
  - a failure to comply with listing standards or a de-listing;
  - non-reliance on previously issued financial statements, audit reports and interim financial statement reviews; and
  - changes in the composition of the board of directors and changes in executive officers;
- require, subject to certain exceptions, that Form 8-K reports be filed within four business days (a table summarizing exceptions to the four-business day deadline is attached as Annex A);
- add a new limited safe harbor from liability under Section 10(b) and Rule 10b-5 under the Exchange Act for failure to timely file a Form 8-K in certain circumstances;

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

Cuckoo Seamier Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100, Japan
(81-3) 3597-8120

Oriental Plaza, Tower E3, Ste.1205
No. 1, East Chang An Avenue
Beijing 100738, People's Republic of China
(86-10) 8518-2766

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

- amend the eligibility requirements of Forms S-2 and S-3 to permit continued eligibility to use those forms despite a failure to timely make *certain* Form 8-K filings; and

- amend Rule 144 to permit continued reliance on that rule despite a failure to timely file Form 8-K reports.

**Disclosure of Form 8-K Items in Periodic Reports**

If a Form 10-Q or Form 10-K will be filed within four days of a Form 8-K triggering event (other than events relating to Item 4.01 (Changes in Registrant's Certifying Accountant) or Item 4.02 (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review)) and the required disclosure is included in the Form 10-Q or the Form 10-K, a Form 8-K need not be filed. The company may disclose the triggering event, other than pursuant to Items 4.01 and 4.02, under revised Item 5 of Part II of Forms 10-Q and 10-QSB and Item 9B of Form 10-K and Item 8B of Form 10-KSB, as applicable.

**The New Form 8-K Disclosure Requirements**

The SEC's amendments add eight new items or events that must be disclosed in Form 8-K reports and transfer, in part, two items from the existing Form 10-Q and 10-K periodic report forms. In addition, the SEC expanded two pre-existing Form 8-K items. A summary of the items that comprise revised Form 8-K follows. The new rules renumber the Form 8-K items into topical categories. The following summary tracks the new format.

**Section 1: Company's Business and Operations**

**Item 1.01**

**Entry into a Material Definitive Agreement.**

This item requires disclosure of material definitive agreements entered into by a company that are not made in the ordinary course of business. The item is also triggered by an amendment to a material definitive agreement (even if the underlying agreement had been entered into prior to the effective date of the new rules and therefore not previously disclosed on a Form 8-K) and by an amendment that results in a previously non-material agreement becoming a material definitive agreement of the company. However, an Item 1.01 Form 8-K is not required if an agreement, which was not material to the company when it entered into the agreement, becomes material to the company. It should be noted that "materiality" applies to the company and its subsidiaries. For example, entry by a subsidiary into a non-ordinary course definitive agreement that is material to the company is reportable under Item 1.01.

The required disclosure includes:

- the date on which the agreement was entered into or amended, the identity of the parties to the agreement or amendment and a brief description of any material relationship between the company or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and

- a brief description of the terms and conditions of the agreement or amendment that are material to the company.

The new 8-K rules do not change previous requirements with regard to filing material agreements as exhibits, nor do they affect the process for requesting confidential treatment of the terms of those agreements. In other words, the new 8-K rules do not require the filing of material agreements as exhibits to an 8-K. Material agreements, including agreements that become material to the company during a reporting period that were not previously considered material agreements, do not need to be filed until the company's next periodic report on Form 10-Q or 10-K. Nevertheless, the SEC encourages companies to file the exhibit with the Form 8-K when feasible, particularly when no confidential treatment is requested.

*Non-binding letters of intent and placement agreements*

In response to substantial comments to its original proposal, the SEC decided not to include letters of intent and other non-binding agreements within the scope of new Item 1.01. As a result, only agreements that provide for obligations that are material to and enforceable against a company, or rights that are material to the company and enforceable by the company against one or more other parties are covered by Item 1.01. According to the SEC, the term "material definitive agreement" is meant to parallel the category of material contracts required to be filed as exhibits with registration statements and periodic reports pursuant to item 601(b)(10) of Regulation S-K.

Under revised Form 8-K, material definitive agreements are required to be disclosed whether or not they are subject to conditions. Thus, for example, a material definitive agreement that 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 the 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 disclosed because the binding provisions are not material.

If a company determines that a placement agency or underwriting agreement is material, it may omit the identity of the underwriters from the disclosure in the Form 8-K to remain within the safe harbor of Rule 135c.

*Compensation Arrangements*

The SEC stated in its November FAQ that an oral agreement relating to compensation of a director that would be required to be filed pursuant to Item 601(b)(10) if written, must be provided on Form 8-K. The company must file a Form 8-K within four days of entering into the agreement, as opposed to within four days of memorializing the agreement on a "summary sheet," and provide a written description of the oral agreement as an exhibit similar to the requirement in Item 601(b)(10)(iii).

If a company enters into, or amends, an employment agreement with a named executive officer or a director, disclosure is required under Item 1.01, unless the employment agreement or amendment to the employment agreement is not required to be disclosed under Item 601(b)(10)(iii)(C) of Regulation S-K. Employment agreements with an executive officer who is not a "named executive officer" (as defined in Item 402(a)(3) of Regulation S-K) or any amendment of such agreement that is material to the registrant must be disclosed under Item 1.01. Whether an employment agreement is "immaterial in amount or significance" must be considered from the perspective of a reasonable investor in light of standards of materiality.

