Benefits Practice Center **ISSN 1544-0575**

JOURNAL REPORTS: LAW AND POLICY
2004

An Expanding and Accelerating Universe: Securities Law Disclosures in 2004

By David B.H. Martin, Covington & Burling
Washington, D.C.

By Andrea Vachss, Covington & Burling
San Francisco, California

By Kerry S. Burke, Covington & Burling
Washington, D.C.

AUGUST 2004

Introduction

Over the past year, the Securities and Exchange Commission, in part as mandated by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), has adopted a number of new disclosure requirements for public companies. Some of these changes already have taken effect, while others become effective soon. For instance, the SEC has revamped Form 8-K in response to the "real time issuer disclosure" mandate of Sarbanes-Oxley. These new requirements become effective Aug. 23, 2004. In addition, the New York Stock Exchange (the NYSE) and the Nasdaq Stock Market (Nasdaq) have made significant changes to their listing standards relating to corporate governance that will require additional disclosures in a public company's SEC filings.[1]

Certain of these regulatory changes are summarized below. First is a brief summary of certain of the SEC's new disclosures rules, other than those reflected in recent amendments to Form 8-K, that are applicable to U.S. public companies in 2004 as they relate to corporate governance issues,[2] as well as a brief summary of selected new disclosure obligations resulting from changes in the NYSE and Nasdaq listing standards.[3] Second is an analysis of the requirements of the expanded and reorganized Form 8-K. A table of the reorganized items is provided.

SEC Disclosure Rules

Summary of SEC Rules - Form 10-K

Subject	*Discussion*
Accelerated Reporting	Although the SEC adopted final rules relating to the acceleration of periodic reporting dates in September 2002, this is the first year in which an "accelerated filer" (as defined in Rule 12b-2 under the Securities Exchange Act of 1934 (the Exchange Act) is subject to an accelerated filing deadline. An accelerated filer must file its Form 10-K within 75 days after the end of its fiscal year if the fiscal year ended on or

	after Dec. 15, 2003.[1] (*General Instruction A to Form 10-K*)
Changes to Nominating Committee Procedures	A company must describe in its Form 10-K (or Form 10-Q) any material changes to the procedures by which security holders may recommend nominees to the board, where those changes are implemented after the most recent nominating committee disclosures contained in the proxy statement (described below). The adoption of such procedures, where there previously were no such procedures, constitutes a material change.(*Item 401(j) of Regulation S-K*)
Nominating Committee Composition and Procedures	A company must address the following information pertaining to the nominating committee and its responsibilities: • disclose whether it has a nominating committee (and if not, why not and who makes nominating decisions in the absence of such a committee), • make the nominating committee charter, if any, available to security holders, either by placing the charter on its Web site or by including a current copy of the charter as an appendix to its proxy statement at least once every three years, • disclose whether members of the nominating committee satisfy the "independence" requirements of the NYSE, the Nasdaq or the AMEX (as applicable), • with respect to the nominating committee's procedures, disclose, among other things, -- whether the nominating committee considers candidates for director nominees put forth by security holders, and, if so, the procedures to be followed by security holders in submitting recommendations, -- if the nominating committee does not have a policy concerning the consideration of candidates recommended by security holders, the basis for the view of the board of directors that it is appropriate for the nominating committee not to have such a policy, -- the nominating committee's process for identifying and evaluating candidates to be nominated as directors, -- any minimum qualifications for nominating committee-recommended nominees, -- whether the company pays any third party a fee to assist in identifying and evaluating nominees, -- whether the nominating committee has rejected

	a candidate recommended within the preceding year by a beneficial owner of more than 5% of the company's voting common stock, and -- the category of persons or entities (i.e., security holder, nonmanagement director, chief executive officer, other executive officer, third-party search firm or other specified source) that recommended each director nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or who are standing for re-election). (*Item 7(d)(2) of Schedule 14A*)
Security Holders' Communications With the Board of Directors	• A company must disclose whether or not the board of directors has a process for security holders to send communications to directors (and, if not, the basis for the view of the board of directors that such a process is inappropriate). (*Item 7(h)(1) of Schedule 14A*) • If the company has such a process, the proxy statement must include (i) a description of the procedures for communications to the board of directors or specified individual directors and (ii) if such communications are screened, the process for determining which communications will be relayed to the board of directors. Alternatively, the company can post this information on its Internet Web site and provide in its proxy statement the Web site address where the information can be obtained. (*Item 7(h)(2) of Schedule 14A*)
Board Attendance Policies	A company must disclose the company's policy regarding director attendance at annual meetings of shareholders and the number of directors who attended the prior year's annual meeting. Alternatively, the company can post this information on its Internet Web site and provide in its proxy statement the Web site address where the information can be obtained. (*Item 7(h)(3) of Schedule 14A*)
Company Repurchase of Common Stock	Form 10-Q (and, in the case of a company's fourth quarter, its Form 10-K) for periods ending on or after March 15, 2004, must include a table showing the following information, presented on a monthly basis, with respect to repurchases (whether in reliance on Exchange Act Rule 10b-18 or otherwise) by the company or an "affiliated purchaser" (as defined by Exchange Act Rule 10b-18) of any of the company's equity securities registered under §12 of the Exchange Act: • total number of shares repurchased, • average price paid per share, • number of shares repurchased as part of a

	publicly announced plan or program, and • maximum number or approximate dollar value of shares that may yet be purchased under such plan or program. Additional details about any publicly announced repurchase plans or programs must be included in a footnote. (*Item 2(e) of Form 10-Q and Item 5(c) of Form 10-K*)
Changes to Nominating Committee Procedures	As discussed above, a company must describe in its Form 10-Q any material changes to the procedures by which security holders may recommend nominees to the board, where those changes are implemented after the most recent nominating committee disclosures contained in the proxy statement. For instance, if a company with a calendar fiscal year end changes its nominating committee procedures after the company's annual meeting in May 2004, the company would be required to disclose such changes in its Form 10-Q for the quarter ended June 30, 2004. (*Item 401(j) of Regulation S-K*)

[1]An accelerated filer also must disclose in its Form 10-K its Web site address and whether it makes reports on Forms 10-K, 10-Q and 8-K available on its Web site, free of charge, as soon as reasonably practicable after these reports are filed with the SEC. If a company does not make such reports available on its Web site, the company must disclose why it does not do so, and whether it will voluntarily provide electronic or paper copies of such filings free of charge upon request. (*Item 101 of Regulation S-K*)

New York Stock Exchange Listing Standards

The amendments to the NYSE corporate governance listing standards adopted in 2003 include a number of provisions that will or could affect a listed company's public disclosures.[4] The compliance deadline for both the NYSE and Nasdaq corporate governance changes is generally the earlier of (i) the company's first annual meeting after Jan. 15, 2004, and (ii) Oct. 31, 2004. The NYSE has advised that its new disclosure requirements do not take effect until the implementation deadline for the substantive corporate governance requirements.[5] Accordingly, the new NYSE disclosures need not be included in either a Form 10-K filed before a company's 2004 annual meeting or in its proxy materials for the 2004 annual meeting. However, companies with a Dec. 31, 2003, year end, for a variety of reasons, may wish to consider voluntary compliance with the new disclosure requirements in their Form 10-K and in connection with their 2004 annual meeting.

Summary of NYSE Listing Standards - Form 10-K[1]

Subject	***Discussion***
Corporate Governance Guidelines	Each NYSE-listed company must have corporate governance guidelines. Each NYSE-listed company also must have (i) an audit committee, (ii) a

and Committee Charters	nominating/corporate governance committee, and (iii) a compensation committee, each of which must have a written charter." The corporate governance guidelines and the charters of the company's "most important committees" (including the audit, nominating/corporate governance, and compensation committees) must be posted on the company's Web site, and the company in its Form 10-K must state that (i) the documents are available on the company's Internet Web site and (ii) are available in print for any shareholder who requests them. (*Section 303A.09 of the NYSE Listed Company Manual*)

[1]This summary does not discuss the NYSE's listing standards relating to the disclosure of a code of business conduct and ethics and the CEO certification requirement. For more information on these standards, see Covington & Burling's "New Securities Law Disclosures in 2004," *supra* note 2, and "New NYSE and Nasdaq Corporate Governance Listing Standards" *supra* note 3.

Summary of NYSE Listing Standards - Proxy Statement[1]

Subject	***Discussion***
Board Independence Disclosures	Under the NYSE's new corporate governance rules, a majority of the directors, as well as each member of the audit, nominating/corporate governance, and compensation committees, must qualify as "independent." There are five per se disqualifying relationships (e.g., employee), but otherwise a director's qualification as "independent" must be affirmatively determined by the board of directors. The process of determining independence may trigger disclosures in the company's proxy statement under the following circumstances: • In order to qualify as "independent," a director cannot have a material relationship with the company. If a director has a relationship (other than one of the five per se disqualifying relationships), but the board of directors determines that the relationship is not material, the basis for the board's determination must be disclosed in the proxy statement. • Alternatively, the board of directors can adopt and disclose "categorical standards" for evaluating the materiality of relationships. If the relationship of a director falls within the categorical standards, it will be sufficient for the board to state that the director meets the categorical standards, without describing the particular aspects of the relationship between

	the director and the company. While the NYSE rules do not state the manner in which the categorical standards are to be disclosed, disclosure in the proxy statement seems logical and should be sufficient. (*Section 303A.02 of the NYSE Listed Company Manual; NYSE Corporate Governance FAQs*)
Contributions to Charitable Organizations	A NYSE-listed company must disclose in its proxy statement all charitable contributions made to any charitable organization of which an independent director of the company is serving as an executive officer if, within the preceding three years, contributions in any year exceeded the greater of $1 million or 2% of the charity's consolidated gross revenues. (*Section 303A.02 of the NYSE Listed Company Manual; NYSE Corporate Governance FAQs*)
Executive Sessions of Nonmanagement Directors	The new NYSE corporate governance rules require the nonmanagement directors of a listed company to meet regularly in executive session. • If one of the nonmanagement directors is selected to preside at these sessions, his or her name must be disclosed in the proxy statement. Alternatively, the company may elect to disclose the procedures for the selection of the presiding director. • The company also must disclose the method by which interested parties, including shareholders, can communicate directly with the presiding director or the nonmanagement directors as a group. (*Section 303A.03 of the NYSE Listed Company Manual*)
Equity-Based Compensation Plans --Possible Amendments to Equity-Based Compensation Plans	Under the new NYSE corporate governance rules, the provisions for shareholder approval of "equity compensation plans" have been substantially revised. As a result, shareholder approval is required not only for a new, nonexempt equity compensation plan, but also for a "material revision" to an existing plan. In some cases, shareholder approval of the plan as amended may be required in order for the company to be able to make new awards under the plan. (*Section 303A.08 of the NYSE Listed Company Manual*)[2]
Equity-Based Compensation Plans --Elimination of Discretionary Voting by Broker-Dealers on Equity Compensation	The NYSE has amended its rules to prohibit member organizations from giving proxies to vote on equity compensation plans without instructions from the beneficial owner of the shares. Companies will need to take this change into account when describing the treatment of "broker nonvotes" in the proxy statement. (*NYSE Rule 452*)

Plans

[1]This summary does not discuss the NYSE's listing standards relating to service on multiple audit committees. For more information on this standard, see Covington & Burling's "New Securities Law Disclosures in 2004," *supra* note 2, and "New NYSE and Nasdaq Corporate Governance Listing Standards," *supra* note 3.