*Business combinations*

New Item 1.01 also requires disclosure of all material definitive agreements regarding business combinations and other agreements that relate to extraordinary corporate transactions. As a result, the filing of the Form 8-K may constitute the first "public announcement" of a business combination transaction for purposes of Rule 165 under the Securities Act and Rule 14d-2(b) or Rule 14a-12 under the Exchange Act (which relate to communications regarding business combinations made before the filing of a registration statement or proxy statement) and thereby trigger a filing obligation under those rules. To avoid duplicative filings, a company will be able to check one or more boxes on the cover page of revised Form 8-K to indicate that it is simultaneously satisfying its filing obligations under these rules, provided that the Form 8-K report contains all of the information and legends required by those rules. Special tagging of the electronic Edgar submission is also required to coordinate the multiple purposes of the filing. It should be noted that Item 1.01 disclosure is also required in cases where the company succeeds to an agreement or amendment by assumption or assignment, other than in connection with a merger or similar transaction.

*Equity compensation plans*

The adoption by the company's board of directors of an equity compensation plan in which named executive officers are eligible to participate requires disclosure pursuant to Item 1.01. If the board of directors adopts such a plan subject to shareholder approval, a Form 8-K is required to be filed upon obtaining shareholder approval of the plan.

The SEC stated in the November FAQ that a Form 8-K was not required to report the grant of an equity award to a named executive officer, other executive officer or director pursuant to an

equity compensation plan previously disclosed under Item 1.01, if such prior disclosure included all material terms and conditions of the award and the grant is consistent with those material terms and conditions. This is because Instruction 1 to Item 601(b)(10) would not require the executive officer's or director's personal agreement under the plan to be filed as an exhibit unless disclosure of particular provisions in the personal agreement is necessary for an investor's understanding of that individual's compensation under the plan. The company may rely on Instruction 1 to Item 601(b)(10) once it has filed a Form 8-K disclosing the material terms of the form of award agreement or notice. A Form 8-K is required if the company enters into or makes an award under the plan using an agreement (or an amended agreement) that is materially different from the material terms and conditions of the form of award or notice that was previously disclosed in the Form 8-K announcing the plan.

*Cash bonus plans*

If the board of directors adopts a cash bonus plan under which named executive officers are eligible to participate, the plan must be disclosed under Item 1.01 even if no specific performance criteria, performance goals or bonus opportunities have been communicated to plan participants, unless the plan is immaterial in amount or significance within the meaning of Item 601(b)(10)(iii)(A). A Form 8-K will also be required when the board of directors sets specific performance goals and business criteria for the participants in the plan. The company is not required to provide disclosure pursuant to Item 1.01 of target levels with respect to specific quantitative or qualitative performance related-factors, or factors or criteria involving confidential commercial or business information, the disclosure of which would have a adverse effect on the company. A Form 8-K must be filed if specific performance goals and business criteria have been established, but not met, and the company exercises discretion in granting a cash bonus.

**Item 1.02**

**Termination of a Material Definitive Agreement.**

This new item requires disclosure regarding the termination of a material definitive agreement that was not made in the ordinary course of business where such termination is material to the company. Disclosure is not required if the termination occurred as a result of the expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement.

The required disclosure includes:

- the date of the termination of the material definitive agreement, the identity of the parties to the agreement and a brief description of any material relationship between the company or its affiliates and any of the parties other than in respect of the material definitive agreement;

- a brief description of the terms and conditions of the agreement that are material to the company;
- a brief description of the material circumstances surrounding the termination; and
- any material early termination penalties incurred by the company.

Disclosure of the termination of a material definitive agreement may be required under this item even if the agreement was not disclosed previously because, for example, the agreement was entered into prior to effectiveness of Item 1.01.

No disclosure is required during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated. However, Instruction 2 to Item 1.02 states that once notice of termination pursuant to the terms of the agreement has been received, Form 8-K disclosure is required, notwithstanding the company's continued efforts to negotiate the continuation of the contract. For example, if a material definitive agreement has an advance notice provision that requires 180 days advance notice to terminate and the counterparty delivers such notice, a Form 8-K must be filed even if the company believes in good faith that the agreement will ultimately not be terminated. Similarly, if a material definitive agreement continues for successive one-year terms unless one party sends a non-renewal notice within a 30-day window six months prior to the automatic renewal date, a Form 8-K filing is triggered when such notice is given. Automatic renewal does not trigger the filing of a Form 8-K.

If an employment contract is terminated pursuant to the departure of an officer, it is sufficient for the company to state in its Item 1.02 disclosures that the contract was terminated in conjunction with the officer's departure and meets the disclosure requirement regarding the "material circumstances surrounding the termination." The November FAQ warned that this does not permit a company to avoid disclosing other "material circumstances" surrounding the termination, such as resulting termination, severance or other payments or other consequences.

The final version of revised Form 8-K does not include the proposed requirement to disclose management's analysis of the effect of the termination. Nevertheless, the SEC reminded companies that any disclosure made 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 retains the basic substantive requirements formerly included in Item 3 of Form 8-K regarding a company's entry into bankruptcy or receivership.

**Section 2: Financial Information**

**Item 2.01**

**Completion of Acquisition or Disposition of Assets.**

This item retains most of the substantive requirements included in former Item 2 of Form 8-K. It requires disclosure if a company, or any of its majority-owned subsidiaries, has acquired or disposed of a significant amount of assets, otherwise than in the ordinary course of business.