[2]For additional information concerning the NYSE's corporate governance rules applicable to equity compensation plans, see *Frequently Asked Questions on Equity Compensation Plans* (Dec. 12, 2004) available at http://www.nyse.com/pdfs/equitycompfaqs.pdf (last updated Feb. 18, 2204).

Nasdaq Stock Market Listing Standards

The amendments to the Nasdaq corporate governance listing standards adopted in 2003 also include a number of provisions that will or could affect a listed company's public disclosures. Nasdaq has taken a contrary position to the NYSE with respect to the implementation of its new corporate governance disclosure requirements. Nasdaq has issued interpretative guidance indicating that Nasdaq-listed companies are required to implement the new corporate governance disclosure standards relating to board independence and the "controlled company" exemption discussed below in proxy statements prepared for annual meetings after Jan. 15, 2004.[6] Thus, these new disclosure requirements must be included in a company's proxy materials for the 2004 annual meeting. Nasdaq-listed companies must implement the new code of conduct requirement by May 4, 2004.

Summary of Nasdaq Listing Standards - Proxy Statement[1]

Subject	***Discussion***
Board Independence	Under Nasdaq's new corporate governance rules, a majority of the board of directors, each member of the audit committee, and each member of the compensation and nominating committees (if the company has such committees) must qualify as "independent." A director's qualification as "independent" must be affirmatively determined by the board of directors. Each Nasdaq-listed company must disclose in its annual proxy statement those directors whom the board of directors has determined to be "independent." *(NASD Rule 4350(c)(1))*
Controlled Company	Under Nasdaq's new corporate governance rules, a "controlled company" need not comply with certain requirements, including the requirement that a majority of its board members be independent. A "controlled company" is a company in which more than 50% of the voting power is held by an individual, a group, or another company. A company relying on the exemption for controlled companies must disclose its reliance, and its basis for that reliance, in its proxy statement *(NASD Rule 4350(c)(5))*
"Exceptional and Limited	As discussed above, the new Nasdaq corporate governance rules require directors serving on

Circumstances" Exception	the audit, compensation and nominating committees to be "independent." This requirement is, however, subject to an exemption for one director on each committee in certain "exceptional and limited circumstances." (*NASD Rules 4350(c)(3)(C), 4350(c)(4)(C), and 4350(d)(2)(B)*) • If one director on the audit, compensation, or nominating committee does not qualify as "independent," he or she may still be appointed to such committee if certain conditions are satisfied. The proposed member must not be a current officer or employee, or a family member of an officer or an employee, of the company. The board of directors must determine, under "exceptional and limited circumstances," that the appointment of such person is in the best interests of the company and its shareholders. The company must disclose in its proxy statement for the next annual meeting subsequent to this determination the nature of the relationship and the reasons for the determination. In addition, if the nonindependent director is to serve on the audit committee, such director must meet the criteria set forth in Exchange Act Rule 10A-3. (*NASD Rules 4350(c)(3)(C), 4350(c)(4)(C), and 4350(d)(2)(B)*) Nasdaq has issued interpretative guidance indicating that a Nasdaq-listed company using any of the "exceptional and limited circumstances" provisions need not comply with the disclosure requirements in its proxy materials for the 2004 annual meeting. A Nasdaq-listed company could use these exceptions when it appoints members of the audit, compensation, and nominating committees, which will not occur until after the election of directors at the 2004 annual meeting; therefore, the disclosure is not required until the company files its proxy statement for the 2005 annual meeting. (*Nasdaq Frequently Asked Questions: Corporate Governance (Dec. 17, 2003, last updated Feb. 18, 2004)*)
Possible Amendment to Equity-Based Compensation Plan	Under the new Nasdaq rules, the provisions for shareholder approval of "equity compensation plans" have been substantially revised. As a result, shareholder approval is required not only for a new, nonexempt equity compensation plan, but also for a "material amendment" to an existing plan. In some cases, shareholder approval of an existing "formula plan" or "discretionary plan" may be required in order for the company to be able to make new awards under the plan. (*NASD Rule 4350(i); IM-4350-5*)

[1]This summary does not discuss the Nasdaq's listing standard relating to the

disclosure of the code of conduct applicable to directors, officers, and employees. For more information on this standard, see Covington & Burling's "New Securities Law Disclosures in 2004," *supra* note 2, and "New NYSE and Nasdaq Corporate Governance Listing Standards," *supra* note 3.

Commentary

The volume and scope of the new disclosure requirements, coupled with the fact that beginning in 2004 the Form 10-K filing deadline for "accelerated filers" is 75 days after the fiscal year end, emphasize the need for companies to give prompt attention to the new requirements. This includes, where necessary, reviewing and updating all of their schedules and systems supporting periodic reporting and annual meeting disclosure documents.