The SEC recognizes that there will frequently be a relationship between the disclosure provided under this item and the disclosure required by new Item 1.01. Typically, a company will report its entry into a material definitive agreement to acquire or dispose of assets under Item 1.01, and then later disclose the closing of the acquisition or disposition transaction under Item 2.01. However, a company will not necessarily be required to provide the Item 2.01 disclosure regarding every material definitive acquisition or disposition agreement disclosed under Item 1.01, as Item 2.01 retains the bright-line reporting thresholds of former Item 2 (with respect to the value and significance of the acquired assets or business) which are not included in Item 1.01.

Item 2.01 requires the same basic disclosure formerly required by Item 2 of Form 8-K, except that disclosure no longer is required regarding the nature of the business in which the acquired assets were used and whether the company acquiring the assets intends to continue such use.

**Item 2.02**

**Results of Operations and Financial Condition.**

The SEC retained in new Item 2.02 all of the substantive requirements of former Item 12 of Form 8-K regarding public announcements or releases of material non-public information regarding a company's results of operations or financial condition for completed fiscal periods.[1]

[1] For more information regarding disclosure of a company's results of operations or financial condition, please see our July 10, 2003 memoranda: "Use of Non-GAAP Financial Measures and Filings of Earnings Releases" and "Regulation G and Item 12 of Form 8-K: A "How-To" Guide."

**Item 2.03**

**Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

This new item requires a company to file a Form 8-K report if it becomes obligated on a direct financial obligation and the obligation is material to the company. In such case, the company must disclose:

- the date on which the company became obligated on the direct financial obligation and a brief description of the transaction creating the obligation;
- the amount of the direct financial obligation, including the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties; and
- a brief description of the other terms and conditions of the transaction or agreement that are material to the company.

In addition, if the company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement, it must disclose:

- the date on which the company becomes directly or contingently liable on the obligation and a brief description of the transaction or agreement creating the arrangement and obligation;
- a brief description of the nature and amount of the obligation of the company under the arrangement, including the material terms under which it may become a direct obligation, if applicable, or may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties;
- the maximum potential amount of future payments (undiscounted) that the company may be required to make, if different; and
- a brief description of the other terms and conditions of the obligation or arrangement that are material to the company.

A "direct financial obligation" consists of any of the following:

- a long-term debt obligation;
- a capital lease obligation;
- an operating lease obligation; or

- a short-term debt obligation that arises other than in the ordinary course of business.

The item refers to Item 303 of Regulation S-K for definitions of "long-term debt obligation," "capital lease obligation," "operating lease obligation" and "off-balance sheet arrangement." It also defines the term "short-term debt obligation" as a payment obligation under a borrowing arrangement that is scheduled to mature within one year.

A company need not file a report under Item 2.03 until the company enters into an agreement enforceable against it, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. The company 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.

A financial obligation may be material due to the amount of the obligation or the surrounding facts and circumstances. The November FAQ stated that with respect to a an obligation that is coming due, a company which replaces or refunds such obligation with another obligation of the same amount and similar terms, may conclude, depending upon other facts and circumstances (including but not limited to factors such as current impact on covenants, liquidity and debt capacity and other debt requirements) that the financial obligation is not material.

A company must provide the disclosure regarding off-balance sheet arrangements whether or not the company is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement. In the event that neither the company nor any affiliate of the company is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance arrangement in question, the four business day period for reporting the event under Item 2.03 would begin on the earlier of (i) the fourth business day after the contingent obligation is created or arises, and (ii) the day on which an executive officer of the company becomes aware of the contingent obligation. This is intended to provide for an additional four day grace period given the nature of this requirement. The SEC reminded companies in its November FAQ that they must ensure that their disclosure and internal controls and procedures ensure that information required to be disclosed in Exchange Act reports is recorded, processed, summarized and reported within the required time frame.

If the company enters into a facility, program or similar arrangement that creates or may give rise to direct financial obligations in connection with multiple transactions, the company must disclose the entering into of the facility, program or similar arrangement, and disclose its obligations, to the extent the obligations are material, as they arise or are created under the facility or program (including when a series of previously undisclosed individually immaterial obligations become material in the aggregate).

If the obligation required to be disclosed under Item 2.03 is a security, or a term of a security, that has been or will be sold pursuant to an effective registration statement of the company,

the company is not required to file a Form 8-K pursuant to the item, provided that the prospectus relating to the sale contains the information required by Item 2.03 and is filed within the required time period under Securities Act Rule 424 (relating to the filing of a final prospectus).

**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 a company to file a Form 8-K report if a triggering event causing the increase or acceleration of a direct financial obligation occurs and the consequences of the event are material to the company. In such case, the company must disclose:

- the date of the triggering event and a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;
- a brief description of the triggering event;
- the amount of the direct financial obligation, as increased if applicable, and the terms of payment or acceleration that apply; and
- any other material obligations of the company that may arise, increase, be accelerated or become a direct financial obligation as a result of the triggering event or the increase or acceleration of the direct financial obligation.

Also, if a triggering event occurs causing a company's obligation under an off-balance sheet arrangement to increase or be accelerated, or causing a company's contingent obligation under an off-balance sheet arrangement to become a direct financial obligation, and the consequences of such event are material to the company, it must disclose:

- the date of the triggering event and a brief description of the off-balance sheet arrangement;
- a brief description of the triggering event;
- the nature and amount of the obligation, as increased if applicable, and the terms of payment or acceleration that apply; and
- any other material obligations of the company that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the obligation under the off-balance sheet arrangement or its becoming a direct financial obligation of the company.

Item 2.04 defines the term "direct financial obligation" by reference to the definition provided in Item 2.03, but also includes an obligation arising out of an off-balance sheet arrangement that is accrued under SFAS No. 5 ("Accounting for Contingencies") as a probable loss contingency. "Off-balance sheet arrangement" is defined by reference to the definition provided in Item 2.03. Finally, the term "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 company or an obligation of the company arising under an off-balance sheet arrangement is increased or becomes accelerated or as a result of which a contingent obligation of the company arising out of an off-balance sheet arrangement becomes a direct financial obligation of the company.

Similar to Item 2.03, disclosure is required if a triggering event occurs in respect of the company's obligation under an off-balance sheet arrangement and the consequences are material to the company, whether or not the company is also a party to the transaction or agreement under which the triggering event occurs.

No disclosure is required unless and until a triggering event has occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including, if required, the sending to the company of notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement and the satisfaction of all conditions to such occurrence, except the passage of time. The November FAQ clarified that if declaration or notice is necessary prior to an increase or acceleration of the agreement, an Item 2.04 Form 8-K is not required until such declaration or notice is received. If no such declaration or notice is required and an increase or acceleration occurs automatically, disclosure is required under Item 2.04.

No disclosure is required if the company believes, in good faith, that no triggering event has occurred, unless the company has received a notice of the triggering event. To the extent that a company has disclosed a statement of its good faith belief as to any relevant matter, including, for example, that all conditions to occurrence of a triggering event have not been satisfied or that a triggering event otherwise has not occurred, disclosure may be required if the company's conclusion as to the triggering event changes due to a loss of, or change in, its good faith belief. The company would have to amend the Form 8-K to provide this updated disclosure within four business days from the date that its conclusion changes.

Where a company is subject to an obligation arising out of an off-balance sheet arrangement, whether or not disclosed pursuant to Item 2.03, and a triggering event occurs as a result of which an accrual for a probable loss under that obligation is required under SFAS No. 5 ("Accounting for Contingencies"), the obligation arising out of the off-balance sheet arrangement becomes a direct financial obligation for purposes of Item 2.04. In this situation, if the consequences are material to the company, disclosure is required under Item 2.04.

**Item 2.05**

**Costs Associated with Exit or Disposal Activities.**

This new item requires disclosure when a company commits to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of SFAS No. 146 ("Accounting for Costs Associated with Exit or Disposal Activities"), under which material charges will be incurred under generally accepted accounting principles. The item requires a company to disclose:

- the date of the commitment to the course of action and a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;
- for each major type of cost associated with the course of action (for example, one-time termination benefits, contract termination costs and other associated costs), an estimate of the total amount or range of amounts expected to be incurred in connection with the action;
- an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and
- an estimate of the amount or range of amounts of the charge that will result in future cash expenditures.

Costs associated with an exit activity are not limited to those addressed in SFAS No. 146, and may include other costs addressed by SOFAS Nos. 87, 88, 106 and 112.

If at the time of filing the company is unable to make a good faith estimate of the amount of the charges, it need not disclose an estimate at that time, but must nevertheless file the Form 8-K report describing the company's commitment to a course of action under which it will incur a material charge. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate. Consistent with SFAS No. 146, if a company is terminating employees as part of a plan to exit an activity, it does not have to disclose the commitment to the plan on Form 8-K until it has informed the affected employees.

**Item 2.06**

**Material impairments.**

This new item requires disclosure when a company concludes that a material charge for impairment to one or more of its assets, including, without limitation, an impairment of securities or goodwill, is required under generally accepted accounting principles. In this event, the company must disclose:

- the date of the conclusion that a material charge is required and a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required;
- an estimate of the amount or range of amounts of the impairment charge; and
- an estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures.

Like Item 2.05, if at the time of filing, the company is unable to make a good faith estimate called for by the item, disclosure of an estimate is not required. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate.

In recognition of the fact that tests for impairment or recoverability often occur in conjunction with the preparation, review or audit of financial statements that will be made available to the public as part of a periodic report on Form 10-Q or 10-K, no Form 8-K disclosure is required pursuant to this item if the conclusion regarding the material charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or fiscal year and the plan is disclosed in a timely filed Exchange Act report for that period.

**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.**

New Item 3.01(a) requires a company to report its receipt of a notice from the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity indicating that:

- the company or such class of its securities does not satisfy a rule or standard for continued listing on the exchange or association;
- the exchange has submitted an application under Exchange Act Rule 12d2-2 to the SEC to delist such class of the company's securities; or
- the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system.

Companies whose securities are quoted exclusively on automated inter-dealer quotation systems such as the over-the-counter bulletin board, or OTCBB, and the Electronic Pink Sheets are not subject to Item 3.01.

A company that receives this type of a notice must disclose the following information:

- the date that it received the notice;
- the rule or standard for continued listing that the company fails, or has failed, to satisfy; and
- any action or response that, at the time of filing, the company has determined to take in response to the notice.