Each company should devote particular attention to its disclosure controls and procedures, executive officer certification processes, director and officer questionnaires, board and committee meeting schedules, and schedules of meetings with its independent auditors to ensure that it elicits the information necessary to satisfy the new disclosure requirements.[7]

New SEC Form 8-K Requirements

Impelled by Sarbanes-Oxley's mandate for "real time" disclosure, the SEC has recently given Form 8-K a major rewrite, one that, in addition to lifting the face of the form, increases the number of its event-driven requirements and accelerates its due date.[8] These changes to the current reporting obligations for U.S. public companies under the Exchange Act become effective Aug. 23, 2004, and do the following:

- reorganize the form into topical sections;
- accelerate the filing deadline to four business days, with safe harbor relief from anti-fraud liability for some late filings;
- add eight new events to be reported;
- accelerate two items from quarterly and annual reports to Form 8-K; and
- expand the disclosure requirements of two existing Form 8-K items.

The New Look

The most obvious change to Form 8-K is a makeover of the report's look. The SEC has arranged both new and old requirements for Form 8-K reporting into topical sections with subparts.[9] This provides a more logical ordering for the disclosure triggers than the previous layout, which was just a sequential listing of disclosure items as they were adopted over the years. The new order should give companies a better intellectual framework with which to remember the requirements of the form, which have increased substantially.

For those who suspect that the SEC is transitioning the periodic disclosure system to one of continuous reporting, however, the new 8-K look may have ominous portent. With topical section headings and one section "reserved" for later use, the form now has a

framework that looks to be built for future expanded disclosure. Also, the SEC describes the Form 8-K expansion as based on items that have "such significance that current disclosure should be required," a new and potentially worrisome standard.

Reporting Deadlines and Safe Harbors

Just as significant as the expanded menu of Form 8-K reporting events is the new reporting deadline of four business days (not applicable to Regulation FD and other voluntary disclosures and certain exhibits). The SEC had proposed a two-business-day deadline from a reportable event and the availability of a two-business-day extension via Rule 12b-25.[10] The final four-business-day deadline is not subject to extension.[11]

Certain of the Form 8-K items contemplate the filing of amendments if (i) circumstances, or the company's conclusions, about the disclosure change,[12] (ii) certain information not available at the time of the original filing becomes available,[13] or (iii) the company receives certain correspondence from its independent accountant or a former director.[14] As described below, these amendments must be filed within four business days, except that amendments filing correspondence from a company's independent accountant or former director under Item 4.02(b) or 5.02(a) must be filed within two business days of the company's receipt of the correspondence.

Aware that several of the new Form 8-K disclosure items will require rapid decisions regarding materiality and whether a disclosure item has been triggered, the SEC adopted a limited safe harbor from liability *only* under the anti-fraud provisions of §10(b) of the Exchange Act and Rule 10b-5, solely for late reports under seven Form 8-K items.[15] This limited safe harbor extends only until the due date of the company's next periodic report. Thus, if a company does not make a required Form 8-K disclosure under one of these items and does not make the disclosure in its next periodic report, it will be subject to potential liability under § 10(b) and Rule 10b-5 (in addition to liability under §§ 13 (a) or 15(d) of the Exchange Act, which is unaffected by the safe harbor). Material misstatements or omissions in a Form 8-K, and information required to be disclosed apart from the Form 8-K requirements, will continue to be subject to liability under § 10(b) and Rule 10b-5 whether or not the safe harbor is available.

Companies that fail to file Forms 8-K on time under the seven specified items will not lose their eligibility to use Securities Act of 1933 (Securities Act) registration Forms S-2 and S-3 as long as they become current in all their Form 8-K filings before filing the Form S-2 or S-3. Lastly, under the safe harbor, a company that fails to file a Form 8-K may still satisfy the "current public information" requirement under Rule 144 under the Securities Act.

New Form 8-K Disclosure Events

Entry Into a Material Definitive Agreement. Item 1.0l requires disclosure of material definitive agreements not made in the ordinary course of business and material amendments to material definitive agreements (whether or not the underlying agreement has previously been filed). A Form 8-K filed under Item 1.01 must disclose the date on which the agreement was entered into or amended, the parties and any material relationship between the company and any of the parties (other than based on the agreement).

A material definitive agreement is defined as one providing for obligations that are both material to and enforceable by or against the company, notwithstanding the existence of conditions that may not yet have been satisfied. This is a narrower definition than that originally proposed, which would have included nonbinding agreements. The item parallels the material contract exhibit requirement in Item 601(b)(10) of Regulation S-K. As a result, in evaluating whether an agreement was made in the ordinary course of business, a company must use the criteria in Item 601(b)(10)(ii)(A)-(D) of Regulation S-K. In another departure from the item as proposed, Item 1.0l does not require the filing of

the agreement as an exhibit to the Form 8-K, but companies are encouraged to do so particularly if confidential treatment is not being requested. The agreement otherwise must be filed with the company's next periodic report or registration statement.

If the agreement relates to a business combination and the filing of the Form 8-K constitutes the first "public announcement" of the transaction for purposes of Rule 165 under the Securities Act and Rule 14d-2(b) or Rule 14a-12 under the Exchange Act, a company will be able to check one or more boxes on the cover page to indicate it is simultaneously satisfying its obligations under these rules. This filing will not, however, relieve the company from reporting the closing of the transaction, if required, under new Item 2.01 (formerly Item 2).

Termination of a Material Definitive Agreement. Item 1.02 requires disclosure of the termination of a material definitive agreement if the termination is material to the company and did not occur as a result of expiration of the agreement by its terms or all parties having completed their obligations. The obligation to file a Form 8-K under this item does not accrue until the agreement has been terminated. Thus, a company engaged in negotiations or discussions regarding termination would not have to make a filing unless and until termination occurs.