In addition, if the company has notified the national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity that the company is aware of any material noncompliance with a rule or standard for continued listing, the company must disclose:

- the date that the company provided such notice;
- a rule or standard for continued listing that the company fails, or has failed, to satisfy; and
- any action or response that, at the time of filing, the company has determined to take regarding its noncompliance.

If a national securities exchange or national securities association that maintains the principal listing for any class of the company's common equity, in lieu of suspending trading in or delisting such class of the company's securities, issues a public reprimand letter or similar communication indicating that the company has violated a rule or standard of the exchange or association, the company must state the date and summarize the contents of the letter or communication.

Finally, Item 3.01 requires that, if the company has taken definitive action to cause the principal listing of a class of its common equity to be withdrawn, or terminated, the company must describe the action taken and state the date of the action. This requirement includes disclosure of an action taken by a company to transfer the listing or quotation of its securities to another securities exchange or quotation system. The definitive action taken by the company may also include the determination to delist the class of securities.

A company is not required to disclose a delisting that results from one of the following:

- the entire class of the security has been called for redemption, maturity or retirement and, if required by the terms of the securities, funds sufficient for the payment of all such securities have been provided for:
- the entire class of the security has been redeemed or paid at maturity or retirement;

- the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if true, the right to receive an immediate cash payment; or

- all rights pertaining to the entire class of the security have been extinguished.

A company must provide the disclosure regarding any failure to satisfy a rule or standard for continued listing for any class of the company's common equity even if the company has the benefit of a grace period or similar extension period during which it may cure the deficiency that triggers the disclosure requirement. The SEC indicated that it generally anticipates two filings in the typical involuntary delisting process. First, an initial filing will be made when the company receives the first notice that it does not comply with a rule or standard for continued listing, or when it notifies the exchange or association that it no longer complies with a rule or standard for continued listing. A second Form 8-K filing will be required upon the actual delisting of a class of the company's securities.

**Item 3.02**

**Unregistered Sales of Equity Securities.**

This new item requires a company to disclose information regarding the company's sale of equity securities in a transaction that is not registered under the Securities Act. This disclosure is currently required in Item 2(c) of Part II of Form 10-Q and Item 5(a) of Form 10-K and calls for disclosure of the information specified in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K.

Revised Form 8-K requires disclosure of certain issuances of unregistered equity securities sooner than currently required by Forms 10-Q and 10-K. Issuances not reported on Form 8-K, however, are required to be reported in periodic reports. A Form 8-K is not required to be filed if the equity securities sold in the aggregate since the company's last report filed under this item or last periodic report, whichever is more recent, constitute less than 1% of the company's outstanding securities of that class.

For purposes of determining the required Form 8-K filing date under this item, the SEC provided that a company has no obligation to disclose information under Item 3.02 until the company enters into an agreement enforceable against it, 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 under which the equity securities are sold.

**Item 3.03**

**Material Modifications to Rights of Security Holders.**

This new item requires a company to disclose material modifications to the rights of the holders of any class of the company's registered securities and to briefly describe the general effect of such modifications on such rights. Disclosure is also required where the rights of a class of registered securities is materially limited or qualified by the issuance or modification of any other class of the company's securities. The substance of the disclosure is similar to that previously required by Items 2(a) and (b) of Part II of Form 10-Q.

Once a company has reported a material modification to the rights of its security holders on Form 8-K, the company need not make any duplicative disclosure about the modification in any of its subsequently filed periodic reports.

**Section 4: Matters Related to Accountants and Financial Statements**

**Item 4.01**

**Changes in the Company's Certifying Accountant**

This item is substantively the same as former Item 4 of Form 8-K, requiring disclosure of the resignation, dismissal or engagement of an independent accountant.

**Item 4.02**

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

This new item requires a company to file a Form 8-K if and when its board of directors, a committee of the board of directors, or an authorized officer or officers if board action is not required, concludes that any of the company's previously issued financial statements covering one or more years or interim periods no longer should be relied upon because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20.

This item requires the company to disclose the following information:

- the date of the conclusion regarding the non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;
- a brief description of the facts underlying the conclusion to the extent known to the company at the time of filing; and

- a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the company's independent accountant the subject matter giving rise to the conclusion.

Similarly, if the company is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, the company must disclose the following information:

- the date on which the company was so advised or notified;
- identification of the financial statements that should no longer be relied upon;
- a brief description of the information provided by the accountant; and
- a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or an authorized officer or officers, discussed with the independent accountant the subject matter giving rise to the notice.

If the company has already reported that reliance should not be placed on previously issued financial statements, the company is not required to file a second Form 8-K to report that its auditor has concluded that future reliance should not be placed on its audit report, unless the auditor's conclusion relates to an error or matter different from that which triggered the company's original filing.

If the company receives such advice or notice from its independent accountant, the company must provide the independent accountant with a copy of the disclosures it is making pursuant to Item 4.02 no later than the same day it files these disclosures with the SEC. The company also must request the independent accountant to furnish to the company as promptly as possible a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company pursuant to Item 4.02 and, if not, stating the respects in which it does not agree. The company must amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K within two business days of the company's receipt of the letter.

**Section 5: Corporate Governance and Management**

**Item 5.01**

**Changes in Control of Registrant.**

This item substantially follows current Item 1 of Form 8-K. If, to the knowledge of the company, a change in control has occurred, the company must disclose, among other things, the identity of the person or persons who acquired control, the basis of the control, a

description of the transaction by which the change in control occurred and the amount and source of the consideration used to effect the transaction.