If a company believes in good faith that the agreement has not been terminated, it need not file unless it has received a notice of termination under the agreement. Of course, it is possible that there may be uncertainty as to whether an agreement has terminated. In such a case, a company, believing in good faith that an agreement has not been terminated, may nonetheless choose to make a disclosure under Item 1.02, such as a statement as to its good faith belief and the reasons therefor. In such event, it will need to file an amendment to the Form 8-K *within four business days* following a change in its conclusion as to termination.

A Form 8-K filed under Item 1.02 must disclose the termination date, the parties, any material relationship between the company and any of the parties (other than with respect to the agreement), the circumstances surrounding the termination and material early termination penalties. The SEC did not adopt its proposal to require management's analysis of the effect of the termination on the company in the Form 8-K.[16]

Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement. Item 2.03 requires a report if a company (a) becomes obligated under a direct material financial obligation or (b) becomes directly or contingently liable for a material obligation arising from an off-balance sheet arrangement. A "direct financial obligation" is a long-term obligation, capital lease obligation or operating lease obligation, in each case as defined in Item 303(a)(5) of Regulation S-K, or a short-term debt obligation (generally maturing in less than one year) that arises other than in the ordinary course of business. The definition of "off-balance sheet arrangement" is that set forth in Item 303(a)(4) of Regulation S-K.

Disclosure of a direct obligation under Item 2.03 is triggered when a company enters into an agreement that is enforceable against it, whether or not subject to conditions, or, if there is no such agreement, when there is a closing or settlement of the transaction. Disclosure of an obligation under an off-balance sheet arrangement is required whether or not the company is a party to the transaction or agreement creating a contingent obligation, in which event the Form 8-K filing requirement is triggered on the earlier to occur of the fourth business day after the contingent obligation is created or arises or the day on which an executive officer becomes aware of it. Where a facility, program or similar arrangement creates direct obligations in connection with multiple transactions, the company must disclose entering into the facility, if material, and disclose material obligations as they arise or are created, including when a series of previously undisclosed material obligations become material in the aggregate.

Disclosure of direct financial obligations must include the date the company becomes obligated, description of the transaction, amount of the obligation, payment terms, acceleration and recourse provisions and other material terms and conditions. Disclosure of an obligation under an off-balance sheet arrangement must include the date the company became directly or contingently liable, description of the transaction, nature and amount of the obligation, circumstances under which if may become a direct obligation or accelerated or increased, recourse provisions, maximum potential future payments by the company (undiscounted and not reduced by any amounts recoverable under recourse or collateralization arrangements) and other material terms and conditions. In a departure from the item as proposed, management's analysis of the effect of the obligation on the company will not be required in the Form 8-K.

No filing is required if the obligation to be disclosed is a security that has been or will be sold in a registered offering and the applicable prospectus contains the information required by Item 2.03.

Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement. Item 2.04 requires disclosure of the occurrence of a triggering event causing (a) the increase or acceleration of a direct financial obligation, (b) the increase or acceleration of an obligation under an off-balance sheet arrangement or (c) a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation, in each case if the consequences of the event are material to the company. For purposes of Item 2.04, the definition of a “direct financial obligation” is expanded from its definition in Item 2.03 to include also an item arising out of an off-balance sheet arrangement that is accrued under SFAS No. 5 as a probable loss contingency. As with Item 2.03, disclosure is required with respect to obligations under off-balance sheet arrangements whether or not the company is a party to the agreement or transaction creating the obligation.

A Form 8-K filed under Item 2.04 must disclose the date, description of the transaction, and triggering event. The disclosure must also include the amount of the obligation, terms of payment or acceleration, and any other material obligations 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 the arrangement becoming a direct financial obligation of the company.

No disclosure is required unless and until a triggering event has occurred in accordance with the terms of the agreement, transaction, or arrangement, including any required notice and the satisfaction of all conditions except the passage of time, unless the company has received a notice that a triggering event has occurred. Similar to Item 1.01, if a company believes in good faith that no triggering event has occurred, it may still decide to make a disclosure under Item 2.04 to address any potential uncertainty. If it does this, the company will need to file an amendment to the Form 8-K within *four business days* following a change in its conclusion.

Costs Associated with Exit or Disposal Activities. Item 2.05 requires a filing when a company becomes committed to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in FASB Statement of Financial Accounting Standards No. 146, and as a result will incur material charges under GAAP. A Form 8-K filed under Item 2.05 must disclose the decision date and description of the course of action, expected completion date and estimates of each major cost, total costs, and amount that will result in future cash expenditures. In response to concerns regarding the item as proposed, a company that is unable to provide these estimates at the time of filing may do so by amendment, and no management's analysis of the effect of the event will be required in the Form 8-K.

Material Impairments. Item 2.06 requires a filing when a company concludes that a

material impairment charge is required under GAAP, unless the conclusion is made in connection with the preparation, review, or audit of financial statements at the end of a fiscal quarter or year and the conclusion is disclosed in the timely filed Exchange Act report for the period. A Form 8-K filed under Item 2.06 must disclose the date the company concluded a material charge is required, description of the impaired assets and circumstances leading to the conclusion and estimates of the impairment charge and the amount of the impairment charge that will result in future cash expenditures. As with Item 2.05 and in response to similar concerns, a company that is unable to provide these estimates at the time filing may do so by amendment, and no management's analysis of the effect of the event will be required in the Form 8-K.

Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing. Item 3.01 requires a filing if any of four specified events occurs in connection with the delisting of any class of a company's common equity from the principal national securities exchange or association (i.e., the Nasdaq Stock Market)[17] on which its listing is maintained:

- The company receives a notice that (i) the company or the listed class does not satisfy a rule or standard for continued listing, (ii) the exchange has submitted an application to the SEC to delist such class, or (iii) Nasdaq has taken all necessary steps under its rules to delist the security. A Form 8-K filed under Item 3.01(a) must disclose the date of the notice, the rule or standard the company has failed to satisfy and any action or response the company has determined to take.

- The company notifies the exchange or Nasdaq that it is aware of material noncompliance with a rule or standard for continued listing. A Form 8-K filed under Item 3.01(b) must disclose the date of the notice, the rule or standard not satisfied, and any action or response the company has determined to take.

- The exchange or Nasdaq issues a public reprimand letter or similar communication that the company has violated a rule or standard. A Form 8-K filed under Item 3.01(c) must state the date and summarize the contents of the communication.

- The company, through its board of directors or, if board action is not required, authorized officer, has taken definitive action to delist or transfer the class. A Form 8-K filed under Item 3.01(d) must describe the action taken and the date.

These requirements are intended to ensure that *all* communications between a company and the applicable exchange or Nasdaq regarding delisting or noncompliance are disclosed. In a departure from the item as proposed, actual communications between the company and exchange or Nasdaq are not required to be filed as exhibits. The report is due four business days from the triggering event even if the company has the benefit of a grace period or similar extension or opportunity to cure the deficiency. It is anticipated that two filings will be made in the typical involuntary delisting—an initial filing triggered by the first notice and a second filing upon the company's receipt of a notice of the actual delisting. In the adopting release, the SEC confirmed, however, that an early warning notice as to a potential noncompliance with a listing standard will not trigger a report under this item.

Nonreliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review. Item 4.02 requires a filing if a company (a) concludes previously issued financial statements should no longer be relied upon due to an error in such financial statements, or (b) is advised by or receives notice from its independent accountant that disclosure should be made or action taken to prevent reliance on a

previously issued audit report or completed interim review related to previously issued financial statements.

A Form 8-K filed under Item 4.02(a) relating to the company's determination must disclose the date of the conclusion regarding nonreliance, the financial statements and years or periods covered, the facts underlying the conclusion and a statement whether the audit committee, board of directors or officers discussed the matter with the company's independent accountant. The item is narrower than as originally proposed, contemplating a report only in the event of an error in the financial statements and not requiring management's analysis regarding the impact of the error on the company's financial statements.

A Form 8-K filed under Item 402(b) relating to the company's receipt of advice or notice from its independent accountant must disclose the date of the advice or notice, the financial statements involved, the information provided by the accountant, and a statement whether the audit committee, board of directors, or officers discussed the matter with the accountant. The company must provide the accountant with a copy of the disclosures no later than the day it files them with the SEC and must request the accountant to furnish a letter addressed to the SEC stating whether the accountant agrees with the company's statements and, if not, the respects in which it does not agree. The company must then amend the Form 8-K by filing the accountant's letter as an exhibit *within two business days* of its receipt.

Items Accelerated From Quarterly and Annual Reports

Unregistered Sales of Equity Securities. Item 3.02 requires reporting of certain unregistered sales of equity securities currently reported in a company's annual report on

Form 10-K or 10-KSB and quarterly report on Form 10-Q or 10-QSB. The new Form 8-K item, however, is subject to a size threshold. No Form 8-K filing will be necessary if the unregistered sales of securities since the company's most recent Form 8-K filed under this item or periodic report amount to less than 1 percent (5 percent for small business issuers) of the company's outstanding securities of that class on an undiluted basis. Transactions below these thresholds will continue to be reportable in periodic reports. The SEC also clarified that reportable unregistered sales of equity securities include conversions and similar transactions. The triggering event for purposes of determining the due date of the Form 8-K is the entry into an agreement for the sale of the securities that is enforceable against the company, whether or not subject to conditions or, if there is no such agreement, the closing or settlement of the transaction.

Material Modifications to Rights of Security Holders. Item 3.03 requires disclosure of material modifications to the rights of any class of a company's registered securities, including working capital and dividend restrictions, and the general effect of such modifications. This disclosure is substantively the same as that currently required in Forms 10-Q and 10-QSB.

Expanded Items

Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers. Item 5.02 expands the number of executive changes requiring disclosure, adding three events that will trigger a Form 8-K filing and expanding the disclosure currently required when a director resigns or refuses to stand for re-election. Item 5.02 covers the following disclosures:

- If a director retires, resigns, is removed, or declines to stand for re-election (other than under circumstances described in the next paragraph), Item 502(b) requires disclosure of the fact of the departure and its date. This disclosure is more limited than the item as proposed, which would have required the reasons

for the departure. Similar disclosure will be required if the company's principal executive officer, president, principal financial or accounting officer or principal operating officer retires, resigns or is terminated from that position.

• If a director resigns or refuses to stand for re-election since the last annual meeting of stockholders due to a disagreement or is removed for cause, Item 502(a) requires expanded disclosure if the disagreement, on any matter relating to the company's operations, policies, or practices, is known to an executive officer of the company. The director need not furnish a letter to the company requesting disclosure of the disagreement as is required by current Item 6, but any written correspondence furnished to the company by the director concerning his or her resignation, refusal or removal must be filed as an exhibit to the Form 8-K. The Form 8-K also must disclose the date of the resignation, refusal or removal, any positions on board committees held by the director, and the circumstances of the disagreement causing the departure. The company must provide the director with a copy of these disclosures no later than the day it files them with the SEC and give the director the opportunity to furnish a letter addressed to the SEC stating whether he or she agrees with the company's statements and, if not, the respects in which he or she disagrees. The company must then amend the Form 8-K by filing the letter as an exhibit within *two business days* of its receipt.

• If the company appoints a new principal executive officer, president, principal financial or accounting officer or principal operating officer, a Form 8-K filed under Item 502(c) must disclose the officer's name, position, date of appointment, the biographical and related party transactions information typically provided in the company's proxy statement or Form 10-K, and the terms of any employment agreement. Responding to concerns regarding the need for smooth executive transitions, an instruction to Item 502(c) permits a company intending to make a public announcement of the appointment to delay the filing of the Form 8-K until the day of the announcement.

• If a new director is elected other than by the stockholders, the company must file a Form 8-K under Item 502(d) disclosing the director's name, election date, arrangement under which he or she was selected, any committee appointments, and the related party transactions information that is required for newly appointed executives under Item 5.02(c). Any information required to be disclosed under Items 5.02(c) and 5.02(d) that is not available at the time the Form 8-K is filed must be filed by amendment within *four business days* of its determination or availability.

Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year. The existing requirement to report a change in a company's fiscal year has been both expanded and limited under new Item 5.03. The expansion adds the requirement for current disclosure by a company with securities registered under §12 of the Exchange Act of any amendment to its articles (or certificate) of incorporation or bylaws. The limitation exempts from the disclosure requirement of Item 5.03 any charter or bylaw amendment proposed in a proxy or information statement filed with the SEC and any change in a company's fiscal year to be submitted to a vote of security holders or effected by means of an amendment to its charter or bylaws. If a Form 8-K is required to report amendment of a company's articles (or certificate) of incorporation or bylaws, the effective date of the amendment and a description of the amendment and, if applicable, the previous provision, must be disclosed. Only the text of the amendment is required to be filed as an exhibit to the Form 8-K; however a company filing only the amendment must file the amended corporate instrument as an exhibit to its next periodic report.

A Form 8-K reporting a change in a company's fiscal year must disclose the date of

determination, date of the new fiscal year end and the Exchange Act form on which the transition report will be filed.

Effective Date and Transition Matters

The effective date for the changes to Form 8-K is Aug. 23, 2004. This longer than normal transition time will not only help companies to ready disclosure controls and procedures for the new filing requirements but will also allow the SEC to make necessary changes to EDGAR, its electronic filing system. As a transition matter, if a company amends a Form 8-K that it filed prior to the effective date for the revised form, the amendment must follow the new numbering system for disclosure items.

Miscellaneous Matters

Exhibits. Item 601 of Regulation S-K has been amended to reflect the additional Form 8-K exhibits in the exhibit table. General Instruction B.2. to Form 8-K clarifies the pre-existing position that exhibits relating to Items 2.02 (Results of Operations and Financial Condition) and 7.01 (Regulation FD Disclosure) will be deemed furnished rather than filed, unless the company otherwise specifies, whether or not the form contains disclosure regarding other items.

Certifications. The adopting release confirmed a previously announced position that Section 906 certifications under Sarbanes-Oxley are not applicable to Form 8-K. This is the first time the five-member SEC has formally approved the exclusion of Form 8-K (as well as Forms 6-K and 11-K) from the Section 906 certification requirement.

Conclusion

The SEC has pared back its proposals to expand Form 8-K in a number of important respects. Doubling of the proposed filing deadline from two to four business days helps—so too, the elimination of proposed disclosure items regarding termination of customer relationships and rating agency decisions, as well as mini-MD&A's for financial events. And, filtered through the lens of “materiality,” many of the new disclosures, particularly for large companies, appear distant realities. By these measures, the challenges of an expanded Form 8-K should be manageable.

By other measures, however, it is hard not to see this regulatory development as one of the more formative post-Sarbanes-Oxley reforms.

- First, the form, itself, now takes on significantly greater critical disclosure mass, replete with unforgiving triggers and procedural complexity.

- Second, the expanded form brings reality to the “real time” disclosure imperative of Section 409 of Sarbanes-Oxley.

- Third, in justifying new Form 8-K mandates as events of such “significance” that current disclosure should presumptively be required, the SEC has adopted a troubling new standard.

- Finally, with an ever-expanding Form 8-K, one must wonder whether the SEC is reversing field on the principle it started with Regulation FD, a disclosure rule that leaves companies discretion as to when, prior to periodic reporting, material information is released. With a form that bases its requirements on “significance,” the SEC now appears to be headed in a different direction, one of prescribing current reporting on an item-by-item basis. One must wonder whether these different approaches can co-exist peacefully over time.

Form 8-K Organization

NEW FORM 8-K ORGANIZATION (EFFECTIVE AUGUST 23, 2004)	
SECTION 1—REGISTRANT'S BUSINESS AND OPERATIONS	
Item 1.01 Entry into a Material Definitive Agreement	New
Item 1.02 Termination of a Material Definitive Agreement	New
Item 1.03 Bankruptcy or Receivership	Formerly Item 3 of Form 8-K
SECTION 2—FINANCIAL INFORMATION	
Item 2.01 Completion of Acquisition or Disposition of Assets	Formerly Item 2 of Form 8-K
Item 2.02 Results of Operations and Financial Condition	Formerly Item 12 of Form 8-K
Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	New
Item 2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation or Obligation under an Off-Balance Sheet Arrangement	New
Item 2.05 Costs Associated with Exit or Disposal Activities	New
Item 2.06 Material Impairments	New
SECTION 3—SECURITIES AND TRADING MARKETS	
Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing	New
Item 3.02 Unregistered Sales of Equity Securities	Formerly Item 2(c) of Forms 10-Q and 10-QSB; Formerly Item 5(a) of Forms 10-K and 10-KSB
Item 3.03 Material Modifications to Rights of Security Holders	Formerly Items 2(a) and 2(b) of Forms 10-Q and 10-QSB
SECTION 4—MATTERS RELATED TO ACCOUNTANTS AND FINANCIAL STATEMENTS	