**Item 5.02**

**Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers**

*a. Disclosure under Item 5.02(a) when a director resigns or refuses to stand for re-election due to a disagreement or is removed for cause.*

Paragraph (a) of Item 5.02 broadens the scope of former Item 6 of Form 8-K. Former Item 6 required disclosure only if a director departed as a result of a disagreement, provided a letter to the company describing the disagreement and then requested that the company publicly disclose the matter. Thus, the action necessary to trigger disclosure pursuant to the former item rested solely with the director.

Under the revised item, if a director has resigned or refuses to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the company, known to an executive officer of the company, on any matter relating to the company's operations, policies or practices, or if a director has been removed for cause from the board of directors, the company must disclose:

- the date of the director's resignation, refusal to stand for re-election or removal;
- any positions held by the director on any committee of the board of directors at the time of the director's resignation, refusal to stand for re-election or removal; and
- a brief description of the circumstances representing the disagreement that management believes caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal.

In addition, if the director furnishes the company with any written correspondence concerning the circumstances surrounding his or her resignation, refusal or removal, the company must file a copy of the correspondence as an exhibit to the report on Form 8-K regardless of whether the director requests that the company do so. The company must provide the director with a copy of the disclosures it makes in response to Item 5.02 no later than the day that the company files the Form 8-K with the SEC.

The company must also provide the director with the opportunity to furnish a letter addressed to the company as promptly as possible stating whether he or she agrees with the company's Item 5.02 disclosures and, if not, the respects in which he or she does not agree. The company must file any letter it receives from the director as an exhibit by amendment to the previously filed Form 8-K within two business days after receipt by the company.

*b. Disclosure under Item 5.02(b) when certain officers retire, resign or are terminated and disclosure when 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.*

Paragraph (b) of Item 5.02 requires disclosure when the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns, or is terminated from that position. This item covers the situation in which the principal officer remains employed and retains his or her title, but the duties and responsibilities as principal officer have been removed or reassigned to other personnel in the organization. The item also requires disclosure when a director retires, resigns, is removed or declines to stand for re-election and the company is not required to provide disclosure under Item 5.02(a).

The Form 8-K reporting obligation is triggered by a notice of a decision to resign, retire or refuse to stand for re-election provided by the director or executive officer, whether or not such notice is written. No disclosure is required by reason of discussions or consideration of resignation, retirement or refusal to stand re-election. Whether such communications represent discussion or consideration, on the one hand, or notice of a decision, on the other hand, depends upon the facts and circumstances. The required disclosure includes the date of the event, the fact that it has occurred and the effective date of such resignation or retirement. In the case of a refusal to stand for re-election, the company must disclose when the election in question will occur. The company should ensure that it has the appropriate disclosure controls and procedures under the rules of the Exchange Act in order to determine when a notice of resignation, retirement or refusal has been communicated to the company. The company is not required to file a Form 8-K if it decides not to nominate a director for re-election, unless such director then resigns his or her position.

*c. Disclosure under Item 5.02(c) and (d) when the registrant appoints certain new officers or a new director is elected*

Paragraph (c) of Item 5.02 requires disclosure if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions. The company must disclose the officer's name, position, the date of the appointment, information regarding the background of the officer and certain related party transactions with the company, and a brief description of the material terms of any employment agreement between the company and the officer. The information required by this item must be reported on Form 8-K even if the information was not required to be disclosed in the Form 10-K because the position does not fall within the definition of an executive officer for the purposes of Items 401 or 404 of Regulation S-K. If the company intends to make a public announcement of the appointment of an officer other than by means of a Form 8-K pursuant to Item 5.02(c), it may delay the filing of such Form 8-K until the day of such other public announcement. The company also does not have to disclose the entry into an employment agreement with the officer pursuant to Item 1.01 until the time of the public announcement. Similarly, if the officer is simultaneously

appointed to the board of directors of the company, an Item 5.02(d) Form 8-K is not required until the time of public announcement.

In addition, if a new director is elected to the board, except by a vote of security holders at an annual meeting or a special meeting convened for such purpose, paragraph (d) of Item 5.02 requires disclosure of the new director's name, the election date, a brief description of any arrangement or understanding pursuant to which the new director was selected as a director, any committees to which the new director has been, or at the time of the disclosure is expected to be, named, and information regarding certain related party transactions between the new director and the company.

To the extent that information regarding an employment contract of a newly-appointed executive officer, or the board committee or related party transaction information associated with a newly-elected director, is not determined or is unavailable at the time of the required Form 8-K filing, a company must include a statement to this effect in the filing and then must file an amendment to the Item 5.02 Form 8-K filing containing the information within four business days after the information is determined or becomes available.

Item 5.02 disclosure with respect to new officers and directors is not required for a company that is a wholly-owned subsidiary of another reporting company.

**Item 5.03**

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

This item requires a company with a class of equity securities registered under Section 12 of the Exchange Act to disclose any amendment to its articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement or information statement. The item requires the company to disclose the effective date of the amendment and a description of the provision adopted or changed by amendment and, if applicable, the previous provision.

If the company determines to change the fiscal year from that used in its most recent filing with the Commission by means other than a submission to a vote of security holders or by an amendment to its articles of incorporation or bylaws, the company must file a Form 8-K disclosing the date of that determination, the date of the new fiscal year end and the form on which the report covering the transition period will be filed.

The SEC added an instruction to this item, as well as to Item 601 of Regulations S-K, clarifying that if an amendment to the articles of incorporation or bylaws is reported on Form 8-K, the company need only file the text of the amendment as an exhibit to the filing. If it does so, it must file the restated articles of incorporation or bylaws as an exhibit to its next periodic report. An Item 5.03 Form 8-K is not required if the company restates its articles of incorporation, i.e., consolidating previous amendments without any substantive changes to

the articles of incorporation. The SEC recommends that the company refile the complete articles of incorporation, if restated, in the next periodic report for ease of reference to investors.

**Item 5.04**

**Temporary Suspension of Trading under Registrant's Employee Benefit Plans.**

Former Item 11 has been retained and renumbered as Item 5.04. This item was recently added to Form 8-K in conjunction with the adoption of Regulation BTR.[2]

**Item 5.05**

**Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.**

Former Item 10 has been retained and renumbered as Item 5.05. This item was recently added to Form 8-K in conjunction with the adoption of requirements that companies adopt a code of ethics for their principal executive and financial officers. Those rules require disclosure of amendments to and waivers of the code of ethics.[3]

**Section 7: Regulation FD[4]**

**Item 7.01**

**Regulation FD Disclosure.**

Former Item 9 has been retained and renumbered as Item 7.01. The due date for filings pursuant to this item remains determined in accordance with Regulation FD rather than the general four-business day requirement.

---

[2] For more information regarding disclosure requirements for Regulation BTR, please see our February 10, 2003 memorandum, "SEC Adopts Rules Regarding Insider Trades During Pension Fund Blackout Periods."

[3] For more information regarding disclosure requirements for codes of ethics, please see our January 31, 2003 memorandum, "SEC Adopts Rules for Disclosure Regarding Codes of Ethics and Audit Committee Financial Experts."

[4] Section 6 of Form 8-K has been reserved.

**Section 8: Other Events**

**Item 8.01**

**Other Events.**

Former Item 5 has been retained and renumbered as Item 8.01.

**Section 9: Financial Statements and Exhibits**

**Item 9.01**

**Financial Statements and Exhibits.**

Former Item 7 has been retained and renumbered as Item 9.01. Companies continue to be able to file financial statements required by this item in an amendment to the original Form 8-K within 75 days of completion of the transaction triggering the need to file the financial statements.

In recent months, some confusion had arisen with respect to Form 8-K's that included information pursuant to Item 12 (now 2.02) and Item 9 (now 7.01) and exhibits relating to those items. The confusion resulted from the fact that Item 12 and Item 9 information is considered "furnished" not "filed" for liability purposes, but Item 7 (now 9.01) did not specifically provide such treatment with respect to Item 7 and the related exhibits. Revised Form 8-K provides that if the report contains disclosures under Item 2.02 (Results of Operations and Financial Condition) or 7.01 (Regulation FD Disclosure), whether or not the report contains disclosures regarding other items, all exhibits to that report relating to Item 2.02 or 7.01 will be deemed furnished, and not filed, unless the registrant specifies exhibits, or portions of exhibits, that are intended to be deemed filed rather than furnished.

**Consequences of Late Filings**

**Limited Safe Harbor from Section 10(b) and Rule 10b-5 Liability**

In recognition of the fact that several of the new Form 8-K disclosure items may require management to quickly assess the materiality of an event or to determine whether a disclosure obligation has been triggered, the SEC has decided to adopt 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 company makes the determination and does not receive a notice described in Item 4.02(b) from its accountant) |

In light of this new limited safe harbor under Section 10(b) and Rule 10b-5, the SEC has eliminated the safe harbor from liability under Section 13(a) or 15(d) contained in its initial proposal. As a result, the new safe harbor will not affect the SEC's ability to enforce any of the Form 8-K filing requirements under these sections.

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 company 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 company's failure to satisfy the other disclosure obligation. For example, if a company 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 company from Section 10(b) and Rule 10b-5 liability regarding its separate disclosure obligation pursuant to the offering or repurchase of securities.

Furthermore, the new safe harbor extends only until the due date of the periodic report for the relevant period in which the Form 8-K was not timely filed. Thus, for example, if an event occurs that requires the filing of a Form 8-K during a particular quarter, but the company fails to make the required timely disclosure on Form 8-K, the company must provide the disclosure prescribed by the relevant Form 8-K item in its Form 10-Q filed for the quarter during which that event occurred. Failure to make such disclosure in the periodic report will subject a company to potential liability under Section 10(b) and Rule 10b-5, in addition to the potential liability under Section 13(a) or15(d).

**Eligibility to Use Forms S-2 and S-3**

Under current rules, to be eligible to use Form S-2 or S-3, a company must, among other things, have timely filed all reports required to be filed under Exchange Act Section 13(a) or 15(d) during the 12 months prior to filing of the registration statement.

In connection with its changes in Form 8-K, the SEC is revising the Form S-2 and S-3 eligibility requirements to provide that companies that fail to file timely reports required by Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a) of revised Form 8-K will not lose their eligibility to use Form S-2 and S-3 registration statements. These are the same items that are covered by the new limited safe harbor from Section 10(b) and Rule 10b-5 liability.

However, a company must be current in its Form 8-K filings with respect to the items listed above at the time of a Form S-2 or S-3 filing. Thus, a company must have filed the disclosure required by any of these Form 8-K items on or before the date that it files a Form S-2 or Form S-3 registration statement to satisfy the eligibility requirements of these forms. With respect to the other Form 8-K items not listed above, a company's failure to timely file Form 8-K pursuant to any of these items will result in a loss of Form S-2 or S-3 eligibility for the 12 months following the Form 8-K due date. Many of these items are currently required Form 8-K disclosure items, while the other new Form 8-K items not included above generally do not require the same degree of analysis.

**Eligibility to Rely on Rule 144**

Because of the significant burden that would be placed on selling security holders if eligibility to rely on Rule 144 were conditioned on a company's satisfaction of the new Form 8-K requirements, the SEC has amended Securities Act Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the 12 months preceding a sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition. As required by Rule 144(h), however, a security holder will continue to be required at the time he or she files a notice on Form 144 to represent that he or she does not possess material inside information.

**Other Matters Related to Form 8-K Filings and Conforming Amendments**

In light of the fact that a company may need to report a given event under Item 1.01 as well as one or more other items, such as Item 2.03, revised Form 8-K permits a company to file a single Form 8-K to satisfy one or more disclosure items, provided that the company identifies by item number and caption all applicable items being satisfied and provides all of the substantive disclosure required by each of the items.

Finally, the SEC revised Exchange Act Rule 12b-23 to make clear that companies may incorporate by reference into their registration statements and reports information previously disclosed on Form 8-K without the requirement to file such Form 8-K reports as exhibits to the statement or report.

* * *

This memorandum provides only a general overview of the proposed disclosure rules. It is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed in the Securities Group—Publications section of our web site (www.paulweiss.com).


| | | | |
|---|---|---|---|
| Mark S. Bergman | (44 20) 7367 1601 | John C. Kennedy | (1) 212-373-3025 |
| Richard S. Borisoff | (1) 212-373-3153 | Edwin S. Maynard | (1) 212-373-3024 |
| Andrew J. Foley | (1) 212-373-3078 | Raphael M. Russo | (1) 212-373-3309 |
| Paul D. Ginsberg | (1) 212-373-3131 | | |

**PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**



1285 Avenue of the Americas, New York, NY 10019-6064

**Annex A**

Summary of Exceptions to New Form 8-K Four-Business Day Filing Requirement

| Item | Event | Exception to Four-Business Day Filing Requirement |
|---|---|---|
| **1.01** | Entry into a material definitive agreement or amendment | The Form 8-K must include a description of the agreement or amendment. A copy of the agreement or amendment does not need to be filed as an exhibit until the company's next periodic report on Form 10-Q or 10-K |
| **2.05** | Costs associated with exit or disposal activities | If at the time of filing the company is unable to make a good faith estimate of the amount of the charge, disclosure of an estimate is not required. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate. |
| **2.06** | Material impairment | If at the time of filing, the company is unable to make a good faith estimate of the charge for impairment, disclosure of an estimate is not required. Within four business days after the company formulates an estimate, the company must amend its earlier Form 8-K filing to include the estimate. |
| **3.02** | Unregistered sale of equity securities | Issuances of equity securities that in the aggregate (since the company's last report filed under this item or last periodic report, whichever is more recent) constitute less than 1% of the outstanding securities of that class may be reported in the Company's next periodic report rather than Form 8-K. |

| | | |
|---|---|---|
| **4.02** | Company concludes, or is advised by its independent accountant, that previously issued financial statements should no longer be relied upon. | If the company receives advice or notice from its independent accountant, the company must provide the independent accountant with a copy of the Form 8-K disclosure no later than the same day it files the Form 8-K with the SEC.<br><br>The company also must request the independent accountant to furnish to the company as promptly as possible a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company and, if not, stating the respects in which it does not agree. The company must amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K within two business days of the company's receipt of the letter. |
| **5.02(a)** | Director resigns or refuses to stand for re-election due to a disagreement or is removed for cause. | The company must provide the director with a copy of the disclosures it makes no later than the day that the company files the Form 8-K with the SEC. The company must file any response letter it receives from the director as an exhibit by amendment to the previously filed Form 8-K within two business days after receipt by the company. |

| | | |
|---|---|---|
| **5.02(c)** | Appointment of new officers or election of a new director | If the company intends to make a public announcement of the appointment of an officer other than by means of a Form 8-K, it may delay the filing of such Form 8-K until the day of such other public announcement.<br><br>To the extent that information regarding an employment contract of a newly-appointed executive officer, or the board committee or related party transaction information associated with a newly-elected director, is not determined or is unavailable at the time of the required Form 8-K filing, a company must include a statement to this effect in the filing and then must file an amendment to the Item 5.02 Form 8-K filing containing the information within four business days after the information is determined or becomes available. |
| **5.03** | Amendment to the articles of incorporation or bylaws, or change in fiscal year, if not proposed in a previously filed proxy statement or information statement. | If an amendment to the articles of incorporation or bylaws is reported on Form 8-K, the company need only file the text of the amendment as an exhibit to the filing. If it does so, it must file the restated articles of incorporation or bylaws as an exhibit to its next periodic report. |
| **7.01** | Regulation FD disclosure | The due date for filings pursuant to this item remains determined in accordance with Regulation FD (generally one day) |
| **9.01** | Financial statements and exhibits | Financial statements may be filed by amendment 71 days after the date that the initial report on Form 8-K must be filed. |