Item 4.01 Changes in Registrant's Certifying Accountant	Formerly Item 4 of Form 8-K
Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	New
SECTION 5—CORPORATE GOVERNANCE AND MANAGEMENT	
Item 5.01 Changes in Control of Registrant	Formerly Item 1 of Form 8-K, expanded
Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers	Formerly Item 6 of Form 8-K, expanded
Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	Formerly Item 8 of Form 8-K, expanded
Item 5.04 Temporary Suspension of Trading under Registrant's Employee Benefit Plans	Formerly Item 11 of Form 8-K
Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics	Formerly Item 10 of Form 8-K
SECTION 6	**[Reserved]**
SECTION 7—REGULATION FD	
Item 7.01 Regulation FD Disclosure	Formerly Item 9 of Form 8-K
SECTION 8—OTHER EVENTS	
Item 8.01 Other Events	Formerly Item 5 of Form 8-K
SECTION 9—FINANCIAL STATEMENTS AND EXHIBITS	
Item 9.01 Financial Statements and Exhibits	Formerly Item 7 of Form 8-K

Footnotes

1 The compliance deadline for both the NYSE and Nasdaq corporate governance changes is generally the earlier of (i) the company's first annual meeting after Jan. 15, 2004, and (ii) Oct. 31, 2004. This summary does not discuss the corporate governance reforms of the American Stock Exchange (AMEX), which were approved by the SEC on Dec. 1, 2003. The compliance deadline for the new AMEX rules is generally the earlier of (i) the company's first annual meeting after March 15, 2004, and (ii) Oct. 31, 2004.

2 For information on Management's Discussion and Analysis of Financial Condition and Results of Operation (MD&A), codes of ethics, non-GAAP financial measures, CEO/CFO certifications, disclosure controls and procedures, and internal control over

financial reporting, as well as requirements applicable to foreign private issuers, see Covington & Burling's "New Securities Law Disclosures in 2004 - U.S. and Foreign Private Issuers" (April 5, 2004), available at http://www.cov.com/publications/download/oid25028/462.pdf.

3 For a discussion of the substantive requirements of the NYSE's and Nasdaq's corporate governance listing standards, see Covington & Burling's "New NYSE and Nasdaq Corporate Governance Listing Standards" (Nov. 5, 2003, rev. Feb. 12, 2004), available at http://www.cov.com/publications/download/oid61382/411.pdf.

4 *See* NYSE Listed Company Manual Section 303A Corporate Governance Listing Standards FAQs, available at http://www.nyse.com/pdfs/section303Afaqs.pdf (last updated Feb. 18, 2004).

5 *See* 2004 Corporate Governance Obligations — Domestic Listed Companies (Nov. 14, 2003), available at http://www.nyse.com/pdfs/transitionletter.pdf (NYSE Corporate Governance FAQs).

6 For additional information concerning Nasdaq's new corporate governance rules, including a discussion of certain compliance deadlines, see "Frequently Asked Questions: Corporate Governance" (Dec. 17, 2003, last updated Feb. 18, 2004), available at http://www.nasdaq.com/about/FAQsCorpGov.stm.

7 For more information on this standard, see Covington & Burling's "New Securities Law Disclosures in 2004," *supra* note 2, available at http://www.cov.com/publications/download/oid25028/462.pdf.

8 *See* SEC Release No. 33-8400 (March 16, 2004) (adopting release).

9 See the table showing the reorganization of Form 8-K, below.

10 *See* SEC Release No. 33-8106 (June 17, 2002) (proposing release).

11 In assessing the costs of the new reporting deadline, the SEC undertook a review of approximately 68,000 Form 8-K filings and noted that approximately 74 percent of those were filed within four business days of the reported event date.

12 *See* Items 1.02 and 2.04.

13 *See* Items 2.05, 2.06, 5.02(c), and 5.02(d).

14 *See* Items 4.02(b) and 5.02(a).

15 Items 1.01 (Entry into a Material Definitive Agreement), 1.02 (Termination of a Material Definitive Agreement), 2.03 (Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement), 2.04 (Triggering Events that Accelerate or Increase a Direct Financial Obligation under an Off-Balance Sheet Arrangement), 2.05 (Costs Associated with Exit or Disposal Activities), 2.06 (Material Impairments), and 4.02(a) (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review) (where the company, and not the independent accountant, has made the determination).

16 The proposing release included requirements for such "mini-MD&A" disclosure in several of the proposed Form 8-K items. Many of the approximately 85 comment letters submitted in response to the proposing release expressed concern that such an analysis might be both difficult to perform in the short time frame for filing and better presented in periodic reports containing financial statements. The adopting release eliminates all proposed requirements for mini-MD&A disclosure in Form 8-K filings but cautions filers that general materiality principles still apply such that Form 8-K disclosures must nonetheless include all information required to prevent the required disclosure from being misleading.

17 Companies whose securities are quoted exclusively on the OTCBB or Electronic Pink Sheets are not subject to Item 3.01